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The Bill of Rights As A Whole: The Interrelations of the First Ten Amendments

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The adoption of the Bill of Rights[1] in 1791 was the people's

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I gratefully acknowledge the editorial and substantive criticism of my wife, Susan Leshe Wishingrad, Esq. For without her encouragement and support, this essay, and the ones leading up to it, would never have been finished amidst the pressures of a law practice.

1. U.S. CONST. amends. I-X.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and

price for ratifying the Constitution in 1789.[2] Since 1791, the first ten amendments have been the subject of countless cases. And in virtually all these cases, the specific clause of the particular amendment in dispute has been judicially dissected and *separately* interpreted. Unfortunately, these clause-specific glosses distance us from the Bill of Rights *as a whole* — an elegant, unitary text, which contains only 461 words.

Scores of books have been written on individual amendments.[3] Many others have scrutinized a single clause within an

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public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

2. *See* L. HAND, THE BILL OF RIGHTS 1 (1958); W. DOUGLAS, A LIVING BILL OF RIGHTS 13 (1961).

3. *E.g.*, W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); THE FIRST AMENDMENT IN A FREE SOCIETY (J. Bartlett ed. 1979); D. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (1986); C. MOYLAN, THE RIGHT OF THE PEOPLE TO BE SECURE: AN EXAMINATION OF THE FOURTH AMENDMENT (1977); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2nd ed. 1987); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951); C. JOINER, CIVIL JUSTICE AND THE JURY (1962) (seventh amendment); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY (1955); THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. 1989); P. Hay & R. Rotunda, The United States Federal System: Legal Integration In The American Experience (1982) (tenth amendment).

amendment.[4] But there are only a precious few books on the entire Bill of Rights, and most of these have a historical or narrative thrust.[5] There is little analysis of the interrelations between and among the first ten amendments. Nor is there a comprehensive interpretation of the Bill of Rights as a whole.

James Madison, our fourth President, and Thomas Jefferson, our third President, were products of the Enlightenment. Madison was a principal author of the Constitution and the Bill of Rights. Jefferson was a philosophical force behind the Bill of Rights and Virginia's seminal Declaration of Rights.[6]

Madison and Jefferson brought to the Bill of Rights their knowledge of political texts and of Enlightenment philosophy. They also brought to the Bill of Rights their generalist legal training and classical and literary education.[7] Most important, they both were infused with first-hand knowledge that unbridled governmental power inexorably leads to its arbitrary abuse.

Time goes by. Almost 200 years have passed. Law practice is now dominated by narrowly trained specialists. There is the tax lawyer, the corporate lawyer, the bankruptcy lawyer, and the real estate lawyer. The civil rights bar is also fragmented. There is the first amendment libel lawyer and the eighth amendment death penalty lawyer, to name just two.

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4. *E.g.*, THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS (B. Chamberlin & C. Brown eds. 1982); Z. CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES (1941); T. EMERSON, THE SYSTEM OF FREE EXPRESSION (1970); L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1977) (presentment clause); M. BERGET, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION (1980); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969); S. SEARLES, REAL ESTATE VALUATION AND CONDEMNATION (1979) (just compensation); W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

5. *E.g.*, R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955); W. DOUGLAS, A LIVING BILL OF RIGHTS (1961); W. BRENNAN, THE BILL OF RIGHTS AND THE STATES (1961); H. KNIGHT, WITH LIBERTY AND JUSTICE FOR ALL: THE MEANING OF THE BILL OF RIGHTS TODAY (1967); I. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING (1965); M. FRIBOURG, THE BILL OF RIGHTS (1967).

6. The Virginia Declaration of Rights was drafted by George Mason and contains 16 specific guarantees similar to the Bill of Rights. A convention of Virginia delegates adopted the Declaration nearly one month prior to the Declaration of Independence. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION xxiv (J. Kaminsky & G. Saladino ed. 1988).

