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Celebrating (?) the Bill of Rights: The Root, Branch, and Foliage of American Liberty

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LECTURE

Celebrating (?) the Bill of Rights: The Root, Branch, and Foliage of American Liberty*

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> Except during the nine months before he draws his first breath, no man manages his affairs as well as a tree does.
>
> George Bernard Shaw***

Everyone knows that on December 15, 1991, the United States will commemorate the bicentennial of the Bill of Rights, the first ten amendments to the Constitution. We may view this historic document as an appendix, but unlike the human appendix the Bill of Rights was necessary for survival. This is because a number of states made it clear that they would not ratify the original Constitution without more protection for the liberties of the people.[1]

The question for us today is, where is the country now, on the eve of this great anniversary? Are the facts worthy of the celebration? Or is there cause for concern rather than applause at the degree of faithfulness, or faithlessness, to the plan for human liberty that the Bill of Rights represents?

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I thank my colleague Burt Neuborne for his valuable ideas on the structure and content of this paper, the early portion of which was adapted from my essay *Civil Liberties, in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 263 (Leonard W. Levy et al. eds., 1986). Lee Michaelson provided useful research assistance with this material.

*** W.H. AUDEN, THE VIKING BOOK OF APHORISMS; A PERSONAL SELECTION, BY W.H. AUDEN AND LOUIS KRONENBERGER 383 (1962).

[1] See BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 119-159 (1977).

Before reaching a conclusion on these questions, it is necessary to do three things. We must first consider what concept is embraced by the Bill of Rights and, more generally, civil liberty. Civil liberty has been broadly defined as "the great end of all human society and government. . . that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws."[2] From a practical perspective, civil liberties are usually claims of right that a citizen may assert against the state. They provide a logical corollary to the concepts of limited government and rule of law. When government acts arbitrarily, it infringes civil liberty; the rule of law combats and confines such abuse of power. The maxim "government of laws, not of men" reflects this principle.

Although civil liberties are usually associated in practice with democratic forms of government, liberty and democracy are distinct concepts. An authoritarian structure of government may recognize certain limits on the state's power to interfere with individual autonomy. Correspondingly, the idea that an individual may assert rights against the expressed will of the majority is at least superficially counter-democratic. Thus, civil liberty does not refer to a particular form of political system, but to the relationship between the individual and the state, however the state is organized.

Though lacking the breadth of international human rights, civil liberties in the United States are equally based on the integrity and dignity of the individual. Their spirit was expressed by Supreme Court Justice Louis Brandeis:

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[3]

Individual rights frequently oppose the express will of the community when such will subordinates liberty out of concern for order, national security, efficiency, aesthetics, or other governmental interests. There are two principal justifications for preferring individual liberties to these community interests—justice and

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[2] GEORGE SHARSWOOD, 1 SHARSWOOD'S BLACKSTONE'S COMMENTARIES 127 n.8 (1881).

[3] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

self-interest. Justice requires norms by which persons in authority should treat those subject to their power; self-interest invites the recognition that, if principle is to govern, our own rights are secure only if the rights of others are protected.

Because these justifications are abstractions to most people, civil liberties often are subordinated in practice to more immediate concerns of the state or to prevailing opinion. In the United States, even administrations relatively friendly to civil liberty have perpetrated serious violations. The administration of Franklin D. Roosevelt interned Japanese-Americans during World War II.[4] Abraham Lincoln suspended the right of habeas corpus.[5] And Thomas Jefferson was far more of a libertarian as a private citizen than as President. In office, he countenanced internment camps for political suspects, censored books, and authorized unlawful search and seizure of private property.[6]

The nation's historic shortcomings do not, of course, detract from the nobility of the idea of civil liberty embodied by the Bill of Rights. But they do provide flags of warning to those that think its aspirations will be easily fulfilled.

Two interrelated tasks remain in order to be able to determine whether the Bill of Rights is being honored in practice as it is being celebrated in ceremony during this bicentennial year. The first is an accounting of the state of our liberties. To do this comprehensively, to complete a true census of the many elements of the rights and privileges of Americans, would be a daunting task. But it is not impossible to etch in the highlights, the essentials of the current state of affairs. This I shall try to do. But another requirement must be met to do the job properly. Logically, a theory first must provide a framework, to give meaning to the accounting.

