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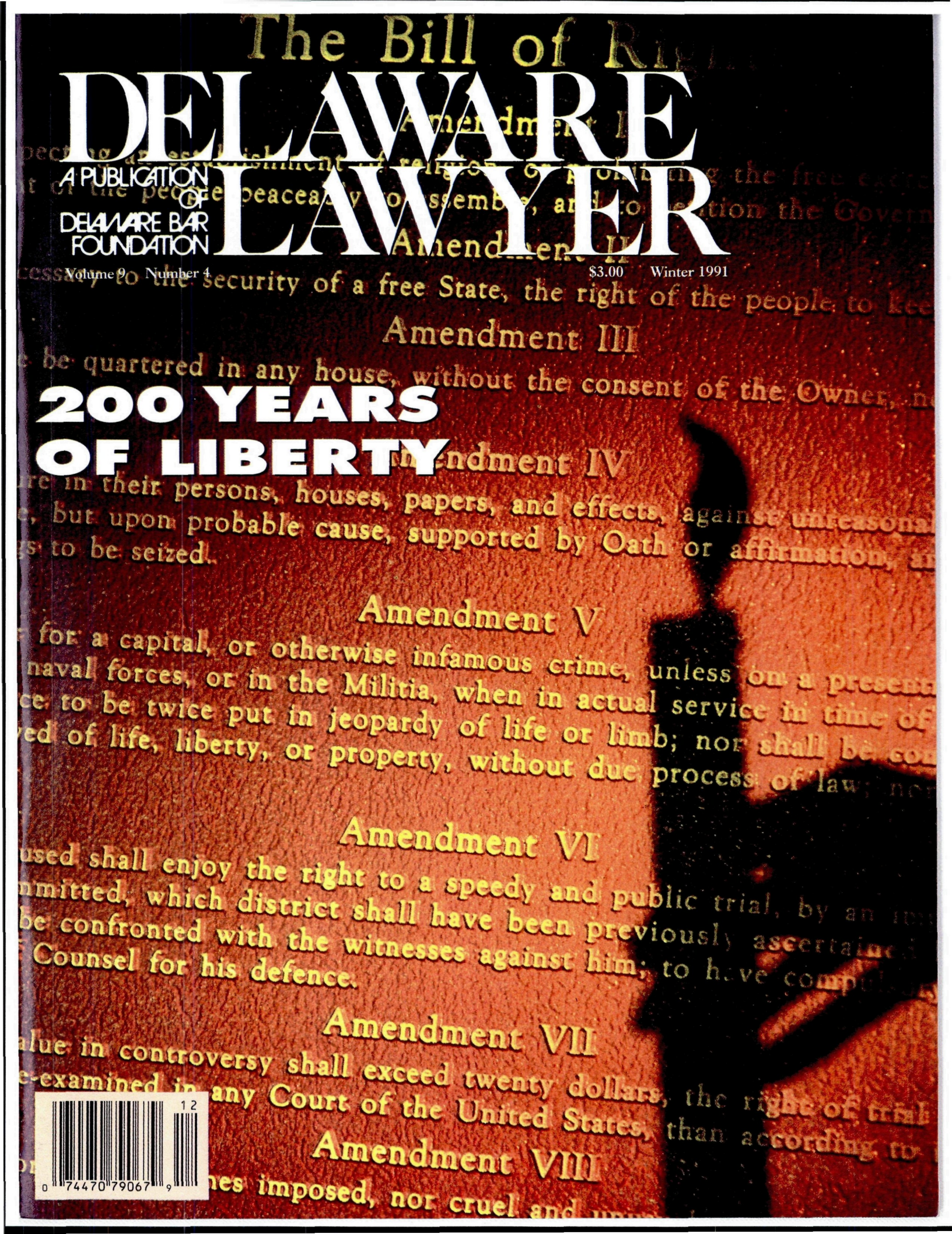

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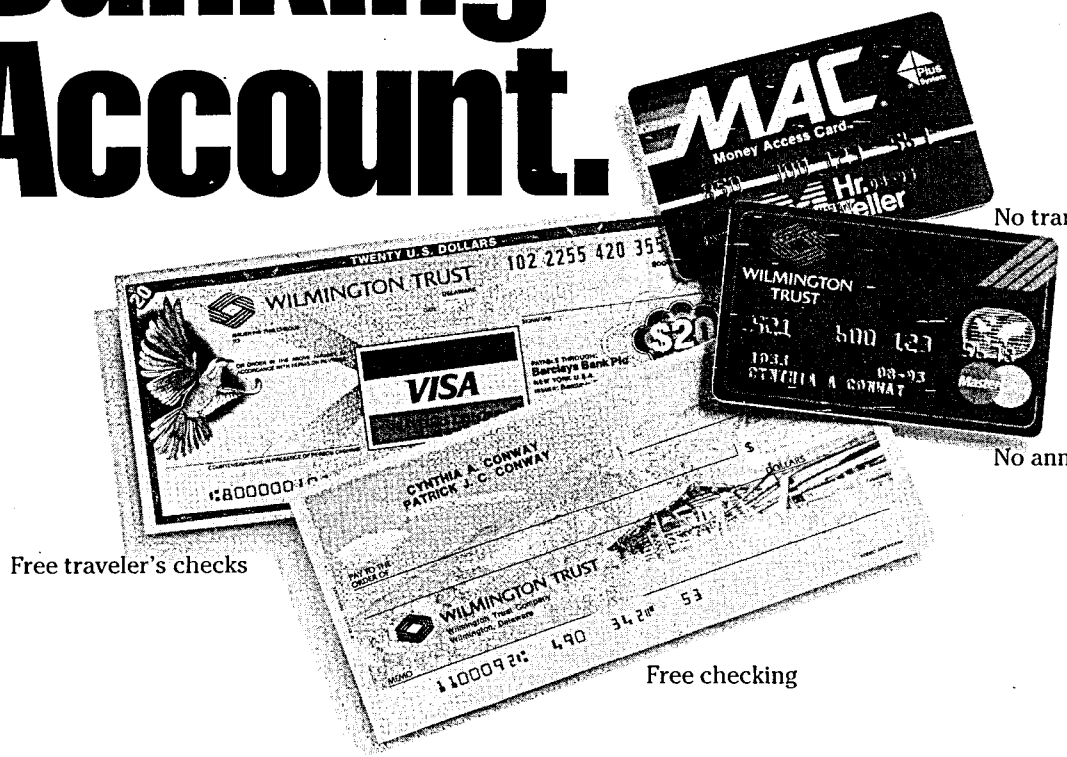