7. *See* R. FERGUSON, LAW & LETTERS IN AMERICAN CULTURE (1984).

Academia is similarly balkanized. The Bill of Rights is studied piecemeal in law school.[8] The fourth amendment,[9] and its rules on "searches and seizures," and parts of the fifth amendment,[10] such as the grand jury requirement, the double jeopardy clause, and the privilege against self-incrimination, are typically covered in criminal procedure courses. The sixth amendment[11] is a minibill of rights for the criminally accused. It guarantees the accused, among other rights, the "right to a speedy and public trial," an "impartial jury," and "Assistance of Counsel." Some of these rights are explored in criminal procedure classes, others in seminars.

The fifth amendment's "just compensation" clause is usually treated in constitutional law, or in an advanced real estate class. The seventh amendment,[12] which guarantees a right to a jury in civil cases, is naturally covered in civil procedure classes. The tenth amendment,[13] which reserves for the States, or the people, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States," is separately covered in an advanced course on federal jurisdiction.

Other amendments, if studied at all, are taught occasionally in small seminars. There are, for example, seminars on the eighth amendment's[14] "cruel and unusual punishments" clause and the death penalty. And there are, of course, a myriad of seminars on the first amendment's[15] freedom of speech and the press clauses, as well as others on its "free exercise" and anti-establishment of religion clauses. The first amendment is also treated in constitutional law classes.

Still other amendments are rarely, if ever, mentioned, let alone studied. Two such amendments are the second amendment,[16] which links the "right of the people to keep and bear

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8. *See* Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295 (1980).

9. U.S. CONST. amend. IV.

10. U.S. CONST. amend. V.

11. U.S. CONST. amend. VI.

12. U.S. CONST. amend. VII.

13. U.S. CONST. amend. X.

14. U.S. CONST. amend. VIII.

15. U.S. CONST. amend. I.

16. U.S. CONST. amend. II. *See* Levinson, *The Embarassing Second Amendment*, 99 YALE L. J. 637 (1989).

Arms" to the need for a "well regulated Militia," and the third amendment,[17] which bars the quartering of soldiers "in any house" except during "time of war, . . . in a manner to be prescribed by law."

The ninth amendment[18] states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is a "water blot," according to former federal Judge Robert Bork, an unsuccessful Supreme Court nominee. To most others, it is an indecipherable Rosetta stone — a terribly important, but unfathomable, text. As such, it is discussed — and not always seriously — only in connection with the landmark right of privacy case of *Griswold v. Connecticut*.[19] In *Griswold*, Justice Douglas found a "right of privacy" from "penumbras, formed by emanations" from the first, third, fourth, fifth, and ninth amendments.[20]

Lawyers of the left and of the right — and from the vast middle for that matter — are thus trained in law school, and then in practice, to analyze the Bill of Rights, clause by separate clause, and amendment by particular amendment. Consequently, lawyers and jurists fail to understand the symbiotic relations among the ten amendments of the Bill of Rights.

Yet no one would interpret the first chapter of a ten chapter novel without considering it, and the other nine chapters, in light of the entire work. Nor would a lawyer interpret a clause in a contract without considering how that clause related to the contract *as a whole*.[21] For "[a] cardinal principle governing the

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17. U.S. CONST. amend. III.

18. U.S. CONST. amend. IX. *See* REPORT OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE: NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REPT. No. 100-7, 100th Cong., 1st Sess. 10-11 (1987).

> [The judge] must treat [the provision] as nonexistent, since, in terms of expression of the framers' will, it is nonexistent . . . . When the meaning of a provision . . . is unknown, the judge has in effect nothing more than a water blot on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention of a constitutional prohibition; and his proper course is to ignore it.

Id. (citing "Interpretation of the Constitution," 1984 Justice Lester W. Roth Lecture, University of So. California, October 25, 1984, at 11-12).

19. 381 U.S. 479 (1964).

20. *Id.* at 484. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.13 (2d ed. 1988).