The framework I have chosen is a metaphor—the metaphor of a tree, one of the loveliest sights on earth, one that we view daily, one that we have reason to understand and appreciate. The tree of liberty is a concept that goes back to the time of the Revolution. In this perspective, a tree is not merely a thing of beauty but also a functioning organism. It is composed of roots that go deep into the ground, that soak up the nourishment needed to sustain life.

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[4] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[5] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1867); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

[6] *See generally* LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963).

A tree also contains branches, the large and small leaders that soar to the heavens and give definition to the hulking trunk. And finally, a tree has foliage, the myriad leaves that soak up the rays of the sun and provide shade and protection for all below.

Let me now try to adapt the arboreal metaphor to the law and politics of the Bill of Rights. Just as the roots of any tree draw nourishment from soil composed centuries and millennia ago, the soil on which the tree of liberty rests also goes "deep" to ancient times.

The first recorded use of the word "freedom" apparently appeared in the twenty-fourth century B.C., when a monarch of Sumeria "established the freedom" of his subjects by purging tax collectors, protecting widows and orphans from injustice from "men of power," and ending the high priest's practice of enslaving temple servants.[7] Much later, the city-state of Athens made a major contribution to civil liberty. In the sixth century B.C., the magistrate Solon produced a constitution that, while falling short of full-blown democracy, gave the poor the right to vote and to call public officials to account. Solon also is credited with first expressing the idea of the rule of law. But Athens accepted slavery and knew no limits on the power of the majority to adopt any law it chose. Apparently, the Athenians had no concept of individual rights against the state. The Stoic philosophers introduced the idea of "natural law" and the derivative concept of equality. Again excluding slaves and also women, all Athenian citizens were equal because all possessed reason and owed a common duty to the law of nature.[8]

The Romans also contributed to civil liberties through a rudimentary separation of governmental powers and later by the elaboration of the nature of law. Justinian's *Institutes*, for example, recite: "Justice is the fixed and constant purpose that gives every man his due."[9] Nevertheless, the Roman emperors were autocratic in practice. There were no enforceable rights, and censorship, restrictions on travel and coerced religion flourished.

The history of the Middle Ages contains little evidence of civil liberties. But the idea of a pure natural law was carried forward in St. Augustine's *City of God* and especially Thomas Aquinas's

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[7] *See* GEORGES ROUX, ANCIENT IRAQ 133 (1980).

[8] *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153-57 (1928-29).

[9] J. INST. 1.1.pr.

Summa Theologica. On the secular side, the contract between feudal lords and their vassals established reciprocal rights and responsibilities whose interpretation, in some places, was decided by a primitive jury drawn from the local community.

The first of the many English antecedents of civil liberties is the Magna Charta of 1215, the first written instrument in world history to exact from a monarch a promise to obey certain rules. This document was violated by some English kings and was certainly not intended as a manifesto of popular rights. Nevertheless, among the basic liberties derivable from it are the security of private property and of the person, the right to judgment by one's peers, the right to seek redress of grievances from the sovereign, and the concept of due process of law. Above all, as Winston Churchill said, the Magna Charta "justifies the respect in which men have held it" because it tells us there is "a law above the king."[10]

The second great charter of English liberty was the 1628 Petition of Right, a statute asserting the freedom of the people from unconsented taxation and arbitrary imprisonment.[11] The third was the English Bill of Rights, enacted in 1689. It declared that elections to Parliament should be free and that members ought not be punished for their speeches in debate. In addition, it condemned the last Stuart Kings' perversions of criminal justice, including excessive bail and cruel and unusual punishments.[12]

The American colonies also contributed to the development of civil liberties. The first colonial charter, Virginia's in 1606, reserved to the inhabitants "[a]ll liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of *England*."[13] The Massachusetts Body of Liberties of 1641 expressed in detail a range of fundamental rights,[14] many of which were adopted in the American Bill of Rights. Other colonial charters, notably Pennsylvania's,[15] were also influential in protecting indi-

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[10] 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 7 (1971) (quoting Churchill).

[11] *See* Petition of Right, 1628, 3 Charles I, c. 1, *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, 256 (Zechariah Chafee, Jr. ed., 1963).

[12] *See* Bill of Rights, 1689, 1 William & Mary, st. 2, c. 2, *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 11, at 267.

[13] First Charter of Virginia art. XV (1606), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 11, at 97.

[14] *See* Massachusetts Body of Liberties (1641), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 11, at 122.

