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This issue's topic, the Bill of Rights, does not sound very exciting but it determines in large part how life is lived in these United States. Everyone knows that these ten amendments exist but probably very few people could give an adequate description of what they contain. Despite that lack of knowledge, many people consider the Bill of Rights – at least the one or two rights that most interest them – to be more important than the Constitution. That stance is not new although several of the "liberties" in these amendments have become very contentious. In an election year, the arguments are likely to be more intense.

Gabriel Moran's essay concentrates on four rights: freedom of speech, the right to bear arms, the right of the accused to a speedy and fair trial, and protection from unreasonable searches and seizures. Adam Liptak places the U.S. Constitution and Bill of Rights into the context of today's world of international law. Orin Hatch's essay is a passionate defense of the right to bear arms from the chairman of the Senate Judiciary Committee.

The people passionately in favor of a Bill of Rights were opponents of the Constitution. James Madison, the chief architect of the Constitution did not see a need for a Bill of Rights but he eventually conceded to what he thought to be a redundancy. The idea for a bill of rights had originated in England in the concessions that parliament forced upon the king. As the opening words of the Constitution are "We the people;" proponents of the Constitution did not see the need for the people to be protected against themselves.

The Bill of Rights has regularly been celebrated as one of the great achievements of the United States of America. These ten amendments are intended to be a protection for an individual against an overly intrusive arm of government. When the process works, the result can be a wonderful support for people to be free in the "pursuit of happiness." However, once these rights had been carved in stone it became difficult to get a consensus that some of these statements from the eighteenth century make little sense today or are obstacles to desperately needed national reforms.

The effort to find out the intention of the authors of the Constitution and the Bill of Rights is a valuable exercise for understanding what they wrote. But a claim that even a perfect reconstruction of their intentions could resolve contemporary debates is a bizarre assumption. James Madison, speaking of the Constitution, had already said that searching for the intention of the writers was not the way to understand the documents. Madison advised looking to the state conventions that accepted and ratified the Constitution. The meaning of any text is not confined to what the author intended; the meaning includes how a text is understood. That principle is especially important for a legal document that has a long history of commentary and applications.

DISTRUST OF GOVERNMENT
By Gabriel Moran

The wording of the first ten amendments keeps an army of lawyers at work in interpreting what the words mean. Interpretation and adaptation of legal statements from the past are a necessary part of having a tradition of laws. But tradition to be alive has to be in constant change; the continuity of tradition demands respect for what the past has given us together with attention to solving contemporary problems.

For example, there is no right to privacy stated in the bill of rights; it is not that the authors were unconcerned with privacy but rather privacy was the underlying assumption on which rights were based. In the late nineteenth century it made sense to state explicitly a right to privacy which clarified many questions in twentieth-century debates (a clear example was the right of both married and unmarried people to obtain contraceptives; a less clear case was basing a right to abortion on privacy). Predictably, some people loudly objected that the courts were making up new rights that are not in the Constitution.

A bigger problem than new rights is an eighteenth-century context and language of rights. The strangest debate in the country is over the second amendment on the "right to bear arms." Based on their recent experience, the authors of the amendment thought a "well regulated militia" (but not of course a standing army) was needed to defend the country. It is close to religious belief for many people in the country today that they need a gun for their security. For many other people, the belief borders on insanity.

Earlier this year Rep. Martin Stutzman, Indiana Republican, said of the right to carry concealed weapons: "Mr. Speaker, rights do not come from the government. We are, in the words of the Declaration of Independence, endowed by our creator with certain inalienable rights." This view was carried even further by Newt Gingrich in a speech before the National Rifle Association in April. Gingrich said that there was no doubt that the Second Amendment referred to an inalienable right. He criticized the NRA for being too timid! During a Gingrich presidency, he said, a human right to bear arms would be affirmed for every person on earth. Sadly or not, the country does not seem destined to have a Gingrich presidency.

Both Stutzman and Gingrich were ridiculed in much of the press for claiming that to carry a gun is not a constitutional right but an inalienable right, or in today's language a human right. Actually, there is considerable historical support for their position. Orin Hatch's argument stated below was backed up by plenty of documents. If the argument is restricted to what the eighteenth-century writers intended, the opponents of any restrictions on firearms win the case. The "militia" referred to was not the national guard but everyone. The right of the people to bear arms shall not be abridged.