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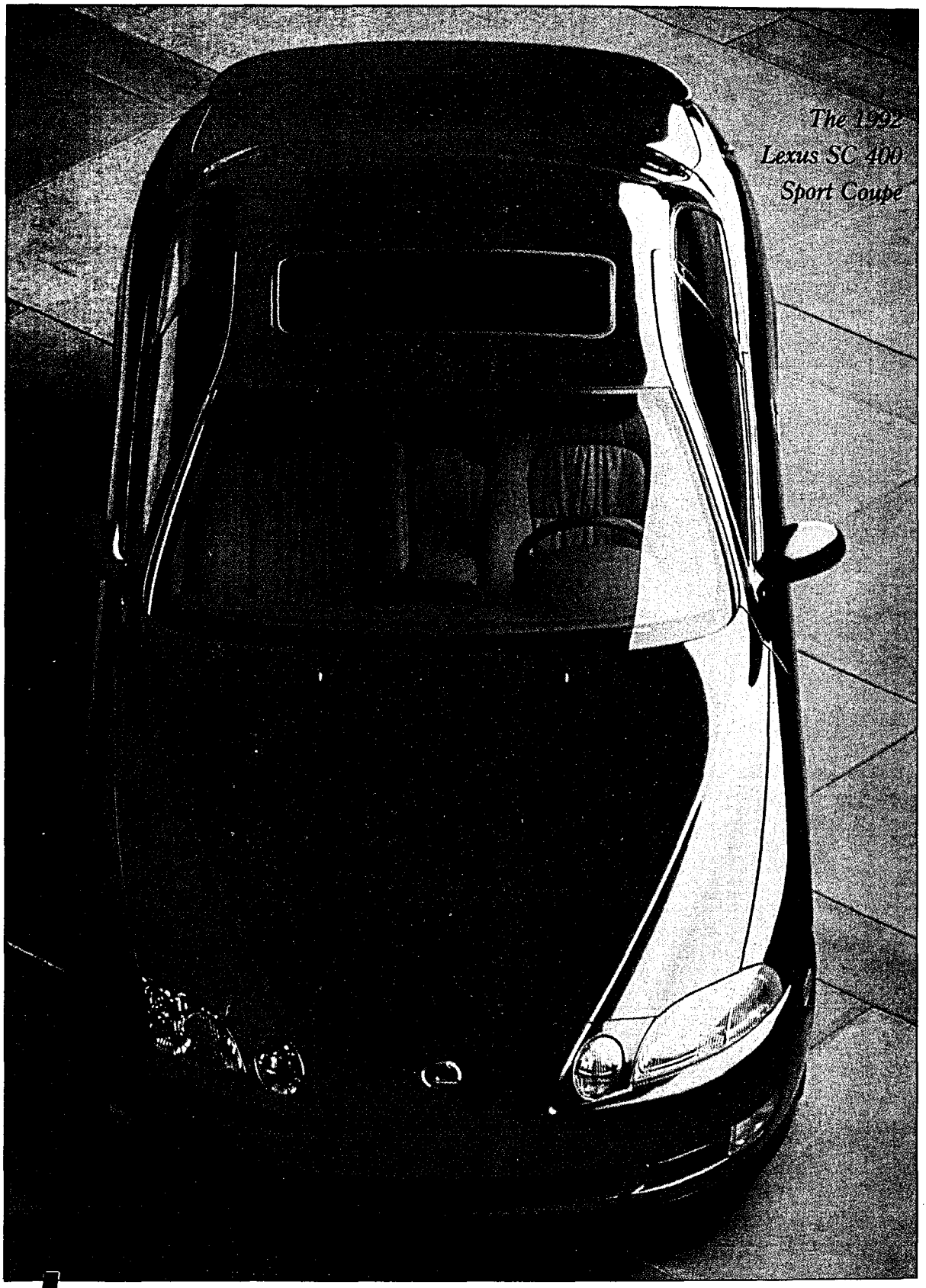

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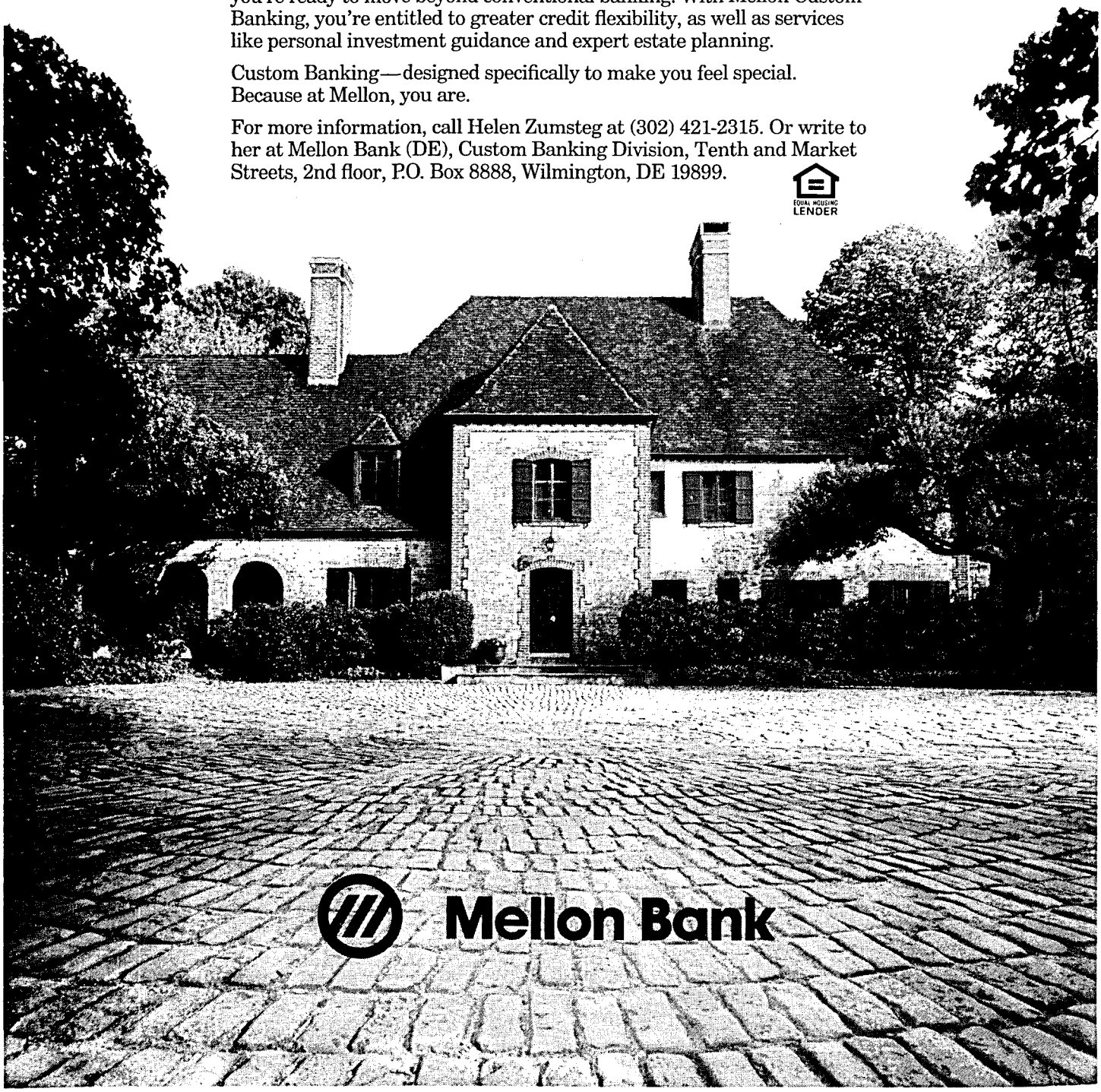