[15] Charter for the Province of Pennsylvania (1680-81), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 11, at 157.

vidual rights. In addition, a New York jury's acquittal in 1735 of the publisher Peter Zenger on a charge of seditious libel (that is, defaming the government) was a milestone in securing the freedom of the press.[16]

Such is a short description of the soil in which the American tree of liberty is planted. What are the roots themselves? In my view there are three. The first is the system of separation of powers in the national government, the division of authority among the executive, the legislative, and the judicial departments. This division is crucial; the Framers of the Constitution understood, anticipating Lord Acton's famous statement that absolute power corrupts absolutely, the importance of dispersing the authority of government. As the Supreme Court said in 1874, the "theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere."[17] Separation of powers is especially valuable in assuring that the courts not lose their independence as a result of domination by the politically elected branches of government.

A second root of American liberty is the First Amendment guaranty of free speech and press. Without this right, citizens could not criticize government and other centers of authority. Consequently, there would be no capacity to expose, debate, and cure problems. Other countries bear tragic witness that freedom of expression is needed to grope toward the truth in public affairs, to assure democratic government, to check arbitrary officials, and to permit individual expression without fear of retaliation.

The third and final root of American liberty is the system of judicial review. The power of lifetime judges, insulated from electoral politics, to declare invalid the acts of legislators and executive officials is the enforcement mechanism that vivifies the Bill of Rights as well as the entire Constitution. Imagine the sort of country this would be if the scores, perhaps hundreds, of laws that have been declared invalid under the Bill of Rights were still the law of the land.

These three doctrines, separation of powers, free expression, and judicial review, are the cornerstones, the roots of the Bill of Rights. Without them, the American people would be subject to unqualified majoritarianism at the cost of liberty. Ours would be

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[16] *See generally* LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 3-44 (1966).

[17] Loan Ass'n v. Topeka, 87 U.S. (20 Wall) 655, 663 (1874).

a system in which fifty-one percent of the voters could take any desired action against minorities that they pleased.

How are these doctrines faring at bicentennial time? Are they in good health?

My colleague Burt Neuborne argues persuasively that "the contemporary doctrine of separation of powers respects neither 'powers' nor 'separation' [and] has resulted in a political implosion that threatens to alter the fundamental structure of our government."[18] But with the exception of the fact that, contrary to the expectations of the Framers, the Executive branch has come to dominate Congress, the recent alterations in the doctrine do not seem to me to severely threaten civil liberty. And even the ascendancy of the Executive, which traces at least to the New Deal, can be cured, or at least mitigated, by resolute political efforts.

The same cannot confidently be said about free expression; that root is frayed in at least three areas. The first is national security. The Court made a promising start in the *Pentagon Papers* case,[19] when it rejected an attempt to enjoin publication of classified documents concerning the origins of the Vietnam War. Since then, however, the Court has regularly sacrificed First Amendment principles by upholding the denial of a visa to enter the United States to a foreign professor whose views were regarded as "Communist,"[20] by permitting the CIA to require all former employees to submit all their future writings for agency review before publication,[21] and by other means.[22]

Free expression also has been impaired in its interaction with the modern administrative state. For example, the Supreme Court shocked a large part of the country by holding recently that a physician working in a family planning agency financed in part by the federal government could be barred from advising patients of the possibility of an abortion to terminate an unwanted pregnancy.[23] This is not the occasion to discuss why the decision represents a low watermark in judicial sensitivity to free speech and to the historic responsibilities of a physician to counsel patients

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[18] Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385, 401 (1991).

[19] New York Times Co. v. United States, 403 U.S. 713 (1971).

[20] *See* Kleindienst v. Mandel, 408 U.S. 753 (1972).

[21] *See* Snepp v. United States, 444 U.S. 507 (1980).

[22] *See generally* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840 (1989).

[23] *See* Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759 (1991).

completely.[24] It is enough here to note that one of the decision's ominous implications almost was realized several months later when the House of Representatives voted to deny subsidies, otherwise available, to artists and museums for works that are "patently offensive" in their sexual explicitness. A disaster for the First Amendment was narrowly averted when, at the eleventh hour, the provision was dropped through political compromise in a House-Senate conference committee.[25]

A third area where danger signals are evident also is related to the arts. The Supreme Court, last term, upheld an Indiana statute banning public nudity as applied to erotic dancing that was not "obscene" and thus, as the Court admitted, entitled to First Amendment protection.[26] The restriction was justified by the government's interest in "societal order and morality,"[27] an elastic standard with no inherent bounds in the absence of a showing of physical disorder.

