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The Structural Role of the Bill of Rights

Richard G. Wilkins[*]

I. INTRODUCTION

Two months ago, when I was asked to make a presentation on the history, structure and derivation of the Bill of Rights, I was quite hesitant—and for a very good reason. True, I teach constitutional law. But since when did constitutional law—which focuses on the occasionally literate meanderings of the Supreme Court—have anything to do with the history, structure or derivation of the Bill of Rights? I therefore invoked ignorance and begged to be passed over. However, Ted Lewis,[1] who called me repeatedly on the issue, was not to be dissuaded. After several discussions, I caved in and agreed to participate. And, when pressed for a topic, I responded with a title that I thought was grandiloquent enough to be academically impressive while still being vague enough to permit almost limitless fudging. "I will speak on the structural role of the Bill of Rights," I said.

The structural role of the Bill of Rights? Ted was kind enough not to snigger, and he dutifully transcribed the title and passed it on to those who prepared today's agenda. Doubtless many of you in the audience are here—not merely to obtain needed Continuing Legal Education credit in a relatively painless fashion—but also to see just *how* Wilkins could press the Bill of Rights into a structural mold.

Generally, when one talks of "structure" in the constitutional law context, the discussion centers around the governmental plan erected by the first three Articles of the Constitution: a tripartite federal government with separated and specifically limited powers operating in tandem (and often in tension) with the states. By contrast, the Bill of Rights is not generally thought of as a "structural" component, but rather as

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a guarantor of especially important freedoms. Thus, in conventional terminology, the Bill of Rights is not "structural" but rather is designed to keep government (however structured) off the backs of the people.

But, despite the general accuracy of the foregoing, I believe that the Bill of Rights has played—and continues to play—several important structural roles. Perhaps not roles perfectly consistent with the classic definition of "structure" just noted, but structural nevertheless.

As an initial matter, the Bill of Rights played a vital structural role in securing the passage of the Constitution.[2] It is quite possible that we simply would not have had the Constitution of 1787 without a wrenching political agreement to amend that document to include the Bill of Rights. That political debate focused on structure, and resulted in the insertion of an explicitly structural component into the Bill of Rights—the Tenth Amendment.

Second, the Bill of Rights has played a significant—and somewhat ironic—role in restructuring American federalism over the past century.[3] The Bill of Rights, originally intended to protect the individual against *federal* power and secure the reserved sovereignty of the states, has instead become a potent means of subjecting the states to federal control. In a very real sense, the Antifederalist "victory" embodied in the Bill of Rights has become the Antifederalists' ultimate defeat.

Third, and finally, the Bill of Rights is now playing a decisive role in restructuring modern society by redefining the contemporary limits of community power.[4] The specific provisions of the Bill of Rights—originally designed to regulate the interaction of the government with the individual—have been expanded to create a generalized, constitutional doctrine of "privacy" or "autonomy" that directs (and sometimes controls) the purely personal interaction of private individuals.

All three of these structural roles—which for the sake of discussion I will label the "historical," the "ironical," and the "sociological"—merit some attention during our celebration of the two-hundredth anniversary of the Bill of Rights. The historical role of the Bill of Rights is instructive, not only for its own sake, but for whatever light it might shed on the future

2. *See infra* part II.
3. *See infra* part III.
4. *See infra* part IV.

interpretation of the document. The ironical use of the Bill of Rights to submerge state sovereignty raises continuing questions about the proper role of federalism in American life. The impact of modern "rights" rhetoric on the sociology of the American community, furthermore, raises issues that must be addressed—not only by thoughtful lawyers and judges—but by the best minds of every profession.

With this background, and with the caveat that my ruminations on these topics are quite preliminary, I will attempt a few personal observations on the various structural roles of the Bill of Rights. First, I will address the role of the Bill of Rights in structuring the Constitution of 1787. My comments on this historical role are somewhat more detailed than those on the ironical or sociological roles—in part because Ted asked me to structure my remarks that way and in part because the history of the Bill of Rights is a topic on which most lawyers have little or no passing knowledge.

II. STRUCTURING THE CONSTITUTION OF 1787: THE ROLE OF THE BILL OF RIGHTS IN THE RATIFICATION PROCESS

The notion that certain rights were "fundamental" or "inalienable" was well-established in America by 1787.[5] The Magna Carta of 1215 and the English Bill of Rights of 1689 had established various "rights of Englishmen," including the right to a trial by a jury of one's peers, a prohibition on standing armies in time of peace, and a limited form of freedom of speech.[6] As Daniel Farber and Suzanna Sherry noted in their recent history of the American Constitution, "In theory, if not in practice, British and colonial governments—as well as the infant state governments—lacked power to deprive citizens of certain rights. Such rights belonged inherently to all citizens, even in the absence of written protections."[7]

This theory of rights was rooted firmly in natural law. The Declaration of Independence and state declarations of rights, drafted immediately following the Revolution, were grounded upon natural law notions of "inalienable" and "self-evident" rights.[8] The 1776 Pennsylvania Declaration of Rights, for

5. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 219 (1990).
6. *Id.*
7. *Id.*
8. *Id.*

example, provided: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[9]

The influential Virginia Declaration of Rights, drafted by George Mason, echoed these natural law themes, and in addition, evidenced a pronounced distrust and fear of governmental power. Mason wrote that "all power is vested in, and consequently derived from, the People," who retain an "unalienable, and indefeasible right, to reform, alter, or abolish" governments they establish.[10]

To preserve the independence of the states as well as the natural rights of mankind, the drafters of the Articles of Confederation purposely created a weak national government that lacked such essential powers as the ability to regulate commerce and levy taxes.[11] Such a governmental structure promoted individual liberty by denying government the power to intrude upon either the state or the individual. But that liberty came at a high cost. In denying the federal government the power to intrude, the Articles of Confederation seemingly denied the federal government the power to exist.[12]

By 1787, the new nation was a veritable shamble. Lacking the power to tax, the continental congress was unable to pay the outstanding debts from the Revolutionary War or maintain an effective army.[13] Unable to regulate commerce, the federal government stood helpless as the states engaged in internecine commercial warfare.[14] As a result, Noah Webster described the new nation as a "pretended union" limping its way toward disaster.[15]

To prevent that disaster, the Constitutional Convention convened in Philadelphia during the summer of 1787. The high purpose of that convention—ostensibly called to amend the Articles of Confederation—was, instead, to create an entirely new form of government.[16] Opposition to this enterprise,

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9. *Id.* at 220 (quoting THE 1776 PENNSYLVANIA DECLARATION OF RIGHTS § (1976)).