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ON THE COVER: THE PLAQUE SETTING FORTH THE BILL OF RIGHTS, PHOTOGRAPHED BY KEVIN FLEMING AT THE J. CALEB BOGGS BUILDING, WILMINGTON, DELAWARE

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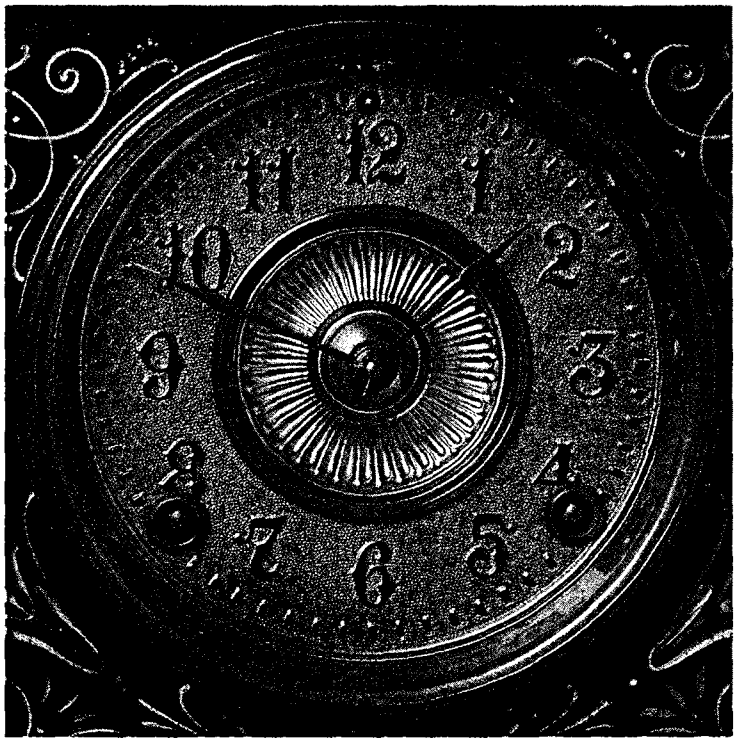

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EDITOR'S PAGE

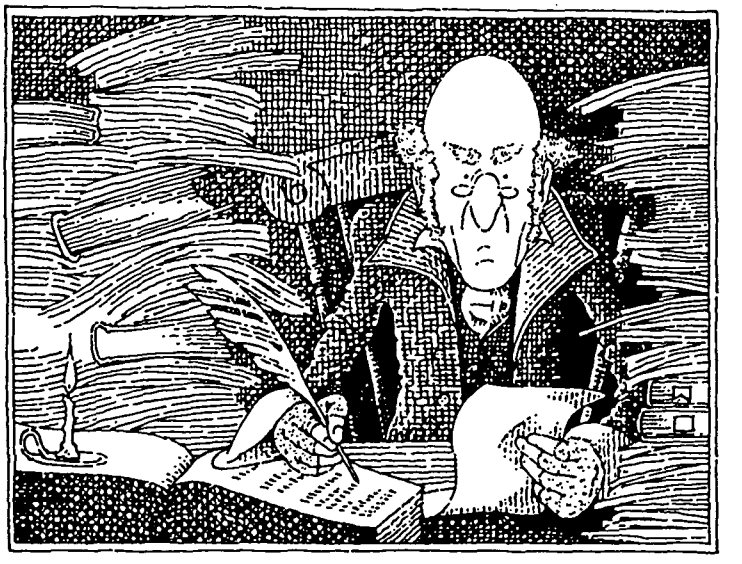
On December 15, 1791, upon ratification by the eleventh state, the first ten amendments, known as the Bill of Rights, became a part of our Constitution. Adoption did not ensure the end of injustice. People, by reason of their color, still were dragged from their homes in chains and driven into slavery, and people, by reason of their sex, still were denied the power to vote.

The Bill of Rights remains as relevant today, 200 years later, as it was then. With our Founders, we maintain that certain truths are self-evident, and we remain committed to them.

This issue of DELAWARE LAWYER has been devoted to the Bill of Rights not only as a formal celebration of those truths but as a testament to our determination to bring them closer to reality for everyone. As Guest Editor of this issue, and as the President of our Bar Association, I recommend that message offered in these pages.

As did the signers of the Declaration of Independence, each generation must bear the exquisite burden of eternal vigilance and, if need be to sustain our heritage, "mutually pledge to each other our Lives, our Fortunes and our sacred Honor". We owe no less.

Harvey Bernard Rubenstein



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NADINE STROSSEN

THE DISTRUST OF FREEDOM:

A DEMOCRATIC PARADOX

AMERICANS' ATTITUDE TOWARD THE Bill of Rights is paradoxical. On the one hand, we rank it with the American flag and apple pie as a core symbol of national identity and pride. What could be more patriotic, after all, than championing a document that is integral to our government, without which our very Constitution might not have been ratified? Moreover, Americans justifiably are proud of the important world-wide impact that the Bill of Rights recently has been exerting, as an inspiration and model for new movements toward democracy and human rights all over the globe. To celebrate the Bill of Rights bicentennial in 1991, the Philip Morris Company has been taking one of the remaining original copies of this document on a cross-country tour, and it has attracted large and enthusiastic audiences everywhere. Americans throughout the land thus seem eager to pay homage to what they apparently regard as a semi-sacred text.

On the other hand many Americans seem to regard the actual enforcement of the Bill of Rights with some skepticism. More disturbingly, too many Americans have made the startling suggestion that those who seek to enforce the Bill of Rights not only are not patriotic, but, to the contrary, actually unpatriotic. It is particularly distressing that this seemingly astounding assertion has been made by some government leaders, including the current President of the United States. During the 1988 presidential election campaign, then Vice President George Bush repeatedly insinuated that then Massachusetts Governor Michael Dukakis was unpatriotic for actions that reflected Dukakis's respect for the Bill of Rights.

For one thing, candidate Bush attacked Dukakis's veto of a Massachusetts statute that would have required public school teachers to lead classroom salutes of the American flag. Yet Dukakis's veto was based on his upholding the First Amendment. Consistent with the Supreme Court's landmark decision in West Virginia Board of Education v. Barnette, Dukakis recognized that to compel all teachers to profess allegiance would violate their freedom of conscience. In the Barnette case, which upheld the freedom of Jehovah's Witness school children to refuse to salute the flag in light of their religious objections, the Supreme Court endorsed the First Amendment's central guarantee of free thought in these often quoted, stirring words:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

ILLUSTRATION BY TROY THOMAS

These moving words have inspired in generations of Americans a deepened respect for the ideas and ideals of freedom that are symbolized by the flag — in other words, deepened patriotism. Therefore, in insisting that the Massachusetts legislature comply with this Bill of Rights edict, Michael Dukakis was showing himself to be a true patriot.

To the contrary, George Bush revealed a lack of understanding and respect for the values of individual liberty that are symbolized in our nation's icon both in his criticism of Dukakis's veto and in his subsequent efforts to overturn the Supreme Court's decision in Texas v. Johnson. In that case the Court held that the First Amendment protects the right to burn the American flag as an expression of political protest.