The third root of American liberty—judicial review, tracing to *Marbury v. Madison*[28]—is alive but not vibrant. An indispensable aspect of judicial review is the ability of people to gain adequate access to the courts to challenge government action they believe unconstitutional. In recent years, in a variety of cases, the Court has used the doctrine of standing to bar litigants from obtaining decisions on the merits of their claims. Thus, for example, the budget of the CIA has remained secret,[29] and racist public housing projects have been insulated from judicial review.[30] Last term the Supreme Court sharply limited the scope of habeas corpus for incarcerated individuals seeking relief in federal courts,[31] and a bill was presented to Congress, supported by the President, to curtail the further availability of the writ.[32] These are not good omens.

Having discussed the roots, we now need to consider the branches of the tree of American liberty. Without branches, a tree

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[24] *See generally* Sylvia Law & Rachael Pine, *Envisioning a Future for Reproductive Rights: Strategies for Making the Dream Real*, 27 HARV. C.R.-C.L. L. REV. ____(Summer 1992). Congress passed a bill in late 1991 that would have authorized physicians to counsel patients on abortion in government financed clinics. But, President Bush vetoed the law and, by a margin of 12 votes, the House of Representatives sustained the veto.

[25] *See* Kim Masters, *"Corn for Porn" Victory*, WASH. POST, Oct. 25, 1991, at B2.

[26] *See* Barnes v. Glen Theatre, Inc., ____ U.S. ____, 111 S. Ct. 2456 (1991).

[27] *Id.* at ____, 111 S. Ct. at 2461.

[28] 5 U.S. (1 Cranch) 137 (1803).

[29] *See* United States v. Richardson, 418 U.S. 166 (1974).

[30] *See* Warth v. Seldin, 422 U.S. 490 (1975).

[31] *See* Coleman v. Thompson, ____ U.S. ____, 111 S. Ct. 2546 (1991).

[32] *See* S. 1241, 102d Cong., 1st Sess. (1991).

is fatally deficient. So it was with the Constitution and Bill of Rights in the eighteenth century. A crucial ingredient was absent, the concept of equality. In a commentary on the bicentennial of the Constitution, Thurgood Marshall pointed out that when the Founders used the phrase "We the People" in the Preamble to the Constitution, "they did not have in mind the majority of America's citizens"[33]

It took a bloody and embittering Civil War to place a stricken nation on the road to rectification. The Thirteenth, Fourteenth, and Fifteenth Amendments provide the first branch to our tree—the outlawing of slavery and racial discrimination in voting and the general protection of equality. The march to full racial parity has been slow and frustrating, but progress was made in the century following these Amendments. Similarly, we have advanced from the paternalistic attitude that prevailed in 1873, when a Supreme Court Justice could say that "the divine ordinance, as well as . . . the nature of things" made "the female sex unfit for many of the occupations of civil life" and consigned women to the "benign offices of wife and mother."[34] Again it took a century, but by 1973 women long since had been given the right to vote,[35] and the Supreme Court had begun the process of subjecting sex discrimination to heightened scrutiny under the Equal Protection Clause.[36] Thus did a second branch grow on the tree of liberty.

And other branches have appeared. The rights of nonmarital children, noncitizens, the mentally ill, and the elderly have received some form of special protection through judicial action, legislative action, or a combination of both.[37]

How sturdy are these branches? The answer varies, but in my view there is no cause to rejoice. To start with race, despite the undoubted and visible progress achieved, inter-group relations in many parts of the United States today are worse than they have been for some years. Legal doctrine in several Supreme Court

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[33] Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (noting that originally the Constitution provided neither Negro slaves nor women the right to vote).

[34] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

[35] U.S. CONST. amend. XIX (ratified in 1920).

[36] *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[37] See Levy v. Louisiana, 391 U.S. 68 (1968) (nonmarital children); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mentally retarded); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1985) (older workers).

decisions reflects this. The recent rulings that undercut strong enforcement of antidiscrimination laws[38] had to be reversed by Congress.[39] Moreover, mounting evidence indicates that an increasing number of Americans are unsympathetic to racial minorities and unwilling to act on altruistic or kindly impulses. The success of former Klansman and Nazi sympathizer David Duke in the Louisiana gubernatorial primary is an extreme symptom of the phenomenon.[40] After a decade of shameless greed and corruption on Wall Street and elsewhere, in which self-gratification has been the prevailing ethic, the trend is not surprising. At such a time, leadership is needed to galvanize public opinion to empathy for the concerns of minorities. But we have had exactly the opposite, exemplified most recently by the almost desperate attempt by the President to thwart passage of a civil rights bill, any civil rights bill, even one acceptable to Senator John Danforth, not previously known as a Radical Republican. It is clear that this branch of the liberty tree needs renewed support.