21. *See, e.g.*, E.A. FARNSWORTH, CONTRACTS § 7.10 (1st ed. 1982).

construction of contracts is that the entire contract must be considered . . . ."[22] And as the Supreme Court has similarly put it about a statute: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but *look to the provisions of the whole law, and to its object and policy.*"[23] Each of the first ten amendments should similarly be read and understood with reference to each other and the Bill of Rights and the Constitution *as a whole.*[24]

But the fragmentation of legal studies and legal practice has obscured the interrelations between and among the first ten amendments. Consequently, we are losing sight of the Bill of Rights as a whole.

We may also be forgetting the collective meaning and overarching mission of the Bill of Rights: to guarantee the people certain rights *and* to prohibit the government from taking certain actions, and to prescribe the requisites before certain other governmental actions may be taken. So it needs to be emphasized that the Bill of Rights was intended to be a barrier — not a rickety picket fence — protecting the people from *their* government.

When was the last time, if ever, that any of us leaned back in a comfortable chair and read — without interruption — the Bill of Rights, from the first amendment straight through to the tenth? Having recently done so, I offer some thoughts and questions on the interrelations among the amendments of the Bill of Rights in anticipation of the 1991 bicentennial.

The first amendment guarantees the "free exercise," and anti-establishment, of religion, "freedom of speech, or of the press," and the "right of the people peaceably to assemble, and to petition the Government for redress of grievances." Can we then, looking at all these clauses together, analogize or fairly infer, from the "coordinated purposes"[25] of these particulars a more general right of conscience? Perhaps so.

Thus it seems that the understanding of the interrelations

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22. Rentways v. O'Neill Milk & Cream Co., 308 N.Y. 342, 347, 126 N.E.2d 271, 273 (1955).

23. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (quoting United States v. Heirs of Boisdorré, 49 U.S. (8 How.) 113, 122 (1850)) (emphasis added).

24. *See* Wishingrad, *Unitary Arguments*, N.Y.L.J., Aug. 3, 1987, at 2, col. 3.

25. *See* D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

begins within the text of the first amendment itself. Its clauses on speech and press, religion, and association have related, if not common, concerns. They must, therefore, be read and interpreted with reference to each other.

The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep [in their houses] and bear Arms, shall not be infringed." The third amendment provides that "[n]o soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Both the second and the third amendments deal with military matters. And the second, impliedly, and the third explicitly, place the "house" off limits to intrusions by the government, except in certain narrowly delineated circumstances.

Is there, then, also a relationship between the third amendment's limitation on government intrusion into "any house" and the fourth amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"? Is the sanctity of, and privacy interest in, a person's "house" underscored by its specific protection under both the third and fourth and, impliedly, under the second, amendments? I think it is.

What are the full dimensions of the "intimate relationship"[26] that Justice Bradley found between the fourth and fifth amendments in *Boyd v. United States*?[27] Does this "intimate relationship" add anything to either? To both? Or, put the other way, what is the consequence of severing or ending that relationship? Probably less protection being afforded by each amendment.[28]

Similarly, what is the relationship between the first and the fourth amendments, which share a rich legal and political history? Is it merely a coincidence that several landmark fourth amendment cases involved the attempted seizure of writings, or

26. Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

27. 116 U.S. 616 (1886).

28. *See Abel*, 362 U.S. at 255-56 (Brennan, J., dissenting). *Compare Boyd*, 116 U.S. 616 (a court-ordered production of private invoices violated the fourth and fifth amendments) *with* Fischer v. United States, 425 U.S. 391 (1976) (compulsory production of incriminating tax documents not violative of the fifth amendment).

of other materials arguably protected by the first amendment, rather than ordinary contraband? I think not.[29] Are these cases first *or* fourth amendment cases? Or are they really first *and* fourth amendment cases? Does it matter?[30] I think so.[31]