George Bush immediately denounced the decision and called for a constitutional amendment to limit the scope of the First Amendment, to make an exception for flag burning. He thus advocated what would have been the first truncation of the Bill of Rights in any respect since its ratification. Moreover, President Bush sought to deal a particularly devastating blow to the Bill of Rights: to limit the expression of political dissent. Such expression long has been viewed as at the heart of the free speech guarantee, which is itself widely considered to be a "preferred freedom," of supreme importance among the Bill of Rights pantheon. Most ironically, President Bush characterized his recommendation as a gesture of patriotism, and many citizens and public officials who supported this effort to curtail the First Amendment sounded the same allegedly patriotic theme. They clearly had forgotten the principle, which is often attributed to Thomas Jefferson, that "Dissent is the highest form of patriotism."

Another respect in which candidate George Bush inverted patriotic values — by suggesting that it is patriotic to undermine the Bill of Rights, and unpatriotic to defend these rights — was in his attacks on Michael Dukakis's membership in the American Civil Liberties Union (ACLU), and thus on the ACLU itself. It is appalling that Bush was able to depict as a liability his opponent's support of an organization dedicated to enforcing the Bill of Rights for all. To the contrary, such support should be viewed as an asset. Indeed, it is useful to recall, Michael Dukakis regarded it as such; he is the one who brought his membership to public attention during the campaign, proudly boasting that he was a "card-carrying member" of the ACLU.

To be sure, as the head of this organization, which prides itself on defending freedom of thought and expression — including for dissenters — I am hardly arguing that all ACLU policies unquestionably set forth the only correct way of interpreting the Bill of Rights. Therefore, I would be no more offended by George Bush's criticism of particular ACLU policies than I am by dissenting opinions from specific Supreme Court constructions of Bill of Rights provisions.

Reasonable people who support the general libertarian philosophy of the Bill of Rights may differ about particular issues concerning the interpretation and application of a certain Bill of Rights provision in a specific context. Indeed, there are spirited debates and disagreements about these issues within the ACLU itself. The ACLU's policies are adopted pursuant to National Board debates, which are always lively and virtually never result in unanimous votes. To the contrary, many ACLU policies result from closely divided votes. Accordingly, even the top leadership of the ACLU itself includes many dissenters from many policies.

What is troubling about George Bush's attack, though, was its broad-gauged nature. Although he criticized particular ACLU policies, he did so in the context of impugning the organization in general, and thus seeking to discredit its overall goal of enforcing the Bill of Rights. Bush would be hard-pressed to deny support for the innumerable uncontroversial policies in the ACLU's Policy Guide which set out conventional understandings of liberties guaranteed in the Bill of Rights. Instead, though, he chose to mention only a few policies (out of approximately 500) with which he disagreed and which were likely to be unpopular or controversial with the public. By his disagreement with these selected policies Bush sought to disparage the ACLU in general. This approach is the equivalent of singling out several of the Supreme Court's most controversial decisions enforcing the Bill of Rights in support of an effort to discredit the Supreme Court and the Bill of Rights in general.

What accounts for the disparity between the two strains in the prevailing American attitude toward the Bill of Rights that I have just described: on the one hand near reverence, but on the other hand, hostility? I think the discrepancy results from the distinction between an abstract view of the Bill of Rights and a specific one, between a conception of the Bill as enunciating some general precepts and the view that it actually guarantees particular freedoms in concrete current contexts. In short, many Americans support the Bill of Rights as an expression of disembodied ideals, but are suspicious of it as a charter for action. In the remainder of this article, I will outline three major aspects of the controversy surrounding the Bill of Rights in its actual application. By showing the misunderstandings that underlie wariness about enforcing the Bill of Rights, I hope to counter this attitude.

The first, most basic, element in the widespread misunderstanding of the Bill of Rights is straightforward ignorance. Public opinion polls consistently show that an alarmingly high percentage of the general population is simply not familiar with the Bill of Rights. When its provisions are read to them, not only do they not recognize the terms as being incorporated in the American Constitution, but, even worse, many assume that these terms come from a very un-American document, such as a Communist tract. For example, an editorial in the San Diego Union noted that in a recent public opinion poll,

> 59 per cent of Americans could not identify the Bill of Rights. Many pundits doubt whether the American people would even ratify those liberties if they were put to a vote today. In fact, some Americans would gladly dispense with many of the liberties contained in the Bill of Rights.

The broad public lack of understanding of the Bill of Rights generally also applies to specific Bill of Rights provisions. For example, to commemorate the 200th anniversary of the First Amendment, the American Society of Newspaper Editors commissioned a survey of public opinions about free speech. Virtually all respondents expressed a generalized belief in free speech, but substantial numbers "understood" free speech as not protecting expression concerning numerous controversial or sensitive subjects. In short, many respondents believed in the abstract idea of free speech but not in actually enforcing it.

For example, when asked if the press should be free to criticize political leaders, 22% said such criticism should never be protected and 41% said it should be only protected sometimes. As another

example, during the Persian Gulf War, 43% said that press opposition to the U.S. position and support for a foreign government's position should never be protected. Yet virtually all the respondents who did not think the First Amendment sheltered these critical views on central public policy issues — which the courts consistently have held to be at the core of First Amendment-protected speech — also described themselves as believing in free speech! Thus, when people say they believe in free speech, they are not referring to the concept of free speech enshrined in the First Amendment and consistently enforced by Supreme Court Justices with widely varying constitutional philosophies.

Even putting aside the fundamental problem that too many Americans are literally unfamiliar with the terms and meanings of the Bill of Rights, there is a second important aspect of the misunderstanding surrounding this document. Many people believe that the Bill of Rights should protect them — and people like them — but not others. This type of misunderstanding is often leveled at the ACLU's efforts to enforce the Bill of Rights. No one ever asks why we defend free speech in general. However, we frequently are asked why we defend free speech for a particular person or group. Why, people inquire, does the ACLU advocate the right to make particular nasty, offensive, wrongheaded, and repugnant statements? The answer is simple: because only those statements are the targets of censorship. Nice, correct, uncontroversial statements are almost never subject to censorship, and hence rarely require express invocations of the First Amendment. As we often explain, in an important sense our real client is not the particular speaker who utters the offensive words that prompt government attempts to stifle them. Rather, in essential respects, our actual client is the Bill of Rights itself, as well as all Americans, since they all benefit from a climate of freedom.

The foregoing ideas are often encapsulated in the notion of the "indivisibility" of rights. In other words, if freedom of speech is denied to any idea, any speaker, or any group, then it is not safe for any idea, any speaker, or any group. Once the government is given power to decide that a particular idea is too extreme or dangerous or offensive to deserve protection, then that power can be unleashed against any other idea.

Just as a decision that particular free speech is unprotected will constitute an adverse precedent, permitting the suppression of other speech, so too, a decision that certain speech is protected constitutes a positive precedent that will shelter other speech. What is viewed as extreme or dangerous or offensive varies enormously from time to time and from place to place. Therefore, a decision protecting speech that conveys a particular message can be used to shield speech that conveys a diametrically opposed message.