As for discrimination against women, as already indicated, some of the grosser problems have been addressed. Still, sizable barriers exist for women seeking many sorts of employment. Women's earnings remain below men's, and their representation in prominent positions in government, universities, and business continues to be low.[41] In this connection, we all saw on television the starkly different ways in which the Senate Judiciary Committee treated Clarence Thomas and Anita Hill, man and woman. *He* was treated with unfailing respect; *she* was savaged by the Republicans and undefended by the Democrats. Wholly apart from who was telling the truth or whether Clarence Thomas should be sitting on the Supreme Court, the scenario provided a vivid and unforgettable exhibition of a double standard at work.

A third and especially vulnerable branch of the liberty tree relates to homosexuals. In view of the deep and long-standing prejudice against lesbians and gay men, it was not surprising, but nevertheless deplorable, that the Supreme Court rejected a consti-

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[38] *See, e.g.*, Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 624 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[39] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[40] Even in communities where there are few racial minorities and no history of racial strife, severe problems have arisen. *See, e.g.*, Isabel Wilkerson, *Seeking a Racial Mix, Dubuque Finds Tension*, N.Y. TIMES, Nov. 3, 1991, at A1.

[41] *See* Barbara Marsh, *Women in the Work Force*, WALL ST.J., Oct. 18, 1991, at B3 (providing charts).

tutional challenge to sodomy laws.[42] That decision was a dramatic reflection of the web of discrimination that surrounds homosexuals in employment, housing, family life, and in the street. Millions of homosexual Americans try to live quiet and productive lives. Until the law and the mass of people come to terms with the virulent discrimination against them, the equality branch of our constitutional heritage will not be healthy.

The final branch on the tree to which I shall refer is a different sort of limb. Although it also addresses a problem of equality, it relates to equal justice with regard to state law. In 1833, the Supreme Court ruled that the Bill of Rights applied only to violations by the United States because it was this entity that the framers feared as a threat to liberty.[43] After the Civil War, there was a long struggle over whether the Fourteenth Amendment required a different result. The Supreme Court eventually held that it did, with three exceptions: the right to bear arms, the right to an indictment by a grand jury, and the right to a civil trial by jury.[44]

The result is that individuals are now generally protected by the same Constitution against all improper behavior by government, whether local, state, or national. This, of course, makes perfect sense if the United States is to be "a more perfect Union," as the Preamble to the Constitution declares.

I turn now to the foliage on our tree of liberty. Leaves are not part of a tree's permanent structure, but they are necessary to its existence; dead trees do not have leaves. Our liberty tree also has foliage—elements of individual freedom that were not part of the original Constitution (the roots) or its subsequent textual growth through amendments (the branches). These non-textual rights—what I am calling the foliage—are no less important to the organism of liberty in our country.

The first of these is the right to travel. It is curious that although the Articles of Confederation explicitly recognized the right of the people of each state (except for paupers, fugitives and vagabonds) to "have free ingress and regress to and from any other State,"[45] no such provision appears in the Constitution or

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[42] Bowers v. Hardwick, 478 U.S. 186 (1986).

[43] *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[44] *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 777-786 (2d ed. 1991).

[45] ARTICLES OF CONFEDERATION art. IV.

Bill of Rights. In fact, in its earliest statement on the subject, the Supreme Court held that a state could require the registration of passengers entering it from other states.[46] By the 1960s, however, the Court could say that the right to travel "has been firmly established and repeatedly recognized."[47] The right has been variously located—as a structural provision,[48] in the Article IV Privileges and Immunities Clause,[49] in the Due Process Clause,[50] in the First Amendment,[51] and even in the Commerce Clause.[52] In one broad 1966 ruling, the Court upheld the application of provisions of civil rights laws to private individuals that attempted to deprive black persons of the right to use public facilities while traveling interstate.[53]

The right to travel, our first burst of foliage, is well established and in generally good color. But complacency is not warranted; we have learned that the government has the power to prevent travel to certain countries[54] and to strip Americans of their passports if their activities are causing or "are likely to cause serious damage to . . . national security or foreign policy."[55] With the end of the Cold War, it is hoped that people will soon be as free to travel to other countries as they are between states. But even interstate travel is not wholly secure. The Supreme Court may soon decide whether groups opposed to abortion can prevent pregnant women from going to a neighboring state for an abortion.[56] If such travel can be prevented, what other forms of mobility may be impaired by vigilantes intent on other holy objectives?

