Introduction

Almost all Americans cherish the liberties and privileges enumerated in the first ten amendments to the U.S. Constitution, collectively known as the Bill of Rights. Public opinion surveys, however, repeatedly show that most citizens have only vague notions about the Bill of Rights. Indeed, many confuse these amendments with other parts of the Constitution and other documents, including the Declaration of Independence. It appears obvious that Americans should want to know about the sources of their freedoms. In addition, the study of the ten amendments, including how their meanings have changed over the years, is a fascinating one.

Certainly the Bill of Rights and the Constitution had a number of defects, at least from the perspective of the twenty-first century. They did not explicitly mention anything about equality or equal rights. The protection of private property in the Fifth Amendment applied to all forms of property, including slavery. In the twenty-fist century, it is easy to condemn such imperfections. But it is important to realize that in the eighteenth century tyranny was common throughout the world. Only a few places in the world offered its citizens anything approaching liberty. The U.S. Constitutional system, with its Bill of Rights, provided a foundation for the development of more rights and liberties in the future, and it also provided a model that other countries could follow.

The liberties and privileges in the Bill of Rights, as interpreted and reinterpreted by the U.S. Supreme Court, frequently have significant consequences on real lives of real people. Examples of contemporary issues dealing with the Bill of Rights are not difficult to find. Common questions about rights discussed in the ten amendments include:

- Can and/or should people be punished if they advocate violence or if they express racist and bigoted opinions that are hurtful to vulnerable members of society?
- Does the Second Amendment guarantee a right to own and use any kind of gun that one wishes, or does the amendment only mean that states have the right to establish well-regulated militias?
- Do Affirmative Action Programs in employment and college admissions, when attempting to increase the number of persons belonging to underrepresented groups (usually minorities and women), unfairly discriminate against individuals who belong to groups that are overrepresented?
- Should tax money be used to support students attending religiously affiliated schools?
- Is capital punishment a cruel and unusual punishment?
- If the police make a technical mistake while obtaining evidence proving that a known criminal has committed a violent act, should that evidence be excluded from a criminal trial?
- Should a woman be permitted to obtain a legal abortion at any time during a pregnancy and for any reason?
- Should pornography—especially the hardcore, violent, and sexist varieties—be restricted in any way—including its availability over the web?
- Should people be allowed to burn and desecrate the U.S. flag, the symbol of the liberties that Americans enjoy?

Challenges to Liberties

Throughout American history, international wars and fears of domestic violence have periodically surfaced and threatened to restrict the liberties guaranteed by the Bill of Rights. On September 11, 2001, the dramatic terrorist attacks on New York City and Washington, D.C. certainly had such an effect. Six weeks later, on October 25, the U.S. Congress enacted a 342-page law called the USA Patriot Act. It was designed to expand the authority of law enforcement officials to monitor telephone conversations and Internet messages and to detain aliens on mere suspicion of terrorist activity. The American Civil Liberties Union and other libertarian groups alleged that the complex law undermined several constitutional guarantees, especially the Fourth Amendment's rules concerning probable cause and search warrants.

On November 13, 2001, President George W. Bush issued a military order that authorized military tribunals to try non-citizens accused of terrorism. The tribunals allowed secret trials without juries, despite the Sixth Amendment (which guarantees an impartial jury and a public trial). Military tribunals also disregard many additional principles of due process that are normally considered to be rights under the Fifth Amendment. Critics of President Bush's order pointed to *Ex Parte Milligan* (1866), in which the Supreme Court rejected the use of military trials when the regular courts were in operation.

On the other hand, supporters of President Bush's order looked to another case, *Ex Parte Quirin* (1942), in which the Court approved trying eight suspected German saboteurs in military tribunals. The legal disputes surrounding the "war on terrorism" demonstrated once again that interpretations of the Bill of Rights can determine the freedom and future prospects of ordinary people.

Incorporation

During the twentieth century, most of the provisions of the Bill of Rights were "incorporated" or "absorbed" into the Fourteenth Amendment, thus making these provisions binding on state governments. It seems clear that James Madison, the major author of the Bill of Rights, intended that the Bill of Rights would apply only to the federal government, because he expected that they would be placed in Article I, Section 8, and Article III of the Constitution, which explicitly applies only to the federal government. He wanted an additional amendment to forbid states from violating "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." His idea was that this amendment would be placed in Section 10, which is applicable to the states. Congress, however, rejected the proposed amendment as inconsistent with their views of federalism.