10. *Id.* at 221.

11. *See id.* at 24-25.

12. THE STATES RIGHTS DEBATE 15 (Alpheus T. Mason ed., 2d ed. 1972).

13. FARBER & SHERRY, *supra* note 5, at 24.

14. *Id.* at 25.

15. *Flaws in the First Charter*, LIFE, Sept. 1987, at 22, 22.

16. *See* ROBERT A. RUTLAND, ORDEAL OF THE CONSTITUTION 10 (1966) ("The

which envisioned a relatively strong central government, was almost immediate. Debate over the new Constitution quickly polarized into two competing political camps: the Federalists (who supported adoption of the new Constitution) and the Antifederalists (who opposed the new governmental structure).[17]

The Antifederalist movement was animated by the two basic concerns that had spawned the Articles of Confederation: states' rights and personal liberties.[18] Their overriding concern, however, was almost certainly the former and not the latter.[19] Indeed, most historians agree that Antifederalist worries regarding the absence of a Bill of Rights were secondary to their concerns regarding states' rights.[20] Nevertheless, early in the ratification struggle Antifederalist leaders learned that citizens were more easily aroused by appeals for personal liberty than with talk of federalism and states' rights.[21] Thus, the Antifederalists quickly focused upon the lack of a Bill of Rights as a rallying call to mobilize public opinion in support of their movement.

Using the Bill of Rights issue to oppose the new Constitution proved attractive on several grounds. For one thing, Antifederalist leaders had little trouble joining states' rights concerns with arguments in favor of a Bill of Rights. The natural law tendencies of the times, coupled with the fact that virtually every state had adopted declarations protective of these natural rights, made state and individual rights arguments often appear as intertwining, indivisible themes.[22] So much so, that during the ratification process it was often difficult, if not impossible, to disentangle the two basic Antifederalist motives.[23] For example, George Mason's classic "Objections to the Constitution of Government Formed by the Convention" raised the alarm that, by subjecting the states to federal control, the new constitution gravely endangered personal liberty. Why? Because in the federal Constitution,

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moving spirits behind the Convention had no further use for the Articles of Confederation, but it would have been imprudent to bare this attitude publicly.").

17. FARBER & SHERRY, *supra* note 5, at 175-76.
18. THE STATES RIGHTS DEBATE, *supra* note 12, at 5.
19. *Id.* at 98.
20. *Id.* at 104 n.178.
21. RUTLAND, *supra* note 16, at 213.
22. *See* FARBER & SHERRY, *supra* note 5, at 219-21.
23. THE STATES RIGHTS DEBATE, *supra* note 12, at 98.

"There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declarations of Rights in the separate States are no Security."[24]

But, the most potent advantage the Bill of Rights issue afforded the Antifederalists was not the palatable buffer it provided for discourses on states rights. Rather, the absence of a Bill of Rights was genuinely troubling to a recently liberated populace that believed in natural, inalienable rights.[25] Brutus, a New York Antifederalist essayist publishing in New York in November of 1787, wrote, "in forming a government on its true principles, the foundation should be laid . . . by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.[26] Brutus argued that the need to expressly reserve "essential natural rights" was "confirmed by universal experience" which had "induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers."[27] Noting that every state in the fledgling Union contained bills or declarations of rights, Brutus concluded that "It is therefore the more astonishing, that this grand security, to the rights of the people, is not to be found in this [federal] constitution."[28]

Federalist supporters responded to these criticisms in a number of ways. States' rights arguments were deflected by emphasizing that the federal government possessed only specific, enumerated powers. Madison wrote, in The Federalist No. 45, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[29] As a result, Madison asserted that "[t]he State governments will have the advantage of the federal government."[30]

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24. Letter of Objections to the Constitution of Government Formed by the Convention from George Mason, Virginia Assemplyman, Constitutional Convention, to George Washington, President of the United States (1787), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 348 (JOHN P. KAMINSKI ET AL. eds., 1981) [hereinafter DOCUMENTARY HISTORY].

25. FARBER & SHERRY, *supra* note 5, at 222-23.

26. *Id.* at 223.

27. *Id.* at 223-24.

28. *Id.* at 224.

29. THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin F. Wright ed., 1961).

30. *Id.* at 326.