The second sort of foliage decorating the tree of liberty is freedom of association. It too is not enunciated in the Constitution. Nevertheless, the Supreme Court unanimously recognized the right

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[46] *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); *see also* The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

[47] United States v. Guest, 383 U.S. 745, 757 (1966).

[48] *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

[49] *See* Corfield v. Coryell, 6 Fed. Cas. 546, 551-562 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit).

[50] *See* Kent v. Dulles, 357 U.S. 116 (1958).

[51] *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[52] *See* Edwards v. California, 314 U.S. 160 (1941).

[53] United States v. Guest, *supra* note 47.

[54] *See* Zemel v. Rusk, 381 U.S. 1 (1965).

[55] Haig v. Agee, 453 U.S. 280, 303 (1981).

[56] *See* Bray v. Alexandria Women's Health Clinic, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 1070 (1991); *cf.* Griffin v. Breckenridge, 403 U.S. 88, 105-106 (1971).

in 1958 when, in the aftermath of *Brown v. Board of Education*,[57] some southern states sought to destroy civil rights organizations. When Alabama ordered the NAACP to disclose its list of members, the Court held that the First Amendment protected the confidentiality of the names because "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[58]

Paradoxically, this decision followed by only a few years the prosecution and blacklisting of Americans that were or were believed to be leaders or simply members of the Communist Party.[59] The freedom of association did not help them. Happily, with the appropriate exception of situations where a large association is used to perpetuate racial or sexual discrimination, the trend in recent years has been to broaden associational rights. But here too ominous signs appear. Only by a 5-4 vote did the Supreme Court hold in 1990 that the government violated freedom of association by basing promotions, transfers, or recalls of its employees on their political affiliation.[60] If this decision is overruled as a result of changes in the composition of the Court, political orthodoxy could determine who can hold government employment in some parts of the country. Moreover, some of the older cases that were antagonistic to free association have not been overruled but merely distinguished, leaving the door ajar for their possible reentry into the main stream of constitutional law.

A third form of foliage is the right of sexual privacy, which the Supreme Court first acknowledged in 1965 by ruling that a state could not make it a crime for married couples to use contraceptives.[61] The principle soon was extended to single people.[62] The natural culmination of these rulings was *Roe v. Wade*,[63] which allowed women to determine the procreative direction of their lives free from state control. How glorious the leaves on the tree of

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[57] 347 U.S. 483 (1954).

[58] NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[59] *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952); Dennis v. United States, 341 U.S. 494 (1951). These cases subsequently were limited or substantially overruled. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Yates v. United States, 354 U.S. 298 (1957).

[60] Rutan v. Republican Party, ___ U.S. ___, 110 S. Ct. 2729 (1990); *see also* Branti v. Finkel, 445 U.S. 507 (1980).

[61] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[62] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[63] 410 U.S. 113 (1973).

liberty looked on that day in January 1973. But we all know the sequel, how case by case the Supreme Court has upheld state laws that have chipped away at the sexual privacy and autonomy that *Roe v. Wade* embodied.[64] Today, a strong possibility, even a likelihood, exists that the leaves representing free choice will be stripped from their branches. This has not been the only recent loss in this sphere. The decision referred to above denying homosexuals the right to engage in adult consensual sex was as much an affront to the non-textual foliage of privacy as it was to the textual branch of equality. Fear is justified for the survival of this part of our tree's anatomy.

The extent of this affront to liberty may be better grasped when it is recognized that the first and to this day unsurpassed judicial statement of the right to sexual privacy came from Justice John Marshall Harlan, a leading conservative. In *Poe v. Ullman*,[65] Harlan protested eloquently at the Court's refusal to decide then and there that a married couple had a constitutional right to use contraceptives. Harlan located the right in the liberty portion of the Fourteenth Amendment's Due Process Clause, but the critical fact is that he went well beyond accepted textual interpretations of the Constitution.[66] How stunned Harlan would have been to be told that his judgment was flawed because the Framers did not have the "original intent" to protect sexual privacy or that these words could not be found in the text of the Constitution. Not coincidentally, I believe, it was Justice Harlan who wrote the opinion in *NAACP v. Alabama*,[67] which first recognized the freedom of association. He was aware that the foliage of non-textual constitutional decision making was sometimes needed to complete the tree of liberty.