In view of this, the Supreme Court properly recognized that the first nine amendments were not binding on the states (see *Barron v. Baltimore*, 1833). There is considerable evidence, however, that after the Civil War, the framers of the Fourteenth Amendment expected that its "privileges or immunities" clause would subsume at least a few, if not most, of the rights in the Bill of Rights. However, in the *Slaughterhouse Cases* (1873), the Supreme Court rejected such a construction of the privileges or immunities clause, and it was not until the 1920's that the Court seriously began to apply most of the Bill of Rights to the states by way of the Fourteenth Amendment's due process clause. The Second Amendment right to keep and bear arms was finally made applicable to the states in *McDonald v. Chicago* (2010). As of 2017, only a few provisions have not been incorporated—primarily the right to a jury trial in civil litigation and the right to a grand jury indictment before a criminal trial. This important topic of incorporation is covered in the Historical Topics and Legal Concepts section in Volume 1 and in several Supreme Court case essays in Volume 2.

Other Rights

This two-volume *Bill of Rights* is limited to the Bill of Rights and thus does not cover every right and liberty that Americans enjoy. The right to vote, for example, is not covered, even though voting is considered a fundamental right of citizenship. Neither the original Constitution nor its first ten amendments addressed qualifications for the voting franchise—a matter that the Constitution left entirely up to the states. It is not the Bill of Rights, but the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments that authorize the federal courts to provide safeguards for the right to vote. Further, the Thirteenth Amendment, which prohibits slavery, is not covered, nor are the various civil rights laws designed to prohibit discrimination based on race, ethnicity, sex, and religion.

Despite this, these volumes do at times go beyond the specific rights and liberties that are enumerated in the Bill of Rights. The Fifth Amendment, for instance, has a clause requiring government to employ "due process of law" whenever depriving persons of their life, liberty, or property. The Due Process Clause primarily refers to procedures in the criminal justice system, which include rights and liberties that are not guaranteed in the Fourth, Fifth, and Sixth Amendments. These additional rights include those mentioned elsewhere in the Constitution, such as the writ of habeas corpus. Some of these rights have their roots in the common law tradition, such as the right of personal autonomy that was recognized by the Supreme Court in *Union Pacific Railway Co. v. Botsford* (1891).

The doctrine of substantive due process recognizes substantive rights to life, liberty, and property, and requires government to justify any deprivation of these rights with an appropriate rationale. The doctrine prohibits government from depriving persons of fundamental rights or acting arbitrarily regardless of the procedures employed. Without substantive due process it would not have been possible for the Supreme Court to have applied the First and Second Amendments to the states by way of the Fourteenth Amendment, because these two amendments deal with substantive rights and not procedures. The Supreme Court, moreover, has expanded the concept of liberty to include a generic "right of privacy," which refers to personal family relationships, personal autonomy and a woman's right to terminate a pregnancy.

Equal Protection of the Laws

The Bill of Rights do not explicitly mention anything about equality, even though the framers certainly meant for all citizens to have equal rights to their provisions. The Fourteenth Amendment requires each state to

provide every person within its jurisdiction the "equal protection of the laws." It is well known that one of its main goals was to make certain that the Civil Rights Act of 1866 would be found constitutional, and, therefore, provide all American citizens, including the recently emancipated slavers, with "the full and equal benefit of all laws and proceedings…as is enjoyed by white citizens."

The Equal Protection Clause of the Fourteenth Amendment was originally binding only on the state governments, not the national government. Racial segregation cases such as *Plessy v. Ferguson* (1896), were concerned with state statutes and did not have any real bearing on the federal government or the Bill of Rights. During World War II, however, the Supreme Court began interpreting the Fifth Amendment's Due Process Clause to incorporate an equal protection requirement. Ironically, the Court first clearly asserted this interpretation, often called "inverse incorporation," when upholding the discriminatory treatment directed at Japanese Americans during World War II, and it firmly established the doctrine in *Bolling v. Sharpe* (1954), the landmark case that held that Congress's own operation of segregated government schools in the national capital violated the Fifth Amendment. Since the *Bolling* ruling, many equal protection cases have directly applied to the Fifth Amendment, including current issues such as discrimination based on race and gender, affirmative action, and same-gender marriage. The various cases dealing with court-ordered busing, on the other hand, are not relevant to the Fifth Amendment, because none of them has ever dealt with federal policies.

