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Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions

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SECOND CIRCUIT
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ALBANY, NEW YORK 12201

CHAMBERS OF
ROGER J. MINER
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Mr. Michael A. Hammer
Editor-in-Chief
Seton Hall University
School of Law
Law Review Office
One Newark Center
Newark, New Jersey 07102

Dear Mr. Hammer:

I am happy to enclose the first eighteen pages of my article in order that you can start working on it. Fortunately, I have been able to spend a few hours at my desk each day and I am making good progress with the article. I have every expectation that I will be able to meet the April 10th deadline.

If you have any questions or comments, please call my secretary, Mrs. Shirley Hicks, at my chambers in Albany and she will relay the message to me.

Sincerely,

Roger J. Miner
Roger J. Miner

RJM/sjh
Encs.

Original article
as forwarded to
Seton Hall

4/6/93

Identifying, Protecting and Preserving Individual Rights:
Traditional Federal Court Functions

Roger J. Miner*

As an employer of recent law school graduates and a sometime teacher of law students, I have become a great admirer of the teaching and scholarship of the law professoriate. I have only a few criticisms that are applicable generally to the present-day work of those who have devoted their legal careers to scholarship and education. In an earlier article I noted that "new lawyers are less equipped to handle the demands of modern law practice than those of a previous generation" as a consequence of "[t]he changing focus of academics, from doctrinal scholarship to interdisciplinary studies."¹ Indeed, law school curricula seem to be developing without much concern for real-world relevance. I recently received a letter of recommendation from a professor who urged me to hire a student of his as a law clerk on the basis of the student's outstanding performance in a course called "Bloodfeuds." Although my court handles a rich variety of cases, we never have had one that would fit within that topical heading. (Perhaps the professor thought that the course would be of interest to me in connection with my relations with my colleagues.) In the same article, I placed at the door of academia the responsibility for the failure of recent law graduates "to obtain the oral and written skills of expression necessary for the survival of the profession."² Law review

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articles and other writings by academics themselves often are so obscure as to be incomprehensible and therefore of little value to the bench and bar. When academics talk only to each other, the rest of the profession suffers.

I have noticed that recent law school graduates increasingly tend to discuss court decisions in terms of the perceived predilections of judges rather than on the basis of legal principles and legal doctrine. This comes, as I understand it, from the inclination of most law professors to classify judges, particularly Supreme Court Justices, as "liberal," "conservative," "moderate," "activist," etc., and to examine their decisions on the basis of such classifications. It seems to me that this is an especially dangerous approach to legal analysis since 1) it leads law students away from a proper understanding of legal principles; 2) it impedes the development of "think-like-a-lawyer" skills; and 3) it is valueless for predictive purposes, being based on the flawed premise that each judge has an ascertainable agenda. The professoriate would do well to abandon this approach.

"Public Policy" is a response all too frequently given by young lawyers when asked to articulate the principles upon which a court decision is grounded. While public policy concerns should not be neglected in legal analysis, those who "profess" the law have an obligation to make their students aware that judges are guided by much more than public policy and that precedent, legal reasoning, rules of statutory interpretation,

logic and stare decisis also are worthy of study. Alison Reppy,³ who was Dean of my alma mater, New York Law School, during my student days frequently repeated the following: "Public policy is the wastebasket of legal thinking." I proudly repeated that aphorism to a recent graduate of a so-called "national" law school, and she commented as follows: "Isn't that strange? We were taught that legal reasoning is the wastebasket of public policy!" It seems to me that the modern legal education stew could do with a pinch less of "public policy" salt.

Teachers of law hardly can be described as faddists. Most (especially those who are tenured) are free-spirited individualists, always ready to abandon the beaten path, to shed new light on old doctrine, to challenge conventional wisdom, to reinterpret received knowledge, to revise history and to pour new wine into old bottles (and drink it). They revel in their eccentricities, and this is all to the benefit of their students, their colleagues and the legal profession at large. And yet -- despite their independence -- law professors are all too receptive to fads. The current fad, universally accepted and demonstrated in numerous scholarly writings, is the use of the term "normative."⁴ The use of that term by academics has become so widespread as to be normative. I no longer know or care what the word means. It has evolved into so imprecise a word as to have no meaning at all for lawyers and judges. I do not care if I never see it again.