On the issue of individual liberty, the Federalists consistently maintained that the "Constitution's institutional checks provided more effective security" for individual rights than a Bill of Rights.[31] They submitted that a federal government with enumerated powers, operating in competition with state governments, eliminated the need for a bill of rights.[32] Thus, in Federalist No. 84, Hamilton asserted that, because "bills of rights are, in their origin, stipulations between kings and their subjects," Americans "have no need of particular reservations" of rights since "in strictness the people surrender nothing" and "retain every thing."[33] And, in Federalist No. 28, Hamilton invoked federal/state rivalry to argue that:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.[34]

Federalists, finally, asserted that any enumeration of protected rights would be positively dangerous for at least two reasons. First, the enumeration might unwittingly expand the power of the federal government. In Hamilton's words, a bill of rights containing "various exceptions to powers not granted" might "afford a colorable pretext to claim more than were granted."[35] A provision protecting the press, for example, could "afford[] a clear implication that a power to prescribe the proper regulations concerning it was intended to be vested in the national government."[36]

The second danger lurking behind a bill of rights in Federalist eyes was the possibility that an enumeration would improperly cabin the natural rights of man. James Iredell cautioned that:

31. THE STATES RIGHTS DEBATE, *supra* note 12, at 85.
32. FARBER & SHERRY, *supra* note 5, at 224; THE STATES RIGHTS DEBATE, *supra* note 12, at 187.
33. THE FEDERALIST NO. 84, *supra* note 29, at 534 (Alexander Hamilton).
34. *Id.* NO. 28, at 225.
35. *Id.* NO. 84, at 535.
36. *Id.*

> [I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[37]

With the lines thus drawn between the Federalists and the Antifederalists, the debate regarding a Bill of Rights raged throughout the ratification period. The debate, indeed, began even before the Constitutional Convention had completed its work. On August 20, 1787, Charles Pinckney submitted a proposal safeguarding "liberty of the Press," prohibiting the use of religious tests, and limiting the maintenance of troops in times of peace.[38] Pinckney's proposal was rejected.[39] Two more attempts to add a Bill of Rights by George Mason and Elbridge Gerry were similarly rejected.[40] On September 16, 1787—the day before the Constitutional Convention finished its labors—Edmund Randolph, objecting to what he called "'the indefinite and dangerous power given by the Constitution to Congress,' proposed to amend the ratification procedure" by granting state ratifying conventions the power to propose amendments "'which should be submitted to and finally decided on by another General Convention.'"[41] This motion, like the others, failed.[42] As a result, Randolph, Elbridge Gerry, and George Mason refused to sign the Constitution when it was adopted by the Convention the very next day.[43]

Having lost the Bill of Rights battle in the constitutional convention, the Antifederalists carried the fight to the Continental Congress. In Congress, Richard Henry Lee led the Antifederalist charge. He argued that Congress should amend

37. FARBER & SHERRY, *supra* note 5, at 224 (quoting North Carolina Ratifying Convention (July 29, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 167 (Jonathan Elliot ed. 1981)).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

the Constitution before sending it to the respective states for ratification.[44] Lee was of the opinion that amendments should contain a Bill of Rights to "'plainly and strongly' provide bulwarks for the states against the national government, particularly the south[ern] states . . . . "[45] Congress, however, heeded the careful arguments of James Madison that Congress could not amend the new Constitution without making it an Act of Congress (that would have to be ratified by all thirteen state legislatures), rather than an Act of the Convention (which could be ratified by the action of nine state ratifying conventions).[46] Evidently fearful that the new Constitution would not be ratified if it went before the various legislatures, the Continental Congress rejected the amendment proposal and sent the Constitution on to the state ratifying conventions.[47]

Now thwarted in the convention and Congress, the Antifederalists renewed their efforts before the state conventions. All involved knew that the greatest battles over the Constitution were yet to be fought. Moreover, it was apparent that the battle for "the Constitution would be won or lost in a few large states."[48] And, it was in those few states that the debate over the Bill of Rights played a pivotal role.

Pennsylvania was the first major state to ratify. That state ratified the Constitution only twenty hours after the Continental Congress had transferred the document to the states for their consideration.[49] Pennsylvania, however, was not much of a test for the Constitution, nor the Federalist party. Realizing that momentum was on their side, Pennsylvania Federalists raced the Constitution through the convention before the opposition had a chance to get organized—even going so far as to place several Antifederalist members under house arrest so that a quorum of members could be obtained for ratification.[50]

In Massachusetts, Virginia and New York, ratification was not as easily attained. Antifederalists in those states were well

44. Congressional Debates of the Confederation Congress and the Constitution (Sept. 26-28 1787), *in* DOCUMENTARY HISTORY, *supra* note 24, at 238.
45. RUTLAND, *supra* note 16, at 219.
46. Letter from James Madison to George Washington (Sept. 30 1787), *in* DOCUMENTARY HISTORY, *supra* note 24, at 276.
47. *See id.*
48. RUTLAND, *supra* note 16, at 50.
49. *Id.* at 20-21.
50. *Id.* at 20.

organized and had gained substantial popular support. To head off almost certain defeat in these large key states, the Federalists retreated on the amendment issue. Realizing that conditional amendments imposed by state conventions would be fatal to the cause, Federalists in Massachusetts proposed that the state convention ratify the Constitution, but attach *recommended* amendments to be considered *by Congress* following ratification.[51]

This proposal was backed by the promises of several prominent Federalists (including James Madison in Virginia) to seek the recommended amendments immediately following ratification.[52] The Massachusetts' compromise caught on, and was followed in eight states, including Virginia and New York.[53] These states unconditionally ratified the Constitution, but attached long and diverse "wish lists" demanding amendments to the document.[54] Although the details of the various "wish lists" differed, they were unanimous on one point: "[a]ll eight . . . included among their recommendations some version of what later become the Tenth Amendment."[55]

With eventual ratification by eleven of the thirteen states, including the large key states, the Constitution was adopted. Nevertheless, the framer's work was not finished. The Massachusetts' compromise had procured the passage of the Constitution, but ratification was accompanied by clamorous demands for important amendments.[56] While these demands technically could go unheeded as ratification had not been conditional upon congressional acquiescence in the proposed amendments, the states still had a formidable weapon at their disposal. "On May 5, 1789, Virginia submitted to Congress an application for the calling of a second constitutional convention. New York followed suit the next day."[57]

The proposal for a second constitutional convention caused great alarm among Federalist forces. Federalist leaders recognized that a second convention probably would not achieve the same results as the first. Unlike the first, a second