The Bill of Rights does not have anything to say about "assault weapons," that is, guns whose sole purpose is killing the most people in the shortest time. Someone arriving from another planet (or even another nation-state) would think that having such guns in

wide circulation is crazy. Politicians are terrified of the National Rifle Association, an issue related to the place of large amounts of money in the election of office holders.

One evening in August, NBC began its nightly news with three items: reports from Arizona, Colorado and Wisconsin on their recent mass murders. The script could have been written at any time: "Yesterday in__a crazed gunman killed__people; local residents of___said they never expected this in their quiet town; mayor ___condemned the shooting as senseless; president ___expressed his condolences and said such violence has no place in America. The day after the shooting in Aurora Colorado the irreverent paper *The Onion* published what would be the next four days of news: what will be said, who will say it; what local people will do, and what state and national figures will not do.

Polls in Arizona, Colorado and Wisconsin later in August showed that the majority in each state did not think gun laws would stop such killings. Politicians on the right say: "See, people agree with us." Politicians on the left say: "It is too bad but there is nothing we can do." The issue disappears until the next time that the television reporter takes out the script and in a voice redolent with shock and compassion says: "This morning in ___ a crazed gunman killed___people; residents said…..

The opponents of any gun control laws are surely right that no gun law will stop mass killings. But laws are one element of what has to be a multi-pronged approach to this national scandal. A prohibitive tax on the bullets for automatic weapons would be more effective than trying to restrict guns. The Bill of Rights says nothing about the regulation of automobiles or guns. Automobiles are also lethal weapons although they can only kill a few people at a time. The possession and use of automobiles is highly regulated. Licenses to drive and automobile insurance are required. That does not stop the unconscionable slaughter on the highways (the main cause of death of young people). The rate of deaths, however, has been drastically lowered partly by laws, partly by cultural changes. The number of pedestrian deaths in New York City is one-fourth what it was in 1927. I would like to see automobiles banned in cities but that does not seem likely. I agree with the former mayor of Toronto who said that everyone has a right to come downtown but not with five thousand pounds of steel.

The steep decline in automobile deaths is due to a combination of factors. Driver education is required even though training is nowhere near adequate. Automobiles are much safer than a few decades ago. Roads and road sign directions are better. Police have more presence especially on holidays when there is a lot of drunk driving. More needs to be done. Sixteen-year olds, with few exceptions, do not have the maturity to handle an automobile alone; teenagers should be carefully screened. And although there are certainly some eighty-five year olds who are competent drivers they should be required to prove it every year. As for the hopeless standoff on gun control, the country does not so much need a conversation about guns as a discussion of how to reduce the horrifying violence in the country.

The fourth amendment is on the right of citizens to be secure against unreasonable searches and seizures. The word unreasonable is up for debate although there would be

consensus that some practices of police are outrageously unreasonable. In this area there has been amazing change in the last decade as to how much intrusion of the government is necessary for "security." Simply requiring "government papers" to travel across the country was unheard of until two decades ago; in a short time body scans at airports were deemed necessary. The authors of the fourth amendment did not have airplane travel in mind nor the threat of suicide bombers on a plane. Closed circuit television cameras have quickly spread that can track an individual's movement within a city. Even more intrusive is the tracking of one's movement through GPS and exposing one's thoughts and interest through the computer.

In these cases, the obvious issue is how to use modern technology in ways that enrich life while recognizing that a government could use the same tools to repress and persecute people. There are great heroes who have stood up for the rights of vulnerable parts of the population. There are also a lot of people who scream about the government taking away their liberties when the intrusions are hardly unreasonable and sometimes positive ("the government should not touch my Medicare.") The greater danger seems to be chaos, violence and a lack of government help where it is needed. Reasonable people can differ but much of the shouting these days is not very reasonable.

Five of the amendments concern crime and the protection of citizens who are accused of a crime. Many people are oblivious of these amendments on the assumption that the stipulations only concern criminals. They may suddenly discover that not just criminals need these protections; any citizen can find himself or herself in the position of being accused of a crime.