How, on occasion, can the due process clause of the fifth, or fourteenth amendments, along with the excessive fines clause of the eighth amendment, collectively limit the amount of punitive damages that may be awarded?[32] Are the first amendment's speech and press clauses, when taken together with either the excessive fines clause and the due process clause, or both, still another source of limits on gargantuan punitive damage awards slapped on media defendants in libel cases?[33]

Can we analogize, or infer, from the eighth amendment's cruel and unusual punishments clause *and* its excessive bail and excessive fines clauses, a more general prohibition of excessive punishments? The Court has done so.[34] And, if so, does the eighth amendment's "proportionality" principle apply more strictly, when arguably first amendment conduct is the subject of Draconian criminal sanctions, which may chill the exercise of first amendment rights?[35] As Chief Judge James L. Oakes, of the United States Court of Appeals for the Second Circuit, put it in

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29. *See, e.g.,* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) (adult books and films); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (a newspaper's photographs and negatives); Roaden v. Kentucky, 413 U.S. 496 (1973) (obscene film); Mapp v. Ohio, 367 U.S. 643 (1961) (lewd and lascivious books and pictures); Entick v. Carrington, 19 HOWELL'S STATE TRIALS 1029 (1765) (private papers, including books and pamphlets).

30. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (majority limited its inquiry to the first amendment in upholding the Georgia sodomy statute while the dissent argued that the first and the fourth amendment prohibited the conviction of homosexuals practicing sodomy in the privacy of their home).

31. Wishingrad, *Privacy and the Bill of Rights,* N.Y.L.J., July 30, 1986, at 2, col. 3.

32. *But see* Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. 2909 (1989) (excessive fines clause of the eighth amendment does not apply to punitive damage awards in private civil cases).

33. *See* Wishingrad, *Eighth Amendment 'Due Process,'* N.Y.L.J., Jan. 13, 1989, at 2, col. 3.

34. *See, e.g.,* O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting); Weems v. United States, 217 U.S. 349 (1910); Solem v. Helm, 463 U.S. 277 (1983) (life imprisonment sentence without the possibility of parole under South Dakota's recidivist statute for issuing no account check for $100 violated the eighth amendment).

35. *See* Schwartz & Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification of the Weems v. United States Excessive Punishment Doctrine,* 24 BUFFALO L. REV. 783, 798 n.65 (1975).

his 1979 James Madison lecture: "Time and again it was in protecting freedom of thought, of conscience, or of expression that the procedural rights embodied in our fourth through eighth amendments were first asserted, then given substance, and finally enshrined as basic to our institutions."[36]

Finally, the methodological role of the ninth amendment in justifying the development of the Bill of Rights by what I call "Constitutional Analogies," needs to be explored in depth. Constitutional Analogies is a method of legal reasoning that involves a textually, structurally, and historically based interpretation of the interrelations of two or more amendments of the Bill of Rights. This method of reasoning by analogies from two or more amendments, or other clauses in the Constitution, takes into account the texts of those amendments or clauses, and their respective histories, underlying philosophies, and the values or rights those texts protect or reflect. It is a reading sympathetic to the Framers' more general goals and concerns.[37]

Constitutional Analogies should, therefore, be developed whenever a governmental threat to life, liberty, or property is not specifically bridled by a particular amendment, but offends or abridges several, at least in substantial part. In short, it is a way to *read* — or "expound" as Chief Justice Marshall put it in *McCulloch v. Maryland*[38] — the Constitution and the Bill of Rights as a whole.

Put still another way, Constitutional Analogies provide a way to *think* about the Constitution and the Bill of Rights as a whole and how they can be construed to retain vitality. They also provide a way to think about the texts and their histories, collectively, not in series, while being sensitive to common ground.[39]

As the Supreme Court has stated: "Time works changes, brings into existence new conditions and purposes. Therefore a

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36. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 921-22 (1979).