For example, in decisions issued during the 1930s and 1940s, the Supreme Court protected speech expressing racial bigotry by speakers whose views were abhorrent to many listeners. For example, in Terminiello v. Chicago, the Court protected attacks on racial and political groups that were well represented in the Chicago neighborhood where the speech occurred, thus profoundly upsetting and angering many listeners. In the 1960s, Terminiello and other similar cases were cited as precedents by judicial decisions that protected the free speech rights of Martin Luther King and other civil rights leaders, who conveyed their anti-bigotry messages in segregated Southern towns, thus profoundly upsetting and angering many listeners.

The Supreme Court repeatedly has reaffirmed the idea of the indivisibility of speech, most recently in the two decisions that upheld the right to burn the U.S. flag to express political protest, in 1989 and 1990. Significantly, those opinions were joined by Justices who spanned the Court's ideological range, from Justice Brennan at the liberal end to Justice Scalia at its conservative end. This unusual alliance underscores that support for a content-neutral enforcement of the Bill of Rights is not peculiar to any particular view of constitutional philosophy, but can fairly be described as inhering in the constitutional philosophy itself. Thus, the ideologically disparate Justices who joined in both rulings declared it "a bedrock principle" that speech may not be censored because of disagreement with or disapproval of the ideas it expresses.

Despite the fact that the Supreme Court so consistently has protected speech that audiences have found to be abhorrent or offensive, many members of the public — perhaps most — believe that some speech with which they disagree should be censored. Conversely, most people become advocates of free speech in the context of seeking to protect certain speech with which they agree. Recently, for example, free speech principles have been actively espoused by many conservatives who have not otherwise been notable free speech champions. Many conservatives view the "politically correct" or "PC" movement on university campuses as threatening the expression of conservative views. Therefore, in order to protect those expressions, they rely on free speech principles.

Perhaps the most prominent example of this phenomenon is President Bush. As described above, he repeatedly has criticized the reliance on free speech guarantees to protect the expression of political and religious dissidents. However, during a commencement address at the University of Michigan last spring, he strongly supported free speech guarantees to protect mainstream conservative views.

Another example is the arch-conservative Congressman Henry Hyde (Republican of Illinois), who was a supporter of the proposed constitutional amendment to prohibit flag burning as a political protest. However, this year, Congressman Hyde sponsored the Collegiate Speech Protection Act, which would have precisely the opposite effect: expanding the scope of the free speech clause, rather than narrowing it. This commendable Act, which the ACLU enthusiastically endorses, would extend free speech protection to students at private colleges and universities. In effect, it would make the First Amendment applicable to those students, although the Amendment itself is directly applicable only to students at state schools, because of the state action doctrine.

Consistent with the ACLU's non-partisan, non-political nature, I want to underscore that I do not single out only conservatives or Republicans to illustrate my point that people are more enthusiastic about protecting free speech for those who share their views. The point is a general one, and I could easily illustrate it through examples drawn from the ranks of liberals or Democrats too. For example, on the very day when I joined Congressman Hyde at a press conference to announce the ACLU's support of his Collegiate Speech Protection Act, I had a meeting with the liberal Democratic Senator, Ted Kennedy, in which Senator Kennedy questioned the ACLU's defense of a type of speech that he found problematical: tobacco advertising. Consistent with his goal of regulating the sale of tobacco products in order to promote public health, Senator Kennedy was considering limitations on the advertising of

such products. The ACLU, in contrast, views such advertising as protected commercial speech, which can be subject only to narrowly drawn regulations.

In using President Bush, Congressman Hyde, and Senator Kennedy to illustrate my point, I must emphasize that they are simply prominent examples of a general — if not universal — attitude. This attitude was vividly captured by the Executive Director of the National Coalition Against Censorship, Leanne Katz, when she said, "Everyone has his or her Skokie." She was referring, of course, to the widely publicized case in the late 1970s, in which the ACLU defended — and the courts upheld — the right of a neo-Nazi group to stage a peaceful demonstration in Skokie, Illinois, a community with many Jews and many Holocaust survivors.

What Ms. Katz meant was that everyone regards one type of speech as uniquely abhorrent, one message as so supremely obnoxious that it should be banned, even though other speech should be protected. In other words, everyone would like to make "just one" exception to the First Amendment. The problem, though, is that for each individual, it may well be a different exception. For example, many of the Holocaust survivors in Skokie would censor anti-Semitic speech; Jesse Helms and many fundamentalist religious leaders would censor immoral speech; George Bush and many other elected government officials would censor flag burning; some feminists would censor sexually explicit speech that is degrading to women; some minority group representatives would censor racist speech.

The foregoing litany should underscore the necessity of the indivisibility principle. For, once we allow speech to be regulated on the ground that there is substantial opposition to the idea it conveys, there is no limiting principle to prevent the aggregated exceptions from swallowing the rule. As Thomas Paine said: "He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach to himself."

I should like to turn now to a third aspect of the controversy and misunderstanding that unfortunately surround the Bill of Rights. Even if people believe that the Bill of Rights generally should be neutrally enforced, including to protect the rights of those with whom they disagree, many believe that we should make exceptions to those rights in light of changes in societal conditions since they were adopted 200 years ago. They argue that society is more complex and dangerous now, and that we face new threats to individual and national security which render Bill of Rights freedoms unaffordable luxuries.

I find it ironic that many people who advance this argument are self-described conservatives who generally take pride in abiding by the Constitution's plain language and original intent. What they are advocating through this argument is a departure not only from the terms of the Bill of Rights, but also from its intent and the circumstances giving rise to it.

The individuals who framed and ratified the Bill of Rights had recently participated in the violent revolution that gave birth to our nation. Moreover, during the very period when the Bill of Rights was proposed, debated, and adopted, our then-new nation was facing serious threats to its ongoing stability. Many members of the founding generation believed that the young, fragile nation's very survival was in jeopardy, both from internal difficulties and strife — including some armed insurrections — and from external assaults. American ships were being fired upon on the high seas, and our land was being attacked from across the Canadian border. Indeed, it was precisely their expressed fear for the nation's survival that led the federalists to call the constitutional convention in Philadelphia in 1787, and ultimately to their proposed Constitution.

Despite the fact that, in 1787-91, national and individual security were at least as severely beleaguered as they were at any subsequent time in American history, the Bill of Rights was then added to the Constitution. Indeed, for many members of the founding generation, the addition of the Bill of Rights was a prerequisite for ratifying the Constitution.

Even those who opposed the initial inclusion of the Bill of Rights in the original Constitution did so not because they did not support libertarian guarantees of the Bill of Rights, but because they believed it was unnecessary to set these forth expressly. They believed that, even under the unamended original Constitution, the government would not be able to deprive individuals of the various freedoms enunciated in the Bill of Rights. That conclusion rested on the fact that the Constitution created a government of limited powers only — namely, those powers that the Constitution specifically enumerated — and the enumerated powers did not include powers to deprive individuals of rights. This argument has substantial force; perhaps the Bill of Rights would not have been necessary as a bulwark against governmental infringement on freedom. Nevertheless, significantly, the founding generation chose to err on the side of caution to ensure that the new government would not infringe on individual rights. Thus, promptly after the original Constitution was ratified, they added the express prohibitions on governmental infringements of liberty that are contained in the Bill of Rights. In light of this history, it is clear that the original intent of those who incorporated the Bill of Rights into our Constitution would not have permitted limitations on freedom in order to preserve security. To the contrary, even in their perilous era, the framers and ratifiers still bent over backwards to make clear beyond peradventure that order and security could not be achieved at the expense of liberty. Rather, consistent with the Enlightenment philosophy that inspired them, they viewed the very *raison d'etre* of organized society and government as the protection of freedom. As Thomas Jefferson wrote to James Madison: "A society that will trade a little liberty for a little order will deserve neither and will lose both."