The Ninth Amendment

Because of the special characteristics of the Ninth and Tenth Amendments, many reference works about the Bill of Rights do not include them. The Ninth Amendment—which suggests the existence of rights not enumerated in the Constitution—is especially enigmatic and open to numerous interpretations. Because of its vagueness, some lawyers look upon the amendment as a refuge for litigants without cogent legal arguments, so that the phrase "relying on the Ninth Amendment" is understood to be almost humorous. However, James Madison and the other framers of the Bill of Rights did choose to include the Ninth Amendment, and they must have assumed that it had some practical application.

Some scholars have interpreted the amendment in light of the framers' commitment to the theory of natural rights, either based on a religious foundation or on an assumption of a shared human nature. Others have emphasized the provisions of the common law tradition, as in the longstanding requirement that a criminal jury in a federal trial must be composed of twelve jurors. Still others have suggested that the amendment simply means that the absence of an enumerated right from the Constitution does not necessarily prove that such a right does not exist. In one significant Supreme Court case, *Griswold v. Connecticut* (1965), the Ninth Amendment's application was overlapping with the doctrine of substantive due process, and it is possible that this broad reading of the amendment may become more common in the twenty-first century.

The Tenth Amendment

Liberal critics of states' rights and federalism often prefer to ignore entirely the Tenth Amendment, which gives states authority over matters not delegated to the federal government in the Constitution. A common complaint is that the amendment has allowed the states to enact undemocratic laws and to oppress members of racial minorities, especially in the time of slavery and Jim Crow. Although there is abundant historical support for this assertion, it is also true that Madison and other framers looked to the Tenth Amendment as a means of preventing abuses by the federal government, and they assumed that the states were bastions of liberty. Historically, the Supreme Court has often considered the application of the Tenth Amendment in relationship to the original Constitution's commerce and elastic clauses—two clauses that have allowed for expansive interpretations of congressional power. In addition, the Fourteenth Amendment, which was ratified in 1868, expanded the authority of the federal government to regulate the states in three broad areas: the privileges and immunities of citizens; the due process of law; and the equal protection of the laws.

Interpretations

Some portions of the Constitution are clear and do not involve much interpretation, i.e. the age requirements for the President or numbers of members of Congress. However, many phrases of the Bill of Rights are open to interpretation: establishment of religion; unreasonable searches and seizures, due process of law, excessive fines, and cruel and unusual punishment. Do the First Amendment words, that Congress shall make "no law…abridging the freedom of speech," refer to the right to commit perjury, yell fire in a crowded theater, or slander the reputation of an individual? In an orderly society, the meaning of "the freedom of speech" need to be better defined.

At least since the monumental decision, *Marbury v. Madison* (1803), the U.S. political system has been partially based on the premise that it is "the province and duty of the Judicial Department to say what the law is."

The hermeneutics (or interpretations) of the Bill of Rights is of central importance in determining "what the law is." The Constitution itself does not say how it is to be interpreted, or whether the justices on the Supreme Court should faithfully adhere to the principle of *stare decisis* (i.e., precedents). Some justices, such as the late Antonin Scalia, are committed to principles of originalism and textualism, which attempt to interpret the words of the Constitution in the way that ordinary, educated people would understand the document at the time it was written. Other justices, such as Stephen Breyer, adhere to the theory of "living Constitution," which assumes that the meaning of the document changes when the culture changes, and they tend to look to the "spirit" more than the "letter" of the document. Others argue that interpretations should be based on principles of justice and equality, regardless of history and what the text says. Most justices take the practice of adhering to the Court's precedents very seriously. However, some justices, such as Clarence Thomas, argue that the Court should not hesitate to overturn a precedent if they believe that a previous case was mistakenly decided.