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51. THE STATES RIGHTS DEBATE, *supra* note 12, at 92.
52. *Id.*
53. *Id.* at 92-93.
54. FARBER & SHERRY, *supra* note 5, at 225.
55. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 569 (1985) (Powell, J., dissenting).
56. FARBER & SHERRY, *supra* note 5, at 226.
57. *Id.* at 226.

convention would not enjoy a cloak of secrecy.[58] The jealousies of politicians and states would be interjected into the convention discussions as newspapers published accounts of the proceedings.[59] Moreover, a second convention was likely to bring about "precipitous changes" in the structure of the new government proposed by the Constitution.[60] As James Madison wrote Thomas Jefferson following New York's ratification of the Constitution: "'The great danger in the present crisis is that if another Convention should be soon assembled, it would terminate in discord . . . or in alterations of the federal system which would throw back *essential* powers into the State Legislatures.'"[61]

"Realizing that adoption of a bill of rights might be the only way to [avoid a second constitutional convention], James Madison fulfill[ed] his . . . promise to shepherd a Bill of Rights through the new Congress."[62] In large part, Madison's willingness to sponsor amendments to the Constitution may have stemmed from his fear that a Bill of Rights could alter the existing structural provisions of the new Constitution. He was concerned that—if the Antifederalists took the lead—they would promote amendments that would damage national authority.[63]

On May 4, 1789, Madison announced to Congress that "he intended to bring amendments to the Constitution before the House in late May" and on June 8, 1789, he presented his amendments to the House of Representatives.[64] Madison's proposed amendments—initially drafted as amendments to the existing seven articles of the Constitution—embodied many of the individual liberties guaranteed in state bills of rights, as well as general principles garnered from the "wish lists" of the various state ratification conventions.[65]

The proposed amendments included many provisions that eventually found their way into the Bill of Rights, such as clauses providing for freedom of religion, freedom of speech, the

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58. RUTLAND, *supra* note 16, at 19.
59. THE STATE RIGHTS DEBATE, *supra* note 12, at 95.
60. *Id.* at 96.
61. RUTLAND, *supra* note 16, at 266.
62. FARBER & SHERRY, *supra* note 5, at 226.
63. THE STATES RIGHTS DEBATE, *supra* note 12, at 96.
64. FARBER & SHERRY, *supra* note 5, at 226.
65. RICHARD B. BERNSTEIN, ARE WE TO BE A NATION?, 264 (1987); ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 194 (1955).

right to keep and bear arms, and the right to be secure against unreasonable searches and seizures.[66] In addition, the proposed amendments prohibited deprivation of life, liberty and property without due process of law, the taking of property without just compensation and cruel and unusual punishment.[67] Beyond these now-well-known provisions, Madison proposed amendments regulating the size of the House of Representatives and exempting a person "religiously scrupulous of bearing arms" from compelled military service.[68]

Two of Madison's proposals directly addressed structural concerns. His eighth proposed amendment would have added a new article to the Constitution, just before the present Article VII, containing two sections.[69] The first section would provide for strict separation of federal powers, by mandating that "[t]he powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise powers vested in the Executive or Judicial," and so on for each branch.[70] The second section—which in slightly altered form eventually became the Tenth Amendment—provided that "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."[71]

Madison's second structural proposal addressed both individual rights *and* governmental structure.[72] In his fourth proposed amendment, Madison provided against federal infringement of religious liberty, free expression and jury trial in criminal cases.[73] In his fifth proposed amendment, however, Madison extended these prohibitions to the states with the following language: "*No State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[74] This proposal, of course, was structural in the same sense that the prohibitions on state power in article I, section 10 are structural: it constituted a direct federal constriction of the states' otherwise plenary power.[75]

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66. FARBER & SHERRY, *supra* note 5, at 228-29.
67. *Id.* at 228.
68. *Id.*
69. *Id.* at 229.
70. *Id.*
71. *Id.*
72. *See id.* at 229-30.
73. *Id.* at 228.
74. *Id.* at 228 (emphasis added).
75. *Compare id.* at 228 *with* U.S. CONST. art. I, § 10 (noting the similarities

Madison's proposals were debated thoroughly on the floor of the House, although the Representatives did not—in complete honesty—attach much importance to the matter. Members repeatedly complained that there was "much other and more important business requiring attention."[76] On August 13, 1789, as Madison struggled to focus the House's attention on the amendments, John Vining of Delaware noted that he had the right to call for consideration of a bill "'establishing a Land Office for the disposal of the vacant lands in the Western Territory.'"[77] Vining nevertheless yielded the floor to Madison for discussion of the amendments, but not without noting that the Vining bill had priority "'in point of time'" and that "'in point of importance, every candid mind would acknowledge its preference.'"[78]

Following House debate, it was decided that the amendments would be appended to the end of the Constitution rather than interlineated into the existing articles of the document.[79] Finally, on August 24, 1789, a House resolution containing seventeen articles of amendment was sent to the Senate for consideration.[80]

Little is known regarding Senate deliberations, due to the fact that the Senate sat in closed session until 1794.[81] The Senate, however, rejected Madison's proposal that conscientious objectors be excused from military service. The Senate also rejected several of Madison's structural proposals, including the article prohibiting the states from violating rights of conscience, freedom of the press and trial by jury and the section calling for strict separation of powers in the national government.[82]

As reformulated by the Senate, twelve amendments were sent to the states for ratification.[83] The first amendment dealt with congressional apportionment.[84] The second provided that "No law varying the compensation for the services of the

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between the structural prohibitions on state power).

76. FARBER & SHERRY, *supra* note 5, at 232.

77. *Id.*

78. *Id.*

79. *Id.* at 240.

80. BERNSTEIN, *supra* note 65, at 267.

81. FARBER & SHERRY, *supra* note 5, at 241.

82. *Id.* at 242.