37. Wishingrad, *Why Law and Literature?*, N.Y.L.J., June 23, 1986, at 2, col. 3.

38. 17 U.S. (4 Wheat.) 316, 407 (1819); Wishingrad, Book Review, 70 A.B.A. J. 152 (Oct. 1984) (reviewing J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984)).

39. *Cf.* Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 97, 102 (1987) (The ninth amendment should be viewed "as a rule of construction guiding the process of constitutional interpretation.").

principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."[40] Constitutional Analogies is the method to insure the continuing vitality of the principles — not just the particulars — embodied in the Constitution and the Bill of Rights.

One avenue to explore Constitutional Analogies is to analyze Supreme Court decisions that do not rest comfortably on the text of a single amendment. These include, in addition to the controversial "right of privacy"[41] cases and the "right to travel"[42] cases, others such as *Boyd v. United States*,[43] *Tennessee v. Garner*,[44] *Stanley v. Georgia*,[45] and *United States v. United States District Court*.[46]

Looking at the Bill of Rights as a whole, it is interesting to note that no less than four of the ten amendments — the fourth, fifth, sixth, and eighth — provide highly specific protections for "criminals." This reflects the Framers' intention to limit and narrowly channel the government's most potent weapon — the criminal law. For the Framers knew too well that the criminal law could be misused to sweep up political dissenters and punish them arbitrarily and severely, as common criminals, for minor infractions (e.g., illegal picketing) which could chill the exercise of first amendment freedoms.

The criminal law may be utilized in other ways that raise a myriad of serious constitutional issues. The Racketeer Influenced and Corrupt Organizations Act, "RICO,"[47] is a unique exemplar. And traditional modes of legal analysis pale in the face of its hydra-headed structure.

RICO has withstood a barrage of legal attacks.[48] Most of the

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40. Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. 2909, 2919 (1989) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

41. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 315 U.S. 535 (1942).

42. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

43. 116 U.S. 616 (1886) (fourth and fifth amendments).

44. 471 U.S. 1 (1985) (fourth and eighth amendments).

45. 394 U.S. 557 (1969) (first and fourteenth amendments); 394 U.S. at 569-72 (Stewart, J., concurring) (fourth and fourteenth amendments).

46. 407 U.S. 297 (1972) (first and fourth amendments).

47. 18 U.S.C. §§ 1961-1968 (1988).

48. *See* Comment, *The RICO Pattern After Sedima — A Case for Multifactored Analysis*, 19 SETON HALL 73, 79-95 (1989).

attacks have focused on one of the various parts of RICO's awesome arsenal. And most have involved issues of statutory interpretation. But the real issue is whether RICO as a whole violates the Bill of Rights as a whole.

Several years ago, in *Sedima S.P.R.L. v. Imrex Co.*,[49] the United States Supreme Court refused to limit RICO to plaintiffs who could allege a specific "racketeering injury."[50] Nor did the Court limit RICO to defendants who had previously been convicted of a racketeering act, or a prior RICO violation.[51] Yet the Court acknowledged concern that civil RICO might be used against "legitimate" businesses, as well as mobsters and organized criminals.[52]

This and other interpretative battles have essentially been lost in the courts. The judicial view is that we elect a Congress and it gives us the laws we deserve — no matter how badly conceived, ill defined, and over zealously implemented. These interpretative battles must now be taken up in Congress. But legislative relief is not imminent.

Further recourse to the courts is, however, appropriate for constitutional challenges. The next round of legal attacks should not be aimed at separate pieces of RICO, but instead at the belly of the beast. These constitutional arguments should not be based solely on an isolated amendment of the Bill of Rights. Rather a "unitary" argument, as Justice Thurgood Marshall put it in his dissenting opinion in *United States v. Salerno*,[53] should be based on constitutional analogies from the Bill of Rights as a whole.

Last term the Supreme Court upheld the Comprehensive Forfeiture Act of 1984[54] in two criminal cases.[55] This forfeiture law applies to criminal RICO defendants and others accused

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49. 473 U.S. 479 (1985).