The fourth and final portion of the tree's foliage is the right to vote. Contemporary Americans find it difficult to believe that the Founders of the greatest democracy in the world did not include a right of citizen participation in the electoral process. The Constitution established certain qualifications for the offices of President, Vice-President, Senator and Representative. It also established

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[64] *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

[65] 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

[66] *Id.* at 521-22 ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right.").

[67] 357 U.S. 449 (1958); *see also supra* note 58 and accompanying text.

the Electoral College for the selection of the President and Vice-President, provided for election of Senators by state legislatures, and declared that those electing members of the House of Representatives shall meet the same qualifications as "electors of the most numerous branch of the State Legislature."[68] But only white, propertied males were allowed to vote at the time. Constitutional amendments were needed to enfranchise women, African-Americans and young people 18 years of age or older.[69]

In recent years, the Supreme Court, relying mainly on the Fourteenth Amendment, without expressly declaring a general right to vote, has invalidated state laws that imposed poll taxes,[70] unreasonable residence requirements,[71] discriminatory literacy tests,[72] and voting districts with unequal populations.[73] Although a number of dubious requirements are still on the books, the foliage of voting rights remains relatively healthy. This is a cause for celebration, but it is sobering to recall that anything close to full suffrage in the United States was delayed until the 1970s, indeed, almost to the 1976 bicentennial of the Declaration of Independence, with its thrilling but premature assertion that "all men are created equal."

It is now time to come to terms with the evidence at hand, to reach some conclusions about the question with which this discussion began. Should we celebrate the bicentennial of the Bill of Rights with enthusiasm, concern, or perhaps both? We should, of course, have enthusiasm for the document itself, for the concept and principles it embodies, for those who produced it, for those who have labored for its fulfillment, and for the considerable successes that they have had. Yet, it is with something less than full enthusiasm that, to be honest, we must face the reality of the Bill of Rights in contemporary America. I hope I have not exag-

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[68] U.S. CONST. art. I, § 2, cl. 1.

[69] U.S. CONST. amends. XV, XIX, XXVI.

[70] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); *see also* U.S. CONST. amend. XXIV.

[71] *See* Dunn v. Blumstein, 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (holding that an Arizona law requiring voters to register at least 50 days prior to the day of election was a constitutional means for promoting accurate voter registration lists); Burns v. Fortson, 410 U.S. 686 (1973) (per curiam) (holding that a Georgia 50 day advance registration law was a constitutional means of promoting accurate voter registration lists).

[72] *See* Louisiana v. United States, 380 U.S. 145, 152 (1965); *see also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (enforcing congressional authority to suspend literacy tests where use of such tests has coincided with low voter participation).

[73] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

gerated the problems, but it is difficult for me to avoid the conclusion that the tree of liberty is not in exuberant health. Roots, branches, and foliage are weak or under stress. As Justice Harry Blackmun wrote recently, "[A] chill wind blows."[74]

If this is true, what is to be done? One appropriate reaction is to turn with new energy and imagination to the government institutions responsible for protecting our liberties. In the past, the United States Supreme Court was the main such institution. As James Madison said in proposing the Bill of Rights, "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[75] Our courts have often done nobly, but it would be a rash person who today looked confidently to the Supreme Court, the apex of the judiciary, as the special guardian of our rights.

We might, of course, turn to other institutions of government to bolster the tree. Indeed, there are many experienced and able persons who believe reliance on courts has been excessive. For example, Supreme Court Justice Robert Jackson shortly before his death in 1954, said: "I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. . . ."[76] If this is true and courts are neither omnipotent nor especially receptive to claims of liberty, to which government institutions can we turn? The executive branch in recent years has been of no help in securing civil liberty. Congress has been somewhat better, but the need to compromise with anti-libertarian elements and an unreceptive President has sapped its effectiveness. More promising, in some places, are institutions of state government. For example, many state courts, relying on their own constitutions, have picked up the slack and afforded their citizens protection well beyond that currently provided by the United States Constitution and Supreme Court.[77]

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[74] *Webster*, 492 U.S. at 560 (Blackmun, J., concurring). Justice Blackmun was referring to the threat to the right of women to "retain the liberty to control their destinies." *Id.* But the point is applicable to the status of civil liberties generally.

[75] 2 SCHWARTZ, *supra* note 10, at 1009 (quoting Madison).