83. BERNSTEIN, *supra* note 65, at 267.

84. FARBER & SHERRY, *supra* note 5, at 243.

Senators and Representatives shall take effect, until an election of Representatives shall have intervened."[85] These first two amendments were never ratified.[86] The last ten amendments—now known as the Bill of Rights—became effective when Virginia became the eleventh state to ratify on December 15, 1791.[87]

The foregoing history establishes, I think, that the Bill of Rights—viewed in historical perspective—has played a vital structural role in at least two ways. First, it was structural arguments by both the proponents and opponents of the Constitution that brought forth the Bill of Rights.

Second, and more importantly, however, the Bill of Rights itself reflects important structural compromises struck by the Federalists and Antifederalists. Madison's proposal to restrict the power of the states by limiting state regulation of conscience, free speech and jury trial was rejected.[88] The amendments that were adopted, moreover, expressly fettered the federal government while preserving the separate role of the states.[89] George Mason and other Antifederalists had repeatedly expressed fears that the new federal government was so powerful that it would eventually subsumed the states.[90] The Tenth Amendment, which preserves to the states all rights "not delegated to the United States," was plainly designed to eliminate these fears.[91]

History, therefore, demonstrates the important structural role of the Bill of Rights played in securing the adoption of the Constitution. Perhaps more important for present purposes, however, is the role the Bill of Rights has played during the past one-hundred years—and continues to play today—in structuring American concepts of federalism and community.

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85. *Id.*
86. *Id.*
87. *Id.*
88. BERNSTEIN, *supra* note 65, at 264; FARBER & SHERRY, *supra* note 5, at 242.
89. FARBER & SHERRY, *supra* note 5, at 230.
90. THE STATES RIGHTS DEBATE, *supra* note 12, at 6.
91. *Compare* JAMES WILSON, SPEECH AT A PUBLIC MEETING IN PHILADELPHIA (Oct. 6 1787), *reprinted in* DOCUMENTARY HISTORY, *supra* note 24, at 339 *and* U.S. CONST. amend. X (addressing Antifederalist fears that the new government would subsume the states).

III. THE IRONICAL ROLE OF THE BILL OF RIGHTS IN RESTRUCTURING AMERICAN FEDERALISM

I would now like to turn attention to the second structural role played by the Bill of Rights: that is, the ironic role it has played in restructuring American federalism. That irony results from the fact that the Bill of Rights—"a notable Antifederalist victory in 1790—is now appraised as a defeat for state rights."[92] The advocates of states' rights believed that a Bill of Rights was necessary to protect the sovereign states from undue intrusion by the federal government.[93] The very protections the Antifederalists lobbied for, however, have been an engine for further subjugation of state power.

This structural shift in power between the federal and state government has resulted from two factors. The first is the incorporation doctrine under the Fourteenth Amendment, by which the Supreme Court has applied the most important elements of the first eight amendments to the states. The second has been the past inability and current unwillingness of the Supreme Court to construct coherent doctrine under the Tenth Amendment. The net effect of these two factors has been a dramatic redrawing of the federal structure of the nation.

History and the writings of the Framers established beyond reasonable dispute that they did not anticipate that the Bill of Rights would apply to the states. Indeed, Madison's proposal to restrict state authority in the areas of conscience, free speech and jury trials was plainly rejected.[94] In *Barron v. Mayor of Baltimore*,[95] the original Justice Marshall reflected this original understanding of the Bill of Rights when he wrote: "Had the framers of the Amendments intended them to be limitations on the powers of the state governments," he wrote, "they would have . . . expressed that intention . . . in plain and intelligible language."[96]

From 1833, when *Barron* was decided, to the turn of the century the Court so frequently reaffirmed Justice Marshall's opinion that the doctrine became "elementary."[97] Nonetheless,

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92. THE STATE RIGHTS DEBATE, *supra* note 12, at 6.
93. *Id.* at 81.
94. BERNSTEIN, *supra* note 65, at 264.
95. 32 U.S. (7 Pet.) 243 (1833).
96. *Id.* at 250.
97. Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39

as one legal scholar in 1926 put it, "[i]nspite of th[e] emphatic language [reaffirming the doctrine], counsel for defendants, whether by reason of ignorance, incorrigible optimism, or desire for delay, continued to urge (chiefly in murder and other criminal cases), that the Federal Bill of Rights applied to State legislation."[98] Ultimately the persistence of legal counsel bore fruit.

In 1925, in the case of *Gitlow v. New York*,[99] the Supreme Court wrote, for the first time, that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress— are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[100]

This analysis was somewhat surprising, due to the fact that—only three years earlier—in *Prudential Insurance v. Cheek*,[101] the Court had asserted that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."[102]

Following *Gitlow*, the Court developed a relatively consistent analytical scheme for incorporating various provisions of the Bill of Rights into the Fourteenth Amendment. The Court initially queried whether a particular constitutional protection was "so rooted in the tradition and conscience of our people as to be ranked as fundamental."[103] By 1968, the analysis had become broader and more inclusive, with the Court asking whether a particular provision was "fundamental to the American scheme of justice."[104]

As a result of these formulations, by 1971 the only provisions of the first eight amendments that had not been incorporated were the second and third amendments, the fifth amendment's requirement of grand jury indictment and the

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HARV. L. REV. 431, 436 (1925-26).

98. *Id.*

99. 268 U.S. 652 (1925).

100. *Id.* at 666.

101. 259 U.S. 530 (1922)

102. *Id.* at 543.