50. *Id.* at 495. *See* Abrams, *The Place for Procedural Control in Determining Who May Sue and Be Sued: Lessons in Statutory Interpretation From Civil RICO and Sedima*, 38 VAND. L. REV. 1477 (1985).

51. 473 U.S. at 495.

52. *Id.* at 499-500.

53. 107 S. Ct. 2095, 2107 (1987) (Marshall, J., dissenting).

54. Comprehensive Forfeiture Act of 1984, 18 U.S.C. § 1963 (1988) and 21 U.S.C. § 853 (1988).

55. Caplan & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

of certain drug related crimes.[56] It permits the government — before trial — to seize assets if a court finds probable cause to believe the assets come from the defendant's alleged criminal acts.[57]

The Court saved the forfeiture statute from attack as a violation of the sixth amendment. Not too convincingly, the Court reasoned that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel," it does not encompass the right to use the government's money.[58] So much for the presumption of innocence.

The Court also *separately* rejected a second constitutional challenge based on the due process clause of the fifth amendment.[59] The imaginative argument, which needs to be bolstered by more than just the due process clause, was that the forfeiture statute permits the government to upset the "balance of forces between the accused and the accuser."[60] The Court was not moved.

The Bill of Rights appears to be losing a war of attrition. It, not the "mob," is in danger of being dismembered by RICO, amendment by amendment and clause by separate clause.

In *Fort Wayne Books, Inc. v. Indiana*,[61] RICO suffered its first major setback in the Supreme Court. This success in limiting RICO, albeit a state law analog, is instructive for future constitutional challenges.

The Court held that a pretrial seizure of a bookstore owner's books and films based on a finding of probable cause, before there had been any judicial determination that the seized items were "obscene," violated the first amendment.[62] The Court also acknowledged that first amendment concerns limit "searches and seizures" under the fourth amendment.[63]

A similar joint, or unitary, argument based on Constitutional Analogies from two or more amendments in the Bill of

56. 21 U.S.C. § 853(a) (1988).
57. *Id.* § 853(e)(1).
58. *Caplan & Drysdale, Chartered*, 109 S. Ct. at 2652.
59. *Id.* at 2656.
60. *Id.*
61. 109 S. Ct. 916 (1989).
62. *Id.* at 927, 929.
63. *Id.* at 927-28.

Rights, needs to be marshalled to confront RICO as a whole. The devastating impact of the totality of RICO — on the "guilty" and "innocent" alike — comes from the procedural advantages it affords prosecutors, its substantive breadth and inherent vagueness, and its Draconian penalties.

For a start, the talented defense lawyers' closing arguments to the jury in last fall's Princeton/Newport racketeering trial sagely included a claim that forfeitures of over $20 million sought by the government after conviction would constitute "cruel and unusual punishment" in violation of the eighth amendment.[64] Southern District Judge Robert L. Carter's decision cited the eighth amendment's "cruel and unusual punishment" clause when he threw out the Princeton/Newport jury's $3.8 million forfeiture verdict.[65] Justice Scalia, dissenting in the Court's most recent RICO decision, *H.J., Inc. v. Northwestern Bell Telephone Co.*,[66] handed down at the end of June 1989, stated: "That the highest Court in the land has been unable to derive from [RICO] anything more than . . . meager guidance bodes ill for the day when [a constitutional] challenge is presented."[67]

The key then is to show how RICO's features work together to stack the legal deck against the accused, and to understand how RICO collectively raises serious constitutional questions under at least five of the ten amendments of the Bill of Rights. So here is an outline of the "unitary" Constitutional argument against RICO for violating the Bill of Rights as a whole.

RICO permits seizure of assets before trial.[68] This implicates the fourth amendment, which prohibits "unreasonable searches and seizures." RICO also permits seizure of legal fees in the hands of attorneys of RICO defendants.[69] This implicates the sixth amendment's guarantee of the right of counsel. RICO

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64. United States v. Regan, 726 F. Supp. 447, 456-57 (S.D.N.Y. 1989).