Controversies and Objectivity

Throughout American history, many interpretations and applications of the Bill of Rights have been extremely controversial. In addition to their practical consequences, the study of these applications are intellectually compelling. Few Americans can be detached or unemotional when considering matters such as freedom for unpopular religious practices (such as peyote smoking), restrictions on the public support of popular religious practices (such as Christmas Nativity scenes), rules for searches and seizures by the police, and reproductive liberty versus fetal rights. Such topics frequently produce angry exchanges and occasionally lead to violent confrontations. Justice Hugo L. Black once stated that most Americans assume that the Constitution supports the particular views that they endorse, and prohibits those ideas and practices they dislike. This common tendency, in fact, seems to be equally true of liberals, conservatives, and moderates. Recognizing the influences of unconscious bias, the articles in these volumes were written as objectively as possible, emphasizing facts and avoiding personal opinions. It is the goal of this work to be fair to all viewpoints, to explain arguments and ideas cogently, and to let the reader decide which position appears to be the most persuasive.

This edition of *The Bill of Rights* is designed primarily for general readers and high school and college students, as opposed to lawyers and scholars with a specialized knowledge of constitutional law. The authors use straightforward language and define terms that are not part of the non-professional's vocabulary. At the same time, however, this work does not avoid difficult and complex legal issues, but utilizes an accessible style and a clarity of expression to analyze such topics.

It has been a true pleasure to work on this project and to select the essays for inclusion in the new edition. I wish to express appreciation to the many fine scholars who have written these essays. In addition, I wish to thank R. Kent Rasmussen, Laura Mars, and the other editors of Salem Press for developing the project, helping in essay selection, and writing great essays.

Thomas Tandy Lewis

Overview of The First Ten Amendments

First Amendment

Description: Written as restraints on government, the First Amendment recognizes six individual rights: (1) freedom of speech; (2) freedom of the press; (3) freedom to practice one's religion; (4) freedom from laws "respecting an establishment of religion"; (5) freedom for peaceful assemblies; and (6) the right to petition the government with requests for changes.

Significance: The wellspring of individual rights protected by the U.S. Constitution, the First Amendment presented the Supreme Court with endless challenges to decide the limits of governmental power and the scope of personal liberties.

Although the First Amendment, together with the other nine amendments known as the Bill of Rights, became part of the U.S. Constitution on December 15, 1791, the Supreme Court took little note of it until the beginning of the twentieth century. This was not for lack of federal laws impinging on free speech, from the Sedition Act of 1798 and the Comstock Act of 1873 to the Alien Immigration Act of 1930 and a wide variety of postal regulations. However, the Court never found that any of these laws violated the First Amendment. Indeed, in 1907 the Court upheld the conviction of an editor for contempt, rejecting a defense based on the First Amendment on the grounds that it only prohibited prior restraint.

It was inevitable that the Court and the First Amendment would travel together through U.S. constitutional law, frequently crossing paths, sometimes diverging, often forced by circumstances to retrace the same ground. Each clause of the First Amendment invites, indeed demands, judicial interpretation.

Freedom of Speech

Beginning at the end of World War I, the Court tackled the task of devising a series of tests to determine whether particular speech was constitutionally protected. The Court could not merely cite the general language of the First Amendment; it had to apply those opaque terms to the real world of real cases.

The first test was articulated by Justice Oliver Wendell Holmes in 1919 in a series of cases challenging the convictions of antiwar activists under the Espionage Act of 1917. The clear and present danger test looked at whether the speech posed a real and immediate risk of a substantive evil that Congress had a right to prevent. Holmes captured the test in a powerful, albeit often misquoted, metaphor that persists to this day: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

Later in 1919, Holmes and his ally, Justice Louis D. Brandeis, dissented in *Abrams v. United States*, arguing for greater constitutional protection for controversial or even subversive speech. The majority of the Court continued to use the clear and present danger test to uphold the punishment of such speech.

Six years later, the majority of the Court tightened the noose on free speech by focusing on whether the expression had a bad tendency. Over bitter dissent from Holmes and Brandeis, the Court upheld a conviction under the New York State Criminal Anarchy Act, stating that a "single revolutionary spark may kindle a fire," and therefore the state may "suppress the threatened danger in its incipiency."