How different that eloquent statement is from today's rhetoric about the relative importance of liberty and order! Sadly, public opinion surveys reveal that many members of the public would willingly sacrifice their own freedom — not to mention that of others, such as individuals accused or convicted of crime — in order to address such pressing societal problems as crime and drug abuse. More troublingly, government officials also make, and in some cases enforce, similarly inverted views about the hierarchy between order and liberty.

A particularly shocking example of the latter attitude was described in a recent news article in the Chicago Tribune. It reported that the Chicago Police Superintendent, who heads this nation's second largest police department, had advocated policies infringing on basic liberties in order to combat crime. Far from honoring the language or intent of our ancestors who ratified the Bill of Rights, Superintendent Martin acknowledged that his role models came from totalitarian societies: a Communist dictatorship and a fascist

dictatorship. The news story provided the following account:

> Chicago Police Supt. LeRoy Martin has returned from China with a modest proposal for the war on crime: the suspension of certain constitutional rights and emulation of the Chinese prison system.
>
> "The sanitary facilities are a bucket. The prisoners are given a bowl of rice and a Thermos bottle of tea. And then they're locked down," said Martin of his recent tour of Chinese prisons. "I know we're a democracy, but you know, I don't think everything the Communists do can't be copied;...And I think there are some things they do that are better than what we do."
>
> While visiting China, Martin said, he found much to admire about the country's handling of criminals. He noted that drug dealers were sentenced to execution by firing squad....
>
> [T]he police superintendent said he believed his views reflected popular sentiment...."[A] lot of people would be in favor of the kind of things that I am talking about," he said.
>
> Reminded that Adolf Hitler's ideas were also popular in Nazi Germany, the superintendent replied: "And they had a very low crime rate then."

Even though I have read that last statement several times, it still sends a shudder down my spine every time I see it. I think that Jefferson, Madison, and the other Founders of this great nation would turn over in their graves if they heard this statement from an important government official, whose specific responsibility is to maintain law and order consistent with the Bill of Rights. This statement embodies such a dramatic departure from the ideals for which they and others of their generation risked their lives.

Sad as it is, perhaps it is not surprising that executive officials such as police chiefs would view the Bill of Rights as an expendable superfluity when enforcing it makes it more difficult or inconvenient to achieve their administrative objectives. Even more distressing is that this same view is widely shared among the very branch of the federal government that was intended to be the ultimate guardian of the Bill of Rights, the judiciary. The Constitution provided that federal judges would have life-time tenure precisely to afford them shelter from the political pressures and day-to-day efficiency concerns that influence the decisions of executive and legislative officials.

The courts' willingness to sacrifice constitutional rights in the hope of combatting a perceived societal problem is best illustrated, currently, by the "War on Drugs." Many constitutional scholars believe that this campaign would be more aptly titled the "War on the Bill of Rights." In effect, they note, the courts have created a "drug exception" to many otherwise applicable Bill of Rights guarantees.

This strategy is not only unprincipled, but it is also ineffective. Despite the sacrifice of many constitutional protections, the drug problem continues to be viewed as a major national crisis. Even Justice Scalia, a conservative who generally defers to law enforcement concerns and to the elected branches of government, has harshly condemned the Supreme Court's willingness to compromise constitutional values for the sake of ineffectual gestures to counter the drug problem. In one case, dissenting from the majority's upholding of warrantless, suspicionless, random drug tests, notwithstanding the Fourth Amendment's plain warrant and probable cause requirements, Justice Scalia excoriated the resulting "immolation of privacy and human dignity in symbolic opposition to drug use." Tragically, Thomas Jefferson's observation to James Madison, which I quoted above, has proven prophetic. Because it is so powerful and so apt, I should like to repeat it: "A society that would trade a little liberty for a little order will deserve neither and will lose both."

Notwithstanding the misunderstood and controversial nature of the Bill of Rights two centuries after its adoption, I do not think that those of us who champion it should be discouraged. We should recognize that such misunderstanding and controversy probably are inevitably associated with the document, given its countermajoritarian nature. The framers recognized that, despite the democratic virtues of a representative government elected by popular majorities, such a government could deprive individuals and minority groups of rights just as much as an unelected, unrepresentative government. Therefore, the Bill of Rights was designed to protect against what James Madison labeled the "tyranny of the majority." By definition, then, the Bill of Rights will be invoked to protect rights that have been infringed by governmental actions that are deemed to be in the majority's best interests. Accordingly, an individual's or minority group's reliance on the Bill of Rights to overturn the majoritarian preference will probably provoke the community's disfavor.

Although defenders of the Bill of Rights may be destined to be in a minority, they should derive comfort from the fact that they are following a noble, and supremely patriotic, tradition. Let me repeat Thomas Jefferson's important words on this point: "Dissent is the highest form of patriotism." Enforcers of the Bill of Rights should draw inspiration from the fact that they are helping to maintain the vitality of freedoms for which our ancestors put their lives on the line two hundred years ago, and for which people all over the world are risking their lives today.

The Bill of Rights embodies the unsuppressible, powerful idea of freedom, which is kept alive through speech and thought. In closing, I will quote one of my favorite expressions of passionate commitment to this ideal. It was written by E.B. White in an essay entitled, appropriately, "Freedom", first published in Harper's Magazine in July 1940, before the U.S. had entered the war against Nazism and during the period of the Nazi-Soviet pact, when both the right and the left in the U.S. chose to ignore totalitarian threats to democracy. Although White was saddened that so many of his contemporaries seemed to have lost their zeal for freedom, he maintained his own enthusiastic commitment, as well as his faith that such zeal would always be kept alive and passed on through the power of free speech and press.

For those of us who believe that the Bill of Rights is being honored in the breach during its Bicentennial year, when it should be celebrated and reaffirmed, White's impassioned words provide consolatory historical perspective. He wrote:

> I have often noticed on my trips up to the city that people have recut their clothes to follow the fashion. On my last trip, however, it seemed to me that people had remodeled their ideas too — taken in their convictions a little at the waist, shortened the sleeves of their resolve, and fitted themselves out in a new intellectual ensemble copied from a smart design out of the very latest page of history....
>
> ....I feel sick when I find anyone adjusting his mind to the new tyranny which is succeeding abroad....I

resent the patronizing air of persons who find in my plain belief in freedom a sign of immaturity. If it is boyish to believe that a human being should live free, then I'll gladly arrest my development and let the rest of the world grow up.

....

I believe in freedom with the same burning delight, the same faith, the same intense abandon which attended its birth on this continent more than a century and a half ago

....