[76] ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 80 (1955). This may overstate the point because courts, although unable to save "a whole people," may assist the people in preserving numerous elements of liberty that together make up a free society. For a perceptive discussion of the role of institutions other than courts in protecting individual rights, see Frederick A.D. Schwarz, The Constitution Outside the Court, 47 Rec. of the Bar of the City of N.Y. (1992) (forthcoming).

[77] *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival*

Yes, all of these institutions are potential if limited saviors. But my final thought is that perhaps too much reliance is being placed on official institutions and not enough on the actions of individuals in securing and defending rights. At various times of crisis, we have seen government institutions subverted and the words of the Constitution and Bill of Rights reduced to "mere paper affirmations," as a British scholar described them a century ago.[78]

This means that the tree of liberty requires constant watering and care by the people. The Bill of Rights was not designed as an abstraction. If it were, the rights it contains would have no more value than the barren promises entombed in the constitutions of many totalitarian countries. Rights must be exercised and respected, or they will atrophy.

Private individuals, that means all of us, in the last analysis are the gardeners and pruners of the tree of liberty, the principal bulwark of our liberties. It is not an easy task, but private institutions, of which there are many, can help us. I am of course most familiar with the American Civil Liberties Union. It is imperative to recognize that the ACLU is important to public life, but not because anyone agrees with every position it takes.[79] I can say with confidence that neither I nor any of the other leaders of the organization did so during all the years there. No, the reason to support the ACLU is that, with other groups, it struggles to give meaning to the Bill of Rights, to act as a nonpartisan counterweight to arbitrary government. And it is not only liberal organizations that deserve credit for such actions; for example, the Business Roundtable, a conservative coalition of business leaders, attempted to play a constructive role in fashioning the 1991 civil rights law. Further, we should recall that those who drafted and approved the Bill of Rights were for the most part conservative, seeking to preserve islands of individual autonomy from government control and to hold government to standards of fairness and evenhandedness in dealings with its citizens.

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of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535 (1986); *see also* Steven A. Holmes, *Frustrated by Federal Courts, A.C.L.U. Looks to States on Individual Rights*, N.Y. TIMES, Sept. 20, 1991, at 14.

[78] *See* ALBERT V. DICEY, THE LAW OF THE CONSTITUTION 341 (1st ed. 1885).

[79] *See generally* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990) (detailing numerous issues since founding of ACLU in 1920 in which there was substantial division within the organization).

Unfortunately, too many of today's "conservatives" are not conserving the principles and values of the Bill of Rights, but are undermining them. Religious fundamentalists, insensitive to the teachings of the Constitution, often lead the onslaught.

The problem does not stem from the tenets of Christianity, especially the humanitarianism and altruism of the Sermon on the Mount. It is, rather, the zealotry of some of its modern leaders, who not only want their children to pray in school, they want everyone's to do so. They not only want to prevent fundamentalist women from choosing to seek an abortion, they want to deny every woman this choice. They not only want their children to learn "scientific creationism" as an alternative to science, they want every child to learn it. They not only want to decide which books their children cannot read, they want to decide for all children. They not only want to spend their own money on church schools, they want everyone to be taxed for this purpose.

In summary, after surveying the American scene in the bicentennial year of 1991, my conclusion is that the tree of liberty stands but does not stand tall and straight. We must try harder to fulfill its promise. Those who dedicate themselves to this task, to assuring the health of the tree of liberty, are engaged in work that is often thankless and reviled. Strong opponents have invoked the slogans of necessity, patriotism, and morality in the course of undermining liberty and dominating people who are weak, unorthodox, and unpopular. Government efficiency, international influence, domestic order, and economic strength are all important in a dangerous and complex world. Yet, none of these is of greater consequence than the principles of freedom and human dignity embodied in the Bill of Rights, our country's proudest heritage, our tree of liberty.[80]

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[80] This paper does not purport to deal with all human rights problems confronting the nation in its bicentennial year. Three important unresolved issues as 1991 drew to a close were the deepening plight of the poor and homeless, *see States Slashed Aid to Poor in 1991, Report Says*, N.Y. TIMES, Dec. 19, 1991, at A28; the inadequacies and increasing cost of the health care system, *see* Walt Bogdanich, *Divided Panel Rejects Revamp of Health Care*, WALL ST. J., Dec. 19, 1991, at B4; and, the persistent crime problem, including the failure of inner city court systems to grapple with the case load and dispense justice, *see* Harry I. Subin, *230,000 Cases, Zero Justice*, N.Y. TIMES, Dec. 19, 1991, at A31.

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SPECIAL FEATURE

THE RIGHTS OF GROUPS*

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