In 1951 the Court used a slightly reformulated test to uphold the convictions of eleven members of the Communist Party under the Smith Act (1940). Chief Justice Fred M. Vinson, writing for the Court, asked "whether the gravity of the 'evil' discounted by its improbability" would justify government limits on speech.

In 1964 Justice William J. Brennan, Jr., introduced a test that was far more protective of free speech. In the landmark case of *New York Times Co. v. Sullivan*, the Court held that false criticism of public officials was constitutionally protected unless it was made with knowledge that it was false or in reckless disregard of the truth. Instead of tilting the constitutional balance in favor of the government, the *Sullivan* test gave the advantage to the speaker.

The Holmes-Brandeis view in favor of more robust protection for free speech was finally vindicated in 1967 in *Brandenburg v. Ohio*, in which the Court declared that mere advocacy of the use of force or violation of the law could no longer be punished unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."

were of central importance in Dale's Laws. The first article in the published code commanded service to God, stipulating that anyone not attending prayers twice daily "would be duly punished according to the martiall law." The second article prescribed the death penalty for anyone who speaks "impiously or maliciously" against the holy Trinity, against any of the three persons in the Trinity, or against any of the "Articles of the Christian faith." The third article read as follows:

> That no man blaspheme Gods holy name upon paine of death, or use unlawful oathes, taking the name of God in vaine, curse, or banne, upon paine of severe punishment for the first offence so committed, and for the second, to have a bodkin thrust through his tongue, and if he continue the blaspheming of Gods holy name, for the third time so offending, he shall be brought to a martiall court, and there receive censure of death for his offence.

The code prescribed capital punishment for numerous sins. Article 9 specified: "No man shall commit the horrible, and detestable sins of Sodomie upon pain of death; & he or she that can be lawfully convict[ed] of Adultery shall be punished with death." A person could also be executed for swearing false oaths, for making statements of derision or contempt for the Bible, and for three instances of failing to observe the Sabbath. Penalties for non-capital crimes included whipping, tongue piercing, galley service, cutting off of ears, and the binding of heels and neck together.

Under article 33, every resident was required to meet with a minister to discuss his or her faith and ways in which moral and spiritual improvement was needed. The minister was told to report any resident who refused to cooperate. The penalty for the first offense was a whipping, a second offense would result in a whipping plus a public confession at church, and and a third offense called for a whipping "every day until he hath made the same acknowledgement, and asked forgiveness for the same." Article 6 prohibited the playing of games on the Sabbath and instructed settlers, before church services, to prepare themselves at home with private prayer.

Dale, accustomed to military disciple, had the reputation of being a stern taskmaster, and he probably expected settlers to be punished if they did not obey the edicts. According to historian David Konig, the colony's "swift and discretionary justice unbound by common law" and the "stern system of social control" were not aberrational for the time, but that they had much in common with English legal practices in Wales, Ireland, and rural places in England. However, William Nelson cautions: "We do not, in fact, know how harshly Dale's laws were enforced in Virginia, although Virginians did complain about their enforcement."

Dale's Code demonstrates that the Anglican Church was the established religion at the beginning of Virginia, and that under the rules of the code, church and state were one and the same. The code also suggests that during the seventeenth century, many committed Anglicans took their religious beliefs and practices as seriously as the Puritans of New England. The code did not tolerate religious dissent of any kind, and standards of Christian morality were strictly enforced, at least in theory.

Dale's stringent code remained in effect until Sir George Yeardley arrived as the new governor in April 1619. Yeardley proclaimed the termination of "those cruel laws" by which the colony had been governed and promising that in the future residents would have the benefit of "those free laws which his majesty's subjects live under in England." Yeardley's proclamation also directed the calling of an assembly so that the residents "might have a hand in the government of themselves." Yet, many of the Dale's *Lawes Divine* continued to be binding on the settlers. Observance of the Sabbath was still mandatory; Christian standards of traditional morality continued to be enforced; and clergymen continued to exercise authority as agents of the government.

Despite the gradual liberalization of the law, a Virginia statute of 1662 still required every resident to attend weekly services "diligently at their parish church…and there to abide orderly and soberly." Failure to obey the ordinance was punished with a fine of fifty pounds of cotton. The colony, moreover, prosecuted blasphemy under the common law and then criminalized blasphemy in a statute in 1676.