103. Palko v. Connecticut, 302 U.S. 319 (1937).

104. Duncan v. Louisiana, 391 U.S. 145 (1968).

seventh amendment's guarantee of jury trial in civil cases.[105] Moreover, in a series of cases in the late 1960s, the Supreme Court established the principle that incorporated provisions of the Bill of Rights apply to the "states in *precisely* the same manner as they appl[y] to the federal government."[106] Thus, if the exclusionary rule applies to the federal government, it applies to the states.[107]

At the same time that the Supreme Court was invoking the doctrine of selective incorporation, it was diminishing the role of the Tenth Amendment. Early cases had invoked the Amendment to invalidate congressional regulation of the "purely internal affairs" of the states.[108] Thus, in *Hammer v. Dagenhart*[109] the Court struck down a child labor law because it intruded upon the "local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."[110]

However, the formulations the Court used in these early Tenth Amendment cases were not, in all candor, terribly satisfying. They tended to turn upon rigid, hypertechnical definitions often far removed from reality. The decisions, moreover, often stood in the way of what was widely perceived as social or economic progress—as witnessed by the Court's invalidation of the child labor law in *Dagenhart*.[111] As a result, judicial enforcement of the Amendment underwent a rapid decline at the end of the 1930s.

Although it was invoked in 1936 to justify the invalidation of federal legislation fixing maximum hours and minimum wages in *Carter v. Carter Coal Co.*,[112] the Tenth Amendment, five years later had been reduced, as noted by Justice Stone in *United States v. Darby*,[113] to nothing but a "truism."[114] Justice Stone noted that the amendment accurately described that the states retained all non-delegated powers—but that description exhausted the amendment's operative force; it

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105. GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 784 (2d ed. 1991).
106. *Id.* at 785 (emphasis in original) (citations omitted).
107. Mapp v. Ohio, 367 U.S. 643 (1961).
108. Hammer v. Dagenhart, 247 U.S. 251 (1918).
109. 247 U.S. at 251.
110. *Id.* at 274.
111. *See id.* at 251.
112. 298 U.S. 238 (1936).
113. 312 U.S. 100 (1941).
114. *Id.* at 124.

would not be (and, he inferred, *could not be*) judicially enforced.[115]

The Tenth remained a mere "truism" for nearly forty years following *Darby*.[116] In 1976, however, that Amendment was revitalized in *National League of Cities v. Usery*.[117] In that case Justice Rehnquist, writing for the Court, observed that "'While the Tenth Amendment has been characterized as a "truism,"' . . . it is not without significance."[118] The majority in *Usery* then proceeded to invalidate amendments to the Fair Labor Standards Act insofar as they "operate[d] to directly displace . . . States' freedom to structure integral operations in areas of traditional governmental functions . . . ."[119]

The new substantive content of Tenth Amendment recognized in *Usery* was short lived. Eight years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[120] the Court, in a five to four decision, overruled *Usery*. The *Garcia* Court asserted that the traditional governmental function test enunciated in *Usery* was as unworkable as the Court's earlier Tenth Amendment cases.[121] Justice Blackmun then concluded that the states' active participation in the federal political process made judicial enforcement of federalism values unnecessary. According to Justice Blackmun's opinion, the only check on federal power contemplated by the Constitution was the one provided by the political process.[122] The Tenth Amendment was again reduced to nothing but a truism.

One can question whether the incorporation doctrine and the devaluation of the Tenth Amendment have been unalloyed blessings. The decisions surveyed above have diminished the vigor with which state governments can compete within the federal power structure. Binding the states to every jot and tittle of the first eight amendments and reducing the Tenth Amendment to the status of a proverb has limited the ability of the states, in the words of Justice Powell, to "serve as an effective 'counterpoise' to the power of the Federal

115. *See id.*
116. GERALD GUNTHER, CONSTITUTIONAL LAW 169 (11th ed. 1985).
117. 426 U.S. 833 (1976).
118. *Id.* at 842-43 (quoting U.S. v. Darby, 312 U.S. 100, 124 (1941)).
119. *Id.* at 852.
120. 469 U.S. 528 (1985).
121. *Id.* at 546-47.
122. *Id.* at 556.

Government."[123]

As the Framers recognized, the federal structure of government preserves numerous advantages to the people.[124] Although it may not be self-evident why states should retain substantial independent authority, there are identifiable advantages to a dual system of government. In "Democracy in America," Alexis de Tocqueville, asserted,

> [t]he strength of free nations resides in the local community. Local institutions are to liberty what primary schools are to science; they bring it within people's reach, they teach people how to use and enjoy it. Without local institutions, a nation may establish a free government, but it cannot have the spirit of liberty.[125]

Justice O'Connor in *Gregory v. Ashcroft*,[126] articulated other advantages of our federal structure. There, she stated that a dual system of government:

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[127]

Such values do not seem to be widely appreciated by many in the legal community. The casebook I use in my own constitutional law course asks the rhetorical question "Why study federalism?" at the outset of the chapter on the scope of congressional regulatory authority.[128] The answers that the authors give are: one, that the study of federalism is interesting for historical reasons and, two, that the study is useful for the perspective it can give on the various analytical tools the Court has developed over time.[129] Not mentioned, of course, is the possibility that federalism is a value not only

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123. *Id.* at 571 (Powell, J., dissenting).

124. *See* THE FEDERALIST NO. 28, *supra* note 29, at 225 (Alexander Hamilton); *Id.* NO. 57, at 357-58.

125. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 62-63 (J.P. Mayer ed., 1969).

126. 111 S.Ct. 2395 (1991).

127. *Id.* at 2399.

128. STONE ET AL., *supra* note 105, at 139.

129. *Id.* at 139-40.

worthy of historical study and academic admiration, but also of promotion and preservation.