This year I have received approximately 250 applications for the three clerkship positions available in my chambers. Each is accompanied by two or more letters of recommendation from law professors. A typical letter includes the following: "Of the three hundred students in my contracts class, Ms. Smith achieved the third highest grade. She participated in classroom discussions, and I spoke to her after class on at least two occasions. From these contacts, I have formed the conclusion that Ms. Smith would be the most outstanding law clerk ever to serve in any court anywhere at any time. If you desire further information, do not hesitate to call me at the telephone number listed below. I am available in my office at the law school from 9:45 A.M. to 10:15 A.M. on the third Thursday of each month." If I never see another letter of this type, it would be too soon!

Finally, and to the point of this Article, it is generally bruited about by the professoriate that the federal courts did not become concerned with individual rights until the twentieth century. According to common academic wisdom: "[t]he concern of the framers, especially the Federalists who fully supported the venture, was principally with creating a central government that would work and last, not with whether that government of limited powers would engage in abuses of power."⁵ From this viewpoint, individual rights and the enforcement of those rights in the federal courts were not on the minds of the Framers. In the same vein, one author has written as follows on the subject of "The Supreme Court and Individual Rights":

The Supreme Court's role as guardian of the rights and liberties of the individual is a new one, a responsibility assumed in the twentieth century.

For most of its history, the Court had little to say about the Constitution's guarantees of individual freedom. Preoccupied with defining the relationship of nation to state, state to state, and government to business, the Court found little occasion and less reason to deal with individual rights.

Indeed, until the twentieth century there was no broad constitutional basis for the assertion of individual rights against government action.⁶

My purpose is to demonstrate that the original Constitution was concerned with individual rights, that the Bill of Rights gave even greater voice to that concern and that, from the beginning, the federal courts were deeply involved in identifying, protecting and preserving individual constitutional rights.

In writing the original Constitution, the Framers were indeed concerned with establishing a structure of government. They certainly were occupied with questions of separation of powers, of federalism, and of commerce. But a close examination of the document itself demonstrates that the rights of individual citizens were very much on the minds of those who drafted the Charter. In the article dealing with legislative powers, the Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.⁷

No Bill of Attainder or ex post facto Law shall be passed.⁸

The same article imposes restrictions upon the States in respect of individual rights:

No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .
9

Article III, the Judiciary Article, which extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,"¹⁰ refers to individual rights in the following particulars:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .
11

No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.¹²

[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.¹³

Included in Article IV are two very significant provisions protective of individual rights:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.¹⁴

The United States shall guarantee to every State in this Union a Republican Form of Government¹⁵

It seems clear that the Framers intended the federal judiciary to enforce these rights. In discussing the importance

of permanent tenure for judges, Hamilton wrote:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹⁶

. . .

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.¹⁷

The provisions for individual rights and the constitutional guarantee of judicial independence clearly are interrelated. Judge Richard Posner, my colleague on the Seventh Circuit Court of Appeals, once stated the proposition most succinctly:

[I]t is hard to imagine why the framers of the Constitution would have bothered to give the federal judges such extraordinary guarantees of independence if they had not expected them to be aggressive in protecting individual rights against encroachment by other branches of government -- and plainly they did; and though the framers' thinking ran more to property rights than to what we call civil liberties the constitutional text is not so confined.¹⁸

An excellent example of the role played by the federal courts in the protection and enhancement of individual rights is found in the enforcement of the constitutional provisions

prohibiting Congress or the state legislatures from passing bills of attainder.¹⁹ According to the records of the Constitutional Convention, a unitary provision prohibiting ex post facto laws as well as bills of attainder first was introduced and debated.²⁰ Interestingly, some delegates thought that a prohibition of ex post facto laws would be superfluous and were reluctant to support such a provision:

Mr. Govr. Morris thought the precaution as to ex post facto laws unnecessary; but essential as to bills of attainder.