Thomas Tandy Lewis

Declaration of Independence

Description: The document in which a group of colonial American leaders declared themselves independent of Great Britain and King George III (*The full text of the Declaration of Independence appears in this volume beginning on page 375.*)

Significance: The Declaration of Independence was the legal basis for the formation of the United

States; it has significantly influenced American political thought, as well as that of other emerging nations, through the years

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

So begins one of the most famous documents in political history. The American Declaration of Independence has had broad and sweeping historical effects. Believing in self-government, the signers of the declaration also believed they were providing the legal basis for organizing a new government—provided that the new republic, with the help of its allies, could win control of the field in battle. The endeavor marked the origins of what eventually became the most powerful nation in the world. In the twentieth century the United States had great significance in world history, and the origins of that historical effect can be traced back to Philadelphia, Pennsylvania, and July 4, 1776.

The Declaration and the Revolution

Many nations have found in the Declaration of Independence inspiration and ideological support for their own revolutions. Some of the wording and many of the ideas have found their way into later, more modern declarations of independence in various parts of the world. The American Revolution was not really a revolution in the modern sense of the word, but was a separatist war seeking independence rather than seeking to overthrow an existing government. In that sense the war could more accurately be called the American war for independence from Great Britain. The colonists claimed they were fighting a defensive war for the preservation of English liberties in the American colonies. There was indeed a continuity with the past, and many of the prewar political leaders in America continued as leaders in the new republic, but major changes also took place, including the writing of the Constitution of the United States in 1787. English customs, traditions, and the continuity of the English common law in the United States helped to preserve stability and minimize the upheaval of such momentous change. In several states the colonial charters were kept largely intact, changing only terms to meet the new political realities.

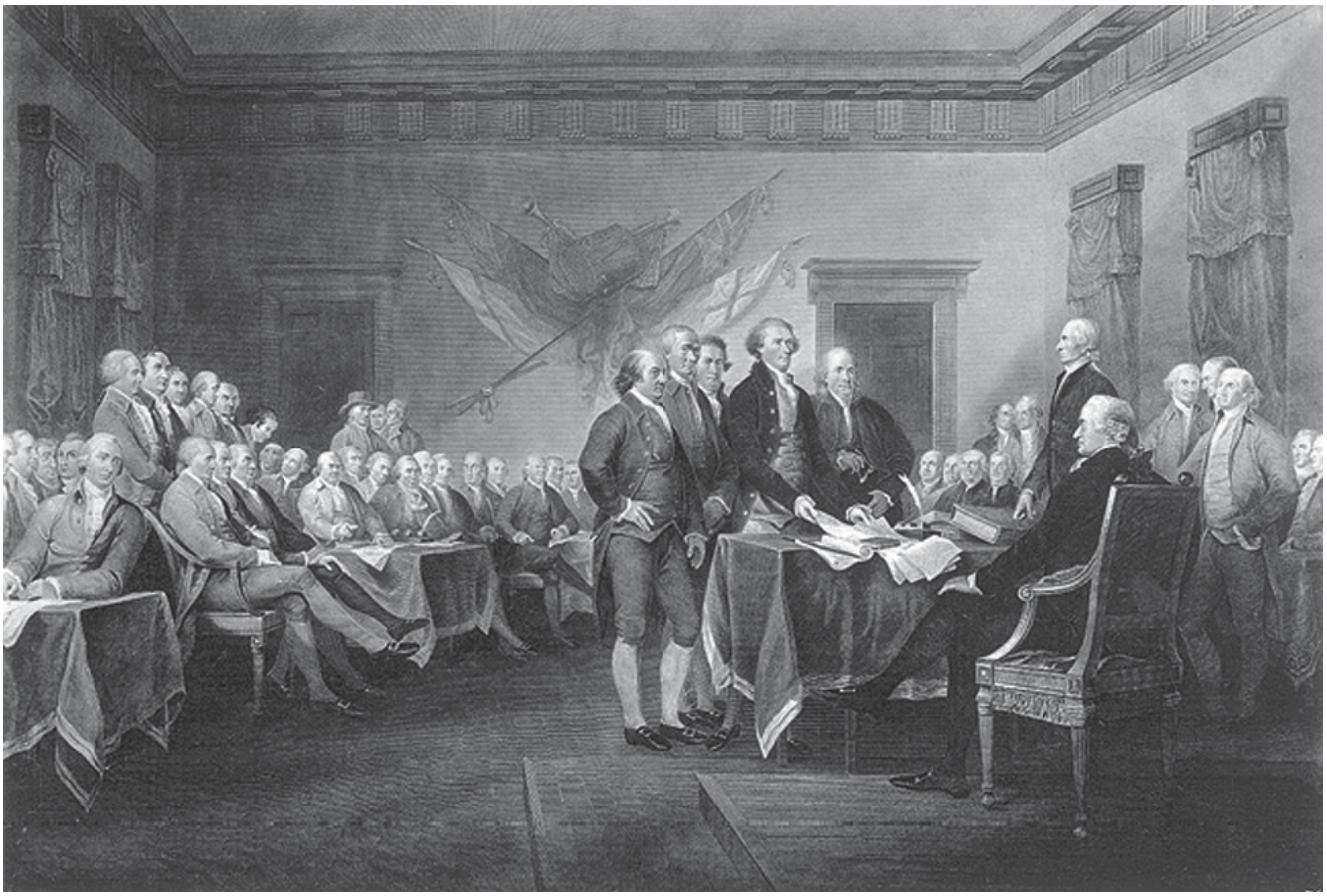
The Declaration of Independence was not entered into lightly, as the preamble and first paragraph explicitly state: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes." The Americans, though, were convinced that there was a design on the part of King George III of Great Britain to "reduce" the American colonies to rule under "absolute Despotism." For that reason they decided to declare independence and risk their lives, fortunes, and "sacred Honor" in the pursuit of freedom and independence. They stood on principle and they stood together, for as Benjamin Franklin so aptly put it, "We must all hang together or surely we will all hang separately." Obviously the British did not consider the Declaration of Independence to be a legal document. The risks were great and so was the courage of the patriots. In the end the British had no choice but reluctantly to acknowledge American Independence as declared.