[T]he free spirit of man is persistent in nature; it recurs, and has never successfully been wiped out....I am inordinately proud these days of the quill, for it has shown itself, historically, to be the hypodermic which inoculates men and keeps the germ of freedom always in circulation, so that there are individuals in every time in every land who are the carriers, the Typhoid Marys, capable of infecting others by mere contact and example.

I hope that I have infected some readers of this article with my own passionate enthusiasm for freedom, and for that great American contribution to freedom, the Bill of Rights.

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Photograph by Tom Tyburski

RODMAN WARD JR. & CHRISTOPHER A. COONS

Federalism and the Delaware Bill of Rights

The Changing Position of the State Bill of Rights

Delaware was the first State to prohibit ex post facto laws and inspired federal provisions prohibiting the quartering soldiers in private homes.

Delaware's first bill of rights, called the "Declaration of Rights and Fundamental Rules of the Delaware State," was enacted on September 11, 1776, and fifteen years before the adoption of the first ten amendments to the Constitution now commonly known as the "Bill of Rights." The Delaware Declaration set forth such fundamental rights of Delaware citizens as freedom of religion and press, trial by jury, the rights to petition and counsel and the prohibition of compulsory self-incrimination. Among other provisions, the Declaration affirmed and defined the nature of popular government, stated generally the role of the legislature and affirmed the independence of the judiciary.

For more than half of our national history the federal Bill of Rights was not interpreted to protect citizens from improper actions by the states. In 1833, the U.S. Supreme Court in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) specifically so held. Even after the adoption of the Fourteenth Amendment in 1868 with its all important due process clause, the U.S. Supreme Court repeatedly held that the Amendment did not serve to apply the various specific restraints of the Bill of Rights to the states. For more than a century of our history as an independent nation, therefore, the Delaware Declaration of Rights and its successors served the citizens of Delaware as their sole constitutional limitation on abuses of state power.

In spite of this long history of federal abstention, most living Americans now see the federal Constitution and the federal courts as their chief guarantors of individual liberties and civil rights against oppression by state and local governments. In fact, they hardly know that their state bills of rights exist. Recent developments suggest that these views may be in need of revision.

Before we get to the recent resurgence of the state bills of rights including Delaware's, we should examine the reasons why they went into eclipse in the first place. The development that caused federal protection to grow and state constitutions to atrophy was a change of heart by the U.S. Supreme Court, which led to the application of the protections in the federal Bill of Rights to the acts of the states. The mechanism the Court used was the judicial incorporation into the due process clause of many of the rights guaranteed in the first eight amendments. The first instance of such incorporation occurred in 1897, when the U.S. Supreme Court, in Chicago B. & Q.R.R. v. Chicago 166 U.S. 226 (1897) held that the prohibition against taking private property for public use without just compensation applied to state action through the Fourteenth Amendment. Incorporation of the other restraints in the Bill of Rights was relatively slow in coming. Not until 1925, in Gitlow v. New York, 268 U.S. 652 (1926) did the Court hint in dictum that the due process clause might extend the protections of the First Amendment to the states.

Thereafter, over the next twenty five years, the Court selectively incorporated in the due process clause those rights guaranteed by the first eight amendments. The protections of the First and Fourth Amendments were applied to

the states in the 1920's, 1930's and 1940's. In the 1960's, the activist Warren Court greatly expanded federal guarantees of the rights of criminal defendants through the incorporation of nine different provisions. As these decisions built up, state courts began to look to U.S. Supreme Court decisions to interpret their own state constitutions. This process was not difficult since, for historical reasons we shall review in a moment, the working of most state bills of rights is very similar to their corresponding federal provisions. Even where textual differences existed, however, many state courts followed federal precedent.

Until recently the Delaware Supreme Court appeared willing to follow federal constitutional precedent. In several cases, the Delaware Court declared that its interpretation of the Delaware Constitution would mirror the jurisprudence of the U.S. Supreme Court. In Thomas v. State Del. Supr., 231 A2d 147 (1975), for example, the court held "the majority of states follow the guidelines of the United States Supreme Court in interpreting their respective state constitutional provisions regarding right to trial by jury in contempt proceedings. We agree with the majority ...." In Rickards v. State Del. Supr., 77 A2d 199 (1950), the Court held the prohibitions against compulsory self-incrimination in the Delaware and U.S. Constitutions are "substantially the same," and applied federal precedent to interpret both provisions.

Nationally, the tide began to turn away from following federal precedent in the late 1970's. A rising interest in federalism and concerns over the more conservative bent of the Burger Court sparked revival of interest in the independent force of state constitutions. Several state courts wrote opinions differing from the Supreme Court in their conclusions, even where the words used in state and federal constitutional provisions were identical. The reasons given for this resurgence of independent state decision-making varied widely. Some courts sought to preserve the activist agenda of the Warren Court through expansive state court decisions, and some to protect rights not reached by the federal Constitution. Others argued that state constitutional jurisprudence can experiment with new standards and approaches in difficult areas of the law and thus contribute to both state and federal constitutional law. Finally, many argued that history and respect for the traditions of federalism require state courts to affirm the independent value of their own constitutions.

Bryan, Sanders and Claudio Reassert the Independent Significance of the Delaware Bill of Rights

Three important recent Delaware Supreme Court decisions have allied Delaware with the national trend toward recognizing the independent significance of the state bills of rights. In light of these decisions, we believe that it is important to review the standards now being applied by the Delaware Supreme Court and, thereafter, to review the history and language of the Delaware Declaration of Rights.

Delaware was one of the first states to adopt a Bill of Rights just two months after the Declaration of Independence.

Bryan v. State Del. Supr., 571 A2d 170 (1990), the first of the three Delaware cases, related to a suspect's right to counsel. In Bryan, the Delaware Court not only disagreed with a federal constitutional interpretation but also with a Maryland Court of Appeals ruling, which, in interpreting Maryland's virtually identical state provision on right to counsel, had come to the same result as the U.S. Supreme Court. We shall discuss the significance of Bryan in greater detail below.

In Sanders v. State, Del. Supr., 585 A2d 117 (1990), the Delaware Supreme Court held that neither the federal Eighth Amendment nor the Delaware Constitution prohibited the execution of a defendant found "guilty but mentally ill" on a charge of first-degree murder. In reaching the same conclusion under both Constitutions, however, the Court openly criticized the U.s. Supreme Court's method of analyzing whether a practice which has been widely rejected by the states, becomes, by contemporary standards, "cruel and unusual punishment." The Delaware Supreme Court questioned the U.S. Supreme Court's "opaque" reasoning the "cramped analytical framework," and criticized the Court's willingness to abandon the proportionality standard that requires capital punishment be proportional to the crime. The Delaware Court also commented on the difficulty of discerning meaningful precedents where the U.S. Supreme Court is divided and plurality decisions are inconclusive.

In Sanders, the Delaware Court rejected "[t]he State's argument that state constitutional interpretation should slavishly follow federal law. . ." The Court stated "[i]f we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty. In a very real sense, Delaware would become less of a State than its sister States who recognize the independent significance of their Constitutions."