Mr. Elseworth [sic.] contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It cannot be necessary to prohibit them.

Mr. Wilson was against inserting anything in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution -- and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.²¹

The records of the Convention revealed that before any further debate was had on the ex post facto issue,

[t]he question [was] divided, [and] [t]he first part of the motion relating to bills of attainder was agreed to nem. contradicente.²²

Although the ex post facto provision, an important protection of individual rights, eventually was adopted, it is apparent that the Framers perceived a greater danger from legislative derelictions in regard to bills of attainder than from legislative derelictions in regard to ex post facto laws. An examination of the history of bills of attainder makes it clear

why this was so.

A sentence of death under the common law of England was said to fix a mark of infamy upon the person to be executed, who was "then called attaint, attinctus [or] stained."²³ The consequences of this common law attainder were the forfeiture to the crown of the personal and real property of the attainted person and the "corruption of blood," which perforce forbade inheritance from ancestors and transmission of wealth and titles to heirs.²⁴ Bills of attainder, being legislative enactments designed to inflict punishment without trial, are different from the common law attainder that followed a sentence of death following trial, and Blackstone recognized the significant distinction between the two.²⁵

First enacted by the English Parliament around the year 1300, bills of attainder originally were designed to ensure that dead traitors' estates would escheat to the crown.²⁶ They later were used to punish those who engaged in a wide range of activities that were considered inimical to the interests of the crown.²⁷ Bills of pains and penalties, also enacted by the English Parliament, were different from bills of attainder only in that they provided for punishments other than death.²⁸ Unhappily, these English practices were imported to colonial America.²⁹ During the American Revolution, each of the thirteen colonies enacted bills of attainder or bills of pains and penalties directed at British loyalists.³⁰ Bills of attainder found their way into the laws of the new states, and the New York

Constitution, adopted on April 20, 1777, was typical in that it prohibited the state legislature from enacting bills of attainder but provided an exception "for crimes . . . committed before the termination of the present war."³¹ Approximately sixty pieces of attainder legislation were enacted in New York between the Declaration of Independence and the 1783 Treaty of Peace.³² Among these was the Attainder Act of October 22, 1779, under which fifty-nine New York citizens were subjected to the forfeiture of their property as a consequence of being attainted.³³ In Virginia, Thomas Jefferson himself, while serving in the legislature of that state in 1778, participated in the adoption of legislation to attain one Josiah Phillips for "hav[ing] levied war against the Commonwealth."³⁴

It is clear that the Framers recognized the evils inherent in bills of attainder. James Madison wrote that "[b]ills of attainder . . . are contrary to the first principles of the social compact and to every principle of sound legislation."³⁵ Quoting Montesquieu, he noted the principal reason for prohibiting bills of attainder: "Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.'"³⁶ There was some ambivalence in the courts about enforcing the Bill of Attainder Clauses in the early years of the Republic, however, since the bills enacted at the time of the Revolution were designed to attain the hated British loyalists and to confiscate their property. For example,

in Cooper v. Telfair,³⁷ the Court refused to declare that a 1782 act of the Georgia legislature attainting British loyalists was void. (It will be remembered that the Constitution prohibited states as well as the federal government from enacting bills of attainder.) Each Justice who participated in the decision in Cooper wrote a separate opinion, but the opinion of Justice Samuel Chase expressed the common denominator: "There is . . . a material difference between laws passed by the individual states, during the revolution, and laws passed subsequently to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous tests now applied"³⁸ Clearly, the Court had a problem with bills of attainder passed during the Revolutionary War.