The Americans declared that they were fighting for certain things besides independence. Thomas Jefferson, the author of the Declaration of Independence, penned the views of the assembled Continental Congress. His famous words expressed their views on the purpose for, and basis of, government:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

"Unalienable Rights"

All Americans (indeed all people, according to the implication of these words) have "certain unalienable Rights." Where did those rights come from? Certainly not from the state—or else the state could change and take them away, and they would not be "unalienable." They came from "their Creator," from "the Laws of nature and of Nature's God." The Declaration of Independence then acknowledges a higher law, or natural law, to which government and human laws must conform. Jefferson was a leader of the American Enlightenment and so used "natural law" terminology. Many of the other leaders were



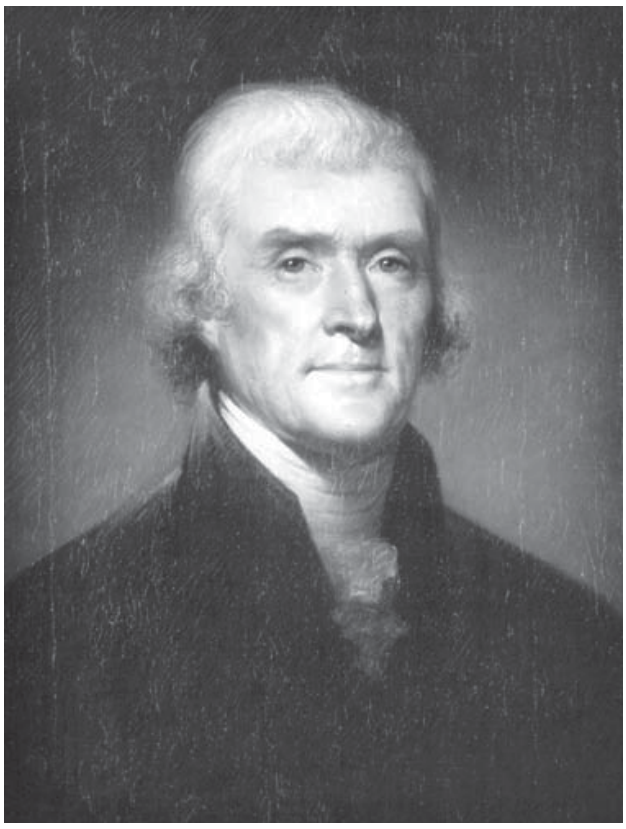
Currier and Ives print of the signing of the Declaration of Independence on July 4, 1776. (Library of Congress)