The one provision in these amendments that does touch many people is in the sixth amendment: "The accused shall enjoy the right to a speedy and public trial, by an impartial jury." That ideal is carried out in numerous television programs but not in many court rooms. The problem is not the people who work in the criminal justice system. To a remarkable extent they do their jobs as honestly and efficiently as they can. But the system has been overwhelmed for decades. A few celebrity cases are handled in public with care for every legal detail. Even in those cases, whatever was imagined to be a "speedy trial," was surely not many months or years.

For the poor who are given the counsel of an overburdened public defender, the chances of the system giving them a fair deal are not good. In any large city most cases are handled by plea bargaining, something not found in the Bill of Rights. But there is no way that everyone accused of a crime can have their speedy trial before an impartial jury. The seventh amendment even preserves a right to trial in civil cases "where the value of the controversy shall exceed twenty dollars." Would defenders of taking the Bill of Rights at its word like to explain how this right is to be upheld.

For anyone who has sat in a jury room for a week and been repeatedly turned down for actually sitting on a jury, the hopeless condition of the current system is evident. The pool of potential jurors has been expanded in recent years. But jury consultants have become more common; their aim is not an impartial jury for a fair trial but jurors who

favor either the prosecution or defense, depending on who the consultant.is working for. Prospective jurors are dismissed for reasons that have nothing to do with their capacity to be a fair judge. The process of jury selection can be long and tedious with no guarantee that the result is a jury of one's peers who will decide the case without bias.

The Bill of Rights is about procedures, many of which are invaluable protections. But the Bill of Rights was not intended to deal substantively with the nature of justice and how to make sense of complicated cases, especially crimes that involve young people. There are many intelligent and honest judges who are prevented from making fair and sensible judgments because they are caught in an unworkable bureaucracy that no one intended.

The first amendment has five provisions, four of which are intended to protect the right of citizens to speak: individually, in the press, at assemblies, and in petitions to the government. The United States has been resistant to any attempt to rethink these provisions of the first amendment. Speech is regulated in one way or another; to try to have no regulations most often leads to some group with economic power becoming the chief regulator. A.J. Liebling famously said: "Freedom of the press is guaranteed only to someone who owns one." The "press" has expanded in ways that the eighteenth century, or even early twentieth century, could never have imagined. With the Internet, Liebling's problem may seem solved, that is, everyone who has a computer owns a printing press.

Although the possibilities of communication have expanded in amazing ways, the avalanche of words also highlights the difference between the liberty to speak and a freedom of speech in which words have meaning and effect. A lack of standards and controls in the public discourse of the United States leads to social controls that may or may not make sense. Liberty of speech does not necessarily produce free wheeling thought. There are areas in the sciences where the United States has been highly creative. But that is the case where there are standards and a "community of discourse" in which there is exchange of ideas that are the product of discipline and reflection.

The ninth and tenth amendments may appear to be throwaway lines; they do not specify any liberty that the individual has. Actually, both amendments are crucial to the functioning of the Constitution. The ninth amendment says that "the people" have other rights than those which are enumerated in the Bill of Rights The amendment was a simple admission by the authors that they had not covered everything. They were more open-minded than many people today who think that the Constitution and the Bill of Rights are sacred scripture from which the country cannot stray.

The tenth amendment hardly belongs in a Bill of Rights but it is probably the most important of the ten amendments. It contrasts the power of the states and the people with "the United States." One might dismiss the significance of this use of "United States" as legal shorthand but it suggests a continuing confusion over whether what existed was a United States or an assemblage of united states. One of the few insightful comments that Newt Gingrich ever made was that the country today is reminiscent of its condition in the 1850s. The question that should be asked of every politician is not do you love America but do you accept the existence of the United States.

NO MODEL FOR THE WORLD
By Adam Liptak

According to a study published in the June 2012 issue of *New York University Law Review,* "the U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere." There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to a new African nation. Said the author of the study, "Nobody wants to copy Windows 3.1."

Justice Ruth Bader Ginsburg has said: "I would not look to the United States Constitution if I were drafting a constitution in 2012." She recommended instead the South African Constitution, the Canadian Charter of Rights and Freedoms or the European Convention on Human Rights. The rights guaranteed by the U.S. Constitution are parsimonious by international standards, and they are frozen in amber. Sanford Levinson has written: "The U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today." (Yugoslavia used to hold that title but Yugoslavia did not work out).

Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By an odd coincidence, Thomas Jefferson, in a 1789 letter to James Madison said that every constitution "naturally expires at the end of 19 years because the earth belongs always to the living generation." These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty. Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence, and entitlements to food, education and health care. Only 2 percent of the world's constitutions protect a right to bear arms. (Its brothers in arms are Guatemala and Mexico).

Many foreign judges say they have become less likely to cite decisions of the U.S. Supreme Court, in part because of what they consider its parochialism. "The United States is in danger of becoming something of a legal backwater," Justice Michael Kirby of the High Court of Australia said in a 2001 interview. He said that he looked instead to India, South Africa and New Zealand.

Justice Aharon Barak, former president of the Supreme Court of Israel, identified a new constitutional superpower: "Canadian law serves as a source of inspiration for many countries around the world." According to the 2012 study, the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its U.S. counterpart. The Canadian Charter is both more expansive and less absolute. It guarantees equal rights for women and disabled people, allows affirmative action, and requires those arrested be informed of their rights. On the other hand, it balances those rights against "such reasonable limits as can be demonstratively justified in a free and democratic society."

THE RIGHT TO BEAR ARMS
By Orin Hatch, U.S. Senate Judiciary Committee

In my studies as an attorney and as a United States Senator, I have constantly been amazed by the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms, which passed the House by a voice vote without objection and hardly a debate, has since been construed in but a single, and most ambiguous Supreme Court decision, whereas his proposals for freedom of religion, which he made reluctantly out of fear that they would be rejected or narrowed beyond use, and those for freedom of assembly, which passed only after a lengthy and bitter debate, are the subject of scores of detailed and favorable decisions.

Thomas Jefferson, who kept a veritable armory of pistols, rifles and shotguns at Monticello, and advised his nephew to forsake other sports in favor of hunting, would be astounded to hear supposed civil libertarians claim firearm ownership should be restricted. Samuel Adams, a handgun owner who pressed for an amendment stating that the "Constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms," would be shocked to hear that his native state today imposes a year's sentence, without probation or parole, for carrying a firearm without a police permit.

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a bill of rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, or the New Hampshire delegates.

Madison proposed among other rights that "That right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption to excuse everyone from military service.

The proposal finally passed the House in its present form: "A well regulated militia, being necessary for the preservation of a free state, the right of the people to keep and bear arms shall not be infringed." In this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing arms "For the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, and this without any qualification as to their condition or degree, as is the case in the British government.

William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment: "The prohibition is general. No clause in the Constitution could by a rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." A few years later, Joseph Story in his *Commentaries on the Constitution* said that the right to keep and bear arms is "the palladium of the liberties of the republic," which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.

When in 1837, Georgia totally banned the sale of pistols (excepting the larger pistols "known and used as horsemen's pistols") and other weapons, the Georgia Supreme Court in *Nunn v. State* held the statute unconstitutional under the Second Amendment to the federal Constitution. The court held that the Bill of Rights protected natural rights which were fully as capable of infringement by states as by the federal government and that the Second Amendment provided "the right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed, curtailed, or broken in on, in the slightest degree; and all this for the end to be attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state."

Within the last century, the only occasion upon which the Second Amendment has reached the Supreme Court came in *United States v. Miller*. There, a prosecution for carrying a sawed-off shotgun was dismissed before trial on Second Amendment grounds. In doing so, the court took no evidence as to the nature of the firearm or indeed any other factual matter. The Supreme Court reversed on procedural grounds, holding that the trial court could not take judicial notice of the relationship between a firearm and the Second Amendment, but must receive some manner of evidence. It did not formulate a test nor state precisely what relationship might be required.

If gun laws in fact worked, the sponsors of this type of legislation should have no difficulty drawing upon long lists of examples of crime rates reduced by such legislation. That they cannot do so after a century and a half of trying — that they must sweep under the rug the southern attempts at gun control in the 1870-1910 period, the northeastern attempts in the 1920-1939 period, the attempts at both Federal and State levels in 1965-1976 — establishes the repeated, complete and inevitable failure of gun laws to control serious crime.