Justice Louis Brandeis, writing nearly sixty years ago, argued that:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[130]

The Supreme Court's incorporation doctrine and Tenth Amendment jurisprudence may discourage useful state experimentation. Discouraging such experimentation, moreover, can have significant costs. An advisory commission on intergovernmental relations recently found that a substantial number of innovations had first been implemented at the state or local level, including sunset legislation, zero based budgeting, equal housing, no fault insurance, pregnancy benefits for working women, limited access highways, education for handicapped children, auto pollution standards, and energy assistance for the poor.[131] Federally mandated standards on every issue within the reach of the federal constitution can dampen not only the ardor—but the ability—of state and local governments to undertake such experiments in the future.

Disregarding federalism concerns may interfere with federal experimentation as well. It is quite possible, for example, that the current Supreme Court's unwillingness to read various protections of the Bill of Rights broadly springs, in large part, from the fact that an expansive reading of those protections will bind *all* courts in the land. When its decisions have such a dramatic impact, the Court has an understandable and strong incentive to move cautiously (perhaps too cautiously) in new areas of the law—and perhaps even cut back on prior decisions that, for various reasons, may have arguably gone too far. Thus, although the incorporation doctrine has undeniably expanded personal liberties throughout the country on both the state and federal level, one can now wonder

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130. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).

131. Advisory Commission on Intergovernmental Relations, The Question of State Government Capability 23-24 (1985).

whether it is not—in fact—operating as something of a brake on further judicial explication of the Bill of Rights.

There are indications that the Supreme Court will remain sensitive to federalism concerns. Despite the Court's application of the first eight amendments to the states (ostensibly in the exact same form as they apply to the federal government), the Court has not completely lost sight of federalism values. The Court, for example, has concluded that twelve-person juries are not indispensable to the right of trial by jury[132] and has upheld the constitutionality of less than unanimous verdicts in some state criminal cases.[133]

There are also indications that the Tenth Amendment may have somewhat more force than Justice Blackmun's opinion in *Garcia* would indicate. In *Gregory v. Ashcroft*,[134] decided earlier this year, Justice O'Connor articulated a "plain statement rule" to add substantive content to the "political process check" on congressional power enunciated in *Garcia*.[135] In essence, the Court put bite into that political process check by requiring Congress to make clear its intent to "'pre-empt the historic powers of the States.'"[136]

The Antifederalists pushed for a Bill of Rights primarily to preserve the independent sovereignty of the states.[137] In a rich historical irony they could not have anticipated, the Bill of Rights instead became the means by which much of the residual power retained by the states following the Constitutional Convention was ceded to the federal government. As a result, the structure of the nation has been undeniably altered, raising the question—recently noted by Justice O'Connor in *Gregory v. Ashcroft*—"whether our federalist system has been quite as successful in checking government abuse as [the Framers] promised."[138]

Whatever the answer to that question, Justice Harlan's observation in *Pointer v. Texas*[139] is worth remembering:

It is too often forgotten in these times that the American federal system is itself Constitutionally ordained, that it

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132. Williams v. Florida, 399 U.S. 78 (1970).
133. Apodaca v. Oregon, 406 U.S. 404 (1972).
134. 111 S. Ct. 2395 (1991).
135. *Id.* at 2401.
136. *Id.*
137. THE STATES RIGHTS DEBATE, *supra* note 12, at 98.
138. *Gregory*, 111 S. Ct. at 2400.
139. 380 U.S. 400 (1965).

embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work this Court.[140]

IV. RESTRUCTURING SOCIETY: THE BILL OF RIGHTS AND MODERN AUTONOMY

I would now like to turn to the final structural role I have identified for the Bill of Rights. That is, its modern role in structuring not merely governmental power, but society itself. As the Provost of this University, Bruce Hafen, recently noted, "it is easy for the contemporary mind to forget that the concepts embodied in the Bill of Rights were originally intended to define only the political relationship between individual citizens and the [Government]—not the domestic and personal relationships among the citizens themselves."[141] The modern Supreme Court, however, has assured that—at least for the foreseeable future—the Bill of Rights will be used not merely to structure governmental relationships, but to restructure social institutions.[142]

If one can believe what one reads in the newspapers and sees on television, the hottest constitutional topics of the day are whether the Bill of Rights includes a generalized right of privacy, and if so, whether the boundaries of that right are narrow or broad. This "right of privacy"—sometimes recast by individual Justices as a right of "autonomy"—lies at the heart of the third structural role of the Bill of Rights. I would therefore like to briefly discuss two issues: First, where does this asserted right of privacy come from? Second, what is the content of the right?

It is relatively easy to pinpoint the Supreme Court decision that gave rise to the modern right of privacy. Although there are decisions from the 1920s[143] and the 1940s[144] that have now been recharacterized as privacy decisions, the font of modern privacy doctrine is quite clearly *Griswold v.*

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140. *Id.* at 409.

141. Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 7.

142. *Id.* at 4-7.

143. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 380 (1923).

144. Skinner v. Oklahoma, 316 U.S. 535 (1942).

Connecticut.[145] It is not as easy, however, to pinpoint the exact constitutional basis for *Griswold* itself.

The case involved a state law that prohibited the use of contraceptives by married couples. Justice Douglas' well-known plurality opinion concluded that the right of privacy was included within the emanations and shadows of the express provisions of the Bill of Rights.[146] Douglas adopted this approach to avoid criticism that the Court was merely engaged in the type of free-wheeling, substantive due process analysis exemplified by *Lochner v. New York*[147].[148]

Other Justices concurring in *Griswold*, however, feared that Douglas' approach was—if anything—more uncabined than *Lochner.*[149] As a result, they grounded their decision on the fact that the contraception law interfered with a personal right so obviously established and so universally accepted that it was undeniably fundamental.[150] This approach, of course, comes very near to establishing modern natural law, with the content of that natural law tied closely to tradition.

The answer to the first question I have posed, therefore, is this: the modern right of privacy comes from *Griswold*, although we can't be quite certain of the precise constitutional niche for the result announced in that case.[151] The uncertain categorization of the privacy right recognized in *Griswold*, in turn, renders the answer to the second question—what is the content of the privacy right?—even more difficult. But, it is the answer to this second question that is of surpassing importance.