The significant protections afforded by the Bill of Attainder Clauses eventually found full expression in the cases involving the so-called "test oath" statutes that were the product of the Civil War. On the same day in 1867, the Supreme Court decided two cases involving test oaths that clarified bill of attainder jurisprudence and, in doing so, struck an important blow for individual rights. In Cummings v. Missouri,³⁹ the Court examined a provision of the Missouri state constitution declaring it a criminal offense for a Catholic priest to engage in his priestly duties without complying with the Missouri constitutional requirement that he swear under oath that he did not support the Confederacy. Finding the state constitution in conflict with the federal Constitution's Bill of Attainder

Clause, which had been read broadly to prohibit bills of pains and penalties as well as bills of attainder, the Supreme Court noted that the intention of the clause was "that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."⁴⁰ And in Ex Parte Garland,⁴¹ the Court found that an Act of Congress prohibiting any person who would not swear that he had not supported the Confederacy from holding public office or practicing law contravened the Bill of Attainder Clause. In both cases, the Court performed a traditional federal court function by giving life and meaning to a constitutional right.

Continuing to identify the Bill of Attainder Clause as an important individual right worthy of protection and preservation, the Supreme Court in 1946 invalidated a statute that foreclosed the payment of salaries to three federal employees said to be "subversive."⁴² The Court there noted that individuals need not be targeted by name because the Constitution forbids any legislation, "no matter what [its] form, that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."⁴³ In 1965 the Court overturned legislation that barred certain Communist Party members from labor union employment.⁴⁴ The Court once again warned against a cramped definition of punishment for bill of attainder purposes and reiterated its "emphatic[] reject[ion] [of] the argument that the constitutional prohibition outlawed only a certain class of legislatively

imposed penalties."⁴⁵

Ultimately, the Court defined punishment for bill of attainder purposes in terms of three tests to be applied to challenged legislation, an affirmative answer to any one of the tests being sufficient to meet the definition: "(1) whether the challenged [act] falls within the historical meaning of legislative punishment; (2) whether the [act] 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'"⁴⁶ And so the courts, in the great common law tradition, gave shape and substance to the stark verbiage of the original constitutional provision prohibiting the passing of bills of attainder by: expanding the Bill of Attainder Clauses to include the prohibition of pains and penalties; extending protections to members of named groups as well as named individuals; and explicating the meaning of punishment for bill of attainder purposes. Beginning in the aftermath of the American Revolution and continuing throughout American history up to the present, bill of attainder jurisprudence has evolved as the federal courts have performed their traditional functions in relation to individual rights.⁴⁷ Each court decision in this area, including those discussed above, stands as a separate argument to contradict the widely-held opinion that

[t]he seeming [sic] individual liberties contained in the body of the Constitution . . . were inserted into the federal Constitution because they were necessary for a federal

structure, not as an assurance of rights considered fundamental or crucial to human happiness or fulfillment.⁴⁸

The story of the adoption of the Bill of Rights need not be repeated at length here. Suffice it to say that Madison, although originally opposed to a so-called declaration of rights, eventually came around to favor it and in fact became its author.⁴⁹ The Federalists, supporters of the Constitution in its original form, thought that a national bill of rights was unnecessary because 1) the Constitution created a limited government and was not a threat to individual rights; 2) an attempt to specify rights could be harmful because certain important rights that were not listed might be considered unprotected; 3) a national bill of rights might reflect the "lowest common denominator" of the rights considered important by the individual states; and 4) a bill of rights might imply certain powers in the federal government that were not intended.⁵⁰ Added to this, of course, would be the argument that the rights considered most fundamental already were included in the original Constitution. The Anti-Federalists, on the other hand, saw the omission of a bill of rights as a basis for defeating the Constitution and urged the citizenry to demand additional constitutional provisions for individual rights.⁵¹ The ratification conventions of the states urged adoption of certain individual rights amendments, and the First Congress submitted twelve amendments to the states for ratification in 1789. Ten of the amendments were ratified by the states by 1791

and became the Bill of Rights.⁵² What does need repeating here, in support of the theme of this Article, is the following statement made on June 8, 1789 by James Madison during the debate in the House of Representatives on the Bill of Rights amendments:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁵³

This statement may have had its genesis in a letter dated March 15, 1789 sent by Thomas Jefferson to Madison from Paris expressing support for the proposed declaration of rights:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.⁵⁴

Both Jefferson and Madison correctly foresaw that the individual rights enumerated in the Bill of Rights would find their primary source of protection in the federal courts.