orthodox Christians and so used biblical terminology. John Dickinson, a leader of the Stamp Act Congress, for example, wrote that "Our liberties do not come from charters; for these are only the declaration of preexisting rights. They do not depend on parchments or seals; but come from the King of Kings and Lord of all the earth." Enlightenment or traditional Christian, both groups agreed that Americans are born with certain Godgiven rights, including life and liberty.

The concept of inalienable rights for the individual presupposes limitations on the power of the state, and that idea is the basic assumption involved in writing a constitution. During the American Revolution the main constitutional authority in the United States rested in the thirteen state constitutions. The Continental Congress acted as the extralegal representative assembly that attempted to hold the states together and to conduct the war and diplomatic relations. It was not until 1781 that the first "constitution" of the United States was adopted, the Articles of Confederation. Both the Continental Congress and the Confederation Congress lacked sufficient authority to act as a central government, however, and in due time the United States Constitution was written, adopted, and put into effect in 1789.

Thomas Jefferson did not claim originality in writing the Declaration. "All American Whigs [Patriots]," he wrote, "thought alike on these subjects." He wrote the declaration "to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. . . . It was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, etc."

The Declaration of Independence is not a constitution or a legally binding law. It was partially designed to attract international support to the American cause. Yet if its basic presuppositions are accepted and "the people" believe they have a right to change their form of



Thomas Jefferson, principal author of the Declaration of Independence. (White House Historical Society)

government, then the Declaration is extremely important as a representative expression of the collective will of the population. Frequently, the Supreme Court has quoted the Declaration with respect, almost suggesting that it is part of our constitutional system. Without general acceptance, the Declaration would simply be a piece of paper with irrelevant words.

FURTHER READING

Probably the most compelling account is Pauline Maier's *American Scripture: Making the Declaration of Independence.* (New York: Vintage Books, 1997). The ideas leading to the signing of the Declaration of Independence are brilliantly discussed in Bernard Bailyn's *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967), and in Gordon S. Wood's *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969). Dumas Malone's *The Story of the Declaration of Independence* (New York: Oxford University Press, 1975) is a pictorial book prepared for the bicentennial for the men who wrote the declaration, see C. Edward Quinn's *The Signers of the Declaration of Independence* (2d ed. The Bronx, N.Y.: The Bronx County Historical Society, 1988). Carl L. Becker's classic account, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage Books, 1922, reprint 1960), is still useful. Many good biographies of Thomas Jefferson are available, including Merrill D. Peterson, *The Jefferson Image in the American Mind* (New York: Oxford University Press, 1960).

William H. Burnside

Dual Sovereignty

Description: There are two constitutional doctrines of "dual sovereignty": (1) the doctrine that the Double Jeopardy Clause permits both federal and state governments to prosecute a defendant for same crime, and (2) the doctrine that both the federal government and the state governments have sovereignty within their respective spheres.

Relevant Amendments: Primarily the Fifth, Tenth, and Fourteenth

Significance: Despite the prohibition against double jeopardy in the Fifth Amendment, it is not unusual for criminal defendants to have been acquitted in either a federal or state trial and then to be tried a second time in another jurisdiction. The other meaning of the term "dual sovereignty," which is based on the Tenth Amendment, is that the U.S. Supreme Court has the responsibility to decide whether Congress has exceeded its constitutional powers by encroaching on the residual powers of the States.

The Double Jeopardy Clause of the Fifth Amendment declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The term dual sovereignty most often refers to a major exception to this clause—an exception that permit two different sovereign jurisdictions within the United States to prosecute a person for the same offense. For example, the police officers who were charged with assaulting Rodney King in 1991 were acquitted in a state trial. They were later tried in federal court and found guilty. This was not considered a violation of the Double Jeopardy Clause.

The word "sovereignty" is polysemous and has a long history. Insofar as the U.S. system of government is concerned, the word usually refers to the final and ultimate authority of federal and state governments to make and enforce public policy within their proper domains—limited