If you doubt the gravity of the second question, you must have been comatose for the past month. The recent interrogation of Clarence Thomas by the Senate Judiciary Committee seemed to suggest that the future of the nation depended upon his answer to the second question. Judge Thomas, of course, refused to give an answer, on the ground that it might influence his impartiality should a case involving that issue come before him. A more candid answer might have been that he—like everyone else—is not quite sure *what* the

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145. 381 U.S. 479 (1965).
146. *Id.* at 483-84.
147. 198 U.S. 45 (1905).
148. *Griswold*, 381 U.S. at 514-15.
149. *See id.* at 486.
150. *Id.* at 485-86.
151. *Id.* at 479.

privacy right entails.

The possible content and reach of the modern right of privacy is exemplified by the differing opinions in *Griswold* itself. The rather free-wheeling analysis used by Justice Douglas has no obvious boundaries.[152] The approach of the other Justices in *Griswold*, by contrast, is closely tied to history and tradition.[153] The first approach would permit Justices to *create* rights they would thereafter *deem* fundamental; the second approach would restrict the right of privacy to rights that have been historically and traditionally recognized as fundamental.

It is simply not clear which of the two approaches preponderates. In *Bowers v. Hardwick*,[154] a majority of the Supreme Court adhered closely to the second approach in concluding that private, homosexual behavior was not constitutionally protected.[155] Justice White, writing for the majority, noted that the Court "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[156] Sensitive to this caution, the Court concluded that homosexual conduct was not entitled to heightened constitutional protection because, far from being "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition," homosexuality had long been rejected by Western culture as deviant behavior.[157]

Justice Blackmun, by contrast, took a much broader view of the privacy right. He concluded that history and tradition were irrelevant because the state prohibition of homosexual conduct intruded upon what he called "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[158] According to Justice Blackmun, autonomy *simpliciter*—not history, tradition, or community values—determines the content of the privacy right.[159]

The divergent approaches to defining the content of the privacy right raise difficult questions for the future. As a

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152. *See id.* at 481-86.
153. *See id.* at 486-507.
154. 478 U.S. 186 (1986).
155. *Id.* at 194.
156. *Id.*
157. *Id.* at 191-92 (citations omitted).
158. *Id.* at 199 (citations omitted).
159. *Id.*

matter of separation of powers, the uncertainty has the potential of shifting a vast reservoir of policymaking authority from the legislative arena into the judicial branch. The eagerness with which various groups, each promoting its cherished "right," have seized upon privacy theory to further their agendas is mute testimony to this fact. *Hardwick* itself is evidence that constitutional privacy litigation is undertaken more in the name of furthering a cause than protecting the rights of individual litigants; no actual prosecution was pending against Mr. Hardwick at the time he filed his suit.[160] As Bruce Hafen has noted, "the case was not concerned with actually protecting Hardwick. Rather, the case was a forum for urging the Court to lead the way in shaping a new cultural consensus."[161]

The dispute regarding the content of the privacy right has troubling sociological overtones as well. The decision that a particular area lies within a zone of "privacy" or "autonomy" effectively shuts out all considerations beyond those deemed relevant by the individual himself. Thus, in the course of deciding in *Roe v. Wade*[162] that the right of privacy included the right to terminate a pregnancy, the Court essentially decreed that all considerations except the woman's own reproductive desires were irrelevant (at least until the unborn child could fend for itself).[163] As a result, society's traditionally cherished interest in protecting unborn life, as well as the long-recognized interests of all other individuals impacted by a pregnancy (including the biological father) were put beyond the pale. The decision, in short, decreed that the community had no right to further communal interests in an area intimately tied to the preservation of society itself—human reproduction.[164]

This is not the place to debate the merits of the Court's abortion jurisprudence. What *Roe v. Wade* and subsequent decisions evidence, however, is the potential of modern privacy doctrine to cut the individual off from the demands of society in ways that go well beyond the express provisions of the Bill of

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160. *Id.*
161. Hafen, *supra* note 141, at 12.
162. 410 U.S. 113 (1973).
163. *See id.*
164. *Id.*

Rights.[165] The completely private individual—secure in a tight little autonomy bubble that bristles with enforceable, porcupine-like rights—comes to exist outside and independent of the community. Such an autonomous individual, moreover, is increasingly encouraged to shout, "I know my rights!" and to forget or minimize the responsibilities that society has, in the past, legitimately imposed.

The extent to which privacy doctrine will effectively immunize the individual from social demands depends upon the approach the Court takes in explicating that doctrine. If the Court emphasizes the role of history and tradition, relied upon by the concurring opinions in *Griswold*, privacy doctrine will reinforce community values and thereby serve as a "link to the past rather than a slide into the future."[166] Should the Court follow the path blazed by Justice Blackmun, however, quite the contrary will occur. I, for one, am personally troubled by that possibility.

It seems clear enough that the Framers of the Bill of Rights intended its provisions to free the individual from odious invasions of personal liberty by the government, and to secure the conditions under which a free society could best thrive.[167] Justice Blackmun's theory of autonomy, however, raises the possibility that the Bill of Rights can be pressed to the point where individuals—but not the community—may survive. Legal scholars and philosophers beyond my abilities have raised cautions regarding this issue.[168] For present purposes, and in conclusion, I simply wish to point out the obvious: in defining the precise content of the modern right of privacy, courts—and the entire legal profession—must keep an eye, not only on the individual, but on the community. For, in our eagerness to protect the golden egg, we may kill the goose that laid it.

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165. *See* Hafen, *supra* note 141, at 1.
166. *Id.* at 23.
167. *See supra* part II.
168. *See, e.g.*, Hafen, *supra* note 141, at 1.