Besides adopting the constitutional amendments known as the Bill of Rights, the First Congress adopted an enduring piece of legislation officially titled: "An Act to Establish the Judicial Courts of the United States."⁵⁵ This legislation frequently has been referred to as the Judiciary Act of 1789 or the First Judiciary Act, and it established a three-level system of

national courts that has continued, with various changes related to the jurisdiction and functions of the courts, to the present day.⁵⁶ There can be little doubt of the interrelationship between the Bill of Rights and the First Judiciary Act. Both were adopted with an eye to Anti-Federalist objections to the lack of specificity in the judiciary article of the Constitution as well as to the omission of a declaration of rights in the original Charter.⁵⁷ Accordingly, a number of rights in the Bill of Rights had to do with the judiciary: the requirement of a grand jury indictment;⁵⁸ the prohibitions against double jeopardy and self-incrimination;⁵⁹ the requirement of due process;⁶⁰ in criminal cases, the rights to a speedy and public trial by jury in the vicinage of the crime,⁶¹ compulsory process to obtain favorable witnesses,⁶² and assistance of counsel;⁶³ the right to trial by jury in suits at common law and a restriction on the reexamination of facts so tried;⁶⁴ and the prohibitions against excessive bail and cruel and inhuman punishment.⁶⁵ The complementary jurisdiction conferred upon each of the three tiers of the new federal judicial system in civil and criminal cases by the Judiciary Act of 1789 clearly evinced the intent of the First Congress to establish "independent tribunals of justice" as "guardians of [the bill of] rights."⁶⁶

It was not until 1833, in a case titled "Barron v. The Mayor and City Counsel of Baltimore"⁶⁷ that the Supreme Court decided that the Bill of Rights applied only to the national government

and did not restrict state authority. The holding arose in the context of a claim by the plaintiff that the City of Baltimore had rendered his wharf useless by causing the deposit of large amounts of sand and earth to be made near the wharf. The water adjacent to the wharf thereby became too shallow for the berthing of most vessels and Barron sought recovery on the claim of deprivation of property without due process, in violation of the Fifth Amendment. Chief Justice Marshall saw the issue as one "of great importance, but not of much difficulty,"⁶⁸ and sent the matter off by reasoning that the amendments were not explicitly made applicable to the states:

[If] the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.⁶⁹

There are those who question whether the issue was as lacking in difficulty as the Court perceived it to be. Professor Gerald Gunther, for example,

[n]ote[s] that a different inference might be drawn from the text of the Bill of Rights: the First Amendment explicitly inhibits "Congress" (but has been read to apply to the entire national government); the Seventh Amendment is explicitly addressed to "any Court of the United States"; but all of the other Bill of Rights provisions speak in general terms. And a few courts, before Barron, thought those provisions generally

applicable.⁷⁰

As will be seen, it was not until the courts seized upon the Fourteenth Amendment that the Bill of Rights would be considered to protect against state action. Until then, however, the courts would continue to identify, protect and preserve individual rights against adverse action by the federal government as specifically provided in the original Constitution as well as in the Bill of Rights.

1. Roger J. Miner, Confronting the Communication Crisis in the Legal Profession, 34 N.Y.L. Sch. L. Rev. 1, 16 (1989).
2. Id.
3. Still available from West Publishing Co. is a book co-authored by Dean Reppy and Joseph Koffler, another one of my professors. The book is entitled: Koffler and Reppy's Hornbook on Common Law Pleading (1969). Who am I to complain about "Bloodfeuds"? I had to study "Common Law Pleading."
4. See, e.g., Martin A. Kotler, Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law, 67 Tul. L. Rev. 347, 383-84 (1992).
5. Stephen J. Wermiel, Rights in the Modern Era: Applying the Bill of Rights to the States, 1 Wm. & Mary Bill of Rts. J. 121, 122 (1992).
6. Elder Witt, The Supreme Court and Individual Rights 1 (2d ed. 1988).
7. U.S. Const. art. I, § 9, cl. 2.
8. Id. at art. I, § 9, cl. 3.
9. Id. at art. I, § 10, cl. 1.
10. Id. at art. III, § 2, cl. 1.
11. Id. at art. III, § 2, cl. 3.
12. Id. at art. III, § 3, cl. 1.
13. Id. at art. III, § 3, cl. 2.
14. Id. at art. IV, § 2, cl. 1.
15. Id. at art. IV, § 4.
16. The Federalist No. 78, at 469 (Clinton Rossiter ed., 1961) (emphasis added).
17. Id. at 470-71 (emphasis added).
18. Richard A. Posner, The Meaning of Judicial Self-Restraint, 59 Ind. L.J. 1, 15-16 (1983) (footnotes omitted).
19. U.S. Const. art. I, § 9, cl. 3; id. art. I, § 10, cl. 1.
20. 2 The Records of the Federal Convention of 1787, at 375-76 (Max Farrand rev. ed. 1966.).