65. *Id.* at 457.

66. 109 S. Ct. 2893 (1989).

67. *Id.* at 2909 (Scalia, J., dissenting). *See also* J. Rakoff, *The Unconstitutionality of RICO*, N.Y.L.J., Jan. 11, 1990, at 3, col. 1.

68. 21 U.S.C. § 848(a) (1988).

69. Caplan & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

is also hopelessly vague and indeterminate.[70] This defect, along with the interference with counsel, implicates the due process clause of the fifth amendment, which requires fair notice of what is criminal and fair procedures. RICO also imposes Draconian penalties, including treble damage awards.[71] This implicates the eighth amendment's prohibition of "cruel and unusual punishments" in egregious cases. Finally, RICO is too often used against alleged "pornographers," who in many instances sell books of literary value as well.[72] This implicates the first amendment, which guarantees freedom of speech and of the press.

Taken together, RICO presents a "clear and present danger" to several — not just one — of our cherished rights and liberties embodied in the Bill of Rights. RICO is an amalgam of procedural and substantive provisions. So it needs to be measured against the Bill of Rights as a whole, which is a collection of procedural protections and substantive rights for individuals, and prohibitions of certain governmental actions. If square violations of various specific amendments raise close and compelling questions, then the question of whether RICO as a whole violates the letter and spirit of the Bill of Rights as a whole, is one that the Court should ultimately address.

In this period between the 1987 bicentennial of the Constitution and the approaching 1991 bicentennial of the Bill of Rights, we would do well to remember that many constitutional questions do not fall squarely under one clause in a particular amendment, or even under just one amendment. Indeed, it is too common for a threat to liberty, such as an invasion of the "right to privacy," to infringe on values inherent or implicit in the text, history, and political philosophy of several amendments — not just one.

The failure to understand, articulate, and debate about the interrelations between and among the amendments that comprise the Bill of Rights has created a clear and present danger to the "right to privacy," which now hangs precariously from the tattered texts of several amendments. As Justice Harry D. Blackmun recently wrote in his impassioned dissent in the *Web-*

70. *See H.J., Inc.*, 109 S. Ct. at 2908 (Scalia, J., dissenting).
71. 21 U.S.C. § 848(a) (1988).
72. *See* Fort Wayne Books v. Indiana, 109 S. Ct. 916 (1989).

ster v. Reproductive Health Serv., Inc.,[73] abortion case:

> The plurality does not even mention, much less join, the *true jurisprudential debate* underlying the case: whether the Constitution includes an 'unenumerated' general right to privacy as recognized in many of our decisions, most notably *Griswold v. Connecticut*, and *Roe* [*v. Wade*], and, more specifically, whether and to what extent such a right to privacy extends to matters of childbearing and family life, including abortion.[74]

But in *Roe v. Wade*,[75] Justice Blackmun, then writing for the Court, did not initiate the "true jurisprudential debate." Instead, he wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[76]

Such an ambiguous explanation is not sufficient to ground a fundamental right. So before the celebration of the bicentennial of the Bill of Rights begins with fireworks and similar festivities, the Bill of Rights should be read straight through — from the first amendment to the tenth. Then, here and elsewhere, there should be a robust, no-holds-barred debate about its fabled history, its collective meaning today, and, most important, its meaning for tomorrow.

For such a public discussion of the Bill of Rights as a whole is surely the most meaningful way to commemorate its passage almost 200 years ago. It is also the only way to insure that those rights will survive the *Sturm und Drang* of political battles and technological progress for at least another 200 years.

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73. 109 S. Ct. 3040 (1989).
74. *Id.* at 3072 (Blackmun, J., dissenting) (citations omitted; emphasis added).
75. 410 U.S. 113 (1973).
76. *Id.* at 153.