21. Id. at 376.
22. Id.
23. 4 William Blackstone, Commentaries *373.
24. Id. at *381.
25. Id. at *256:
As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made pro re nata, and by no means an execution of such as are already in being.
26. Michael P. Lehmann, The Bill of Attainder Doctrine: A Survey of the Decisional Law, 5 Hastings Const. L.Q. 767, 772 (1978); Note, Bills of Attainder and the Supreme Court in 1960 -- Flemming v. Nestor, 1961 Wash. U. L.Q. 402, 403.
27. Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330, 331 (1962).
28. Id.
29. Alison Reppy, The Spectre of Attainder in New York, 23 St. John's L. Rev. 1, 3-4 (1948).
30. Raoul Berger, Bills of Attainder: A Study of Amendment by the Court, 63 Cornell L. Rev. 355, 376-79 (1978).
31. Quoted in Reppy, supra note 29, at 19.
32. See id. at 17-35.
33. Id. at 22.
34. Thomas Jefferson, Bill to Attaint Josiah Phillips, (May 28, 1778), reprinted in 3 The Founders' Constitution 345, 345 (Philip B. Kurland & Ralph Lerner eds., 1987).
35. The Federalist No. 44, at 282.
36. The Federalist No. 47, at 303.
37. 4 U.S. (4 Dall.) 14 (1800).
38. Id. at 19.

39. 71 U.S. (4 Wall.) 227 (1867).
40. Id. at 325.
41. 71 U.S. (4 Wall.) 333 (1867).
42. See *United States v. Lovett*, 328 U.S. 303 (1946).
43. Id. at 315.
44. See *United States v. Brown*, 381 U.S. 437 (1965).
45. Id. at 447-48.
46. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473, 475-76, 478 (1977)).
47. See, e.g., In re Extradition of McMullen, Nos. 91-2402, - 2420 (2d Cir. Mar. 24, 1993) (in banc) (majority and dissenting opinions).
48. William E. Nelson & Robert C. Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* 88 (1987).
49. David M. O'Brien, The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism, 8 *Const. Commentary* 119, 131-37 (1991).
50. Maeva Marcus, The Adoption of the Bill of Rights, 1 *Wm. & Mary Bill of Rts. J.* 115, 117 (1992).
51. Id. at 116.
52. Id. at 118.
53. Quoted in 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1031 (1971).
54. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 *The Papers of Thomas Jefferson* 659, 659 (Julian P. Boyd ed., 1958).
55. Ch. 20, 1 Stat. 73 (1789).
56. See generally Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 30-49 (3d ed. 1988) (tracing the evolution of the federal court system).
57. Maeva Marcus & Natalie Wexler, The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?, in *Origins of the Federal Judiciary* 13, 29 (Maeva Marcus ed., 1992); see also

Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789
21 (1990).

58. **U.S. Const. amend. V.**

59. Id.

60. Id.

61. **U.S. Const. amend. VI.**

62. Id.

63. Id.

64. **U.S. Const. amend. VII.**

65. **U.S. Const. amend. VIII.**

66. See supra note 53.

67. 32 U.S. (7 Pet.) 243 (1833).

68. Id. at 247.

69. Id. at 250.

70. **Gerald Gunther, Cases and Materials on Individual Rights in**
Constitutional Law 82 (3d ed. 1981).