While recognizing that Delaware's constitutional language prohibiting "cruel punishments" is "essentially identical" to the federal Eighth Amendment, the Delaware Court looked to four sources to interpret Delaware's constitutional provision: First, the state's popularly enacted legislation; second, other objective evidence of the state's standards of decency; third, the persuasive reasoning of other state and federal courts; fourth, discernible patterns in the evolution of Delaware's laws.

Unlike the U.S. Supreme Court, the Delaware Court need not be influenced by concerns of federalism and thus can focus on Delaware history and local concerns. More particularly, the Court considered the history of the insanity defense in Delaware and the General Assembly's action in establishing a potential verdict of "guilty but mentally ill." In reviewing Delaware's legislative and legal history regarding insanity, the Court specifically pointed to the value of experimentation by the states with varying standards in difficult areas of the law. The Court concluded that the Delaware Constitution permitted the execution of Sanders but affirmed the independent force of the proportionality standard as an element of Delaware's constitutional prohibition against cruel punishment.

In Claudio v. State,Del. Supr., 585 A2d 1278 (1991), the Delaware Supreme Court considered the federal right to trial by jury and the comparable provision in the Delaware Constitution. The Court concluded that differences in his-

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tory and phraseology between the provisions created "a significant substantive difference in that historic right, as it has been preserved for Delaware's citizens." The Delaware Constitution guarantees the right to trial by jury as it existed at common law, while the federal Congress altered that right as finally expressed in the Bill of Rights. In reaching its result, the Delaware Court reviewed the history of the adoption and provisions of the Delaware Declaration of Rights and the Constitutions of 1776 and 1791.

We now return to Bryan v. State. By comparing the differing approaches of the Maryland and Delaware Courts in the right to counsel cases, exemplified in Delaware in the Bryan case, we see more clearly the context of the recent Delaware decisions. Maryland, unlike Delaware, continues to follow U.S. Supreme Court decisions, even where the Maryland court disagrees with the federal Supreme Court's reasoning. The Maryland Court of appeals recognizes that provisions of the Maryland Declaration of Rights are "independent and separate" from the federal Bill of Rights and "capable of divergent effect". But in recent key cases involving right to counsel, search and seizure and peremptory challenges, Maryland continues to follow federal decisions. The Delaware Supreme Court, as we have seen, takes a different view.

The Maryland decision in Lodowski v. State 490 A2d 1228 (Md. 1985) illustrates this divergence. In Lodowski, a murder suspect in police custody waived his right to counsel and confessed to a crime, unaware that the police were delaying lawyers, retained by his mother, who were present in the police station demanding to see their client. A unanimous Maryland Court of Appeals ruled the trial judge erred in refusing to suppress the confession, holding that a valid waiver of counsel requires the defendant be fully informed of the actual availability of counsel. In reaching its decision, the Maryland Court cited extensively an earlier Delaware case, Weber v. State, that reached the same conclusion.

Soon after, the Supreme Court in Moran v. Burbine, 475 U.S. 412 (1986) reached the opposite conclusion and vacated the Lodowski judgment, remanding it for reconsideration. On remand, the Maryland court stated that it did not find the reasoning behind Burbine persuasive but deferred to the decision of the U.S. Supreme Court, and unanimously rejected arguments that the police conduct violated the Maryland Constitution. The court wrote:

> It is true that similar provisions within the Maryland and United States Constitutions are independent and separate from each other. Generally, however, comparable provisions of the two constitutions are deemed to be in pari materia... [T]he concern with self-incrimination, assistance of counsel and due process of law was shared by those who framed the Federal Constitution and those who framed the Maryland Constitution. This concern on the part of the drafters of each constitution was implanted in the same climate and nurtured by the same hopes and fears... We cannot say, in the frame of reference here, that the Federal provisions and the State provisions are to be construed and applied differently. 513 A2d at 306

The Delaware Bill of Rights, which has been consistently endorsed by four popularly constituted constitutional conventions, quite clearly deserves great deference from the courts.

In the Bryan case, as we have seen, the Delaware Supreme Court expressly held that police action blocking contact with a client is "thoroughly incompatible with fundamental principles of the Delaware Constitution," The Delaware Court thus affirmed its earlier holding in Weber v. State, and insulated its holding from Supreme Court review by expressly stating that its holding rested "on independent state grounds." Under the long-standing doctrine of "independent and adequate state grounds," the U.S. Supreme Court will not review any state court decision that rests on state statutory or constitutional law, even when federal issues are present, unless the decision violates minimum protections guaranteed by the U.S. Constitution.

The differing results in Delaware and Maryland are even more striking because all of the relevant state and federal constitutional provisions are nearly identical, and Delaware courts "[had] not in the past construed Art. I, 7 of the Delaware Constitution as affording defendants greater rights than the federal constitution." In fact, the Delaware and Maryland "declarations of rights" were drafted within weeks of each other in 1776 and, except for three provisions, are nearly identical. To understand this difference in interpretation we must look to judicial attitudes toward federalism.

In disagreeing with the U.S. Supreme Court's constitutional interpretations, the Delaware Court acted in accordance with accepted norms of constitutional law. The Burbine opinion, itself, expressly recognized that state courts could interpret state constitutions to provide broader protections than the United States Constitution. The high courts of several states, including California, Connecticut, Louisiana, and Texas, have followed this path and, on independent state grounds, have reached conclusions similar to Delaware's. The Supreme Court of California, for example, cited several state cases, including Weber, in rejecting Burbine and discussed its view of federalism and Supreme Court precedent:

> It is settled beyond debate, of course, that our state Constitution is 'a document of independent force'; unless a contrary intent is apparent, its guarantees 'are not dependent on those [provided] by the United States Constitution.'
>
> We sit as a court of last resort on the meaning of California's Declaration of Rights. Our decisions cannot limit federal guarantees, but restrictive federal interpretations of the United States Constitution do not preclude a finding that the Constitution of our state accords its citizens greater individual rights. Indeed, in the federal system, state charters offer important local protection against the ebbs and flows of federal constitutional interpretation.
>
> We do not depart lightly from clear United States Supreme Court rulings. The high court's decisions defining fundamental

> rights and liberties are entitled to 'respectful consideration.' But they are to be followed in California, 'only where they provide no less individual protection than is guaranteed by California law.' In appropriate cases, we have forthrightly rejected adherence to U.S. Supreme Court precedent ... even where it was necessary to overrule our own prior decision adopting the federal rule." 724 P.2d 1166, 1174 (Cal. 1986)

California thus declared its belief that the structure of federalism empowers and even requires its courts to interpret state constitutional guarantees independently of U.S. Supreme Court precedent.

On the other hand, some courts and commentators have argued that the importance of uniformity in constitutional law requires state courts to defer to the federal Court unless distinctive state factors, such as the language or history of the state constitution, clearly supports a conclusion different from that reached by the U.S. Supreme Court.

The Background and Development of Delaware's Bill of Rights

In light of the Delaware Supreme Court's emphasis on historical development, a short diversion to review the origin and context of Delaware's Declaration of Rights is in order.

Delaware was one of the first states to adopt a constitution and bill of rights. On August 27, 1776, just two months after the Declaration of Independence was signed in Philadelphia, ten delegates from each of the three Delaware counties met in New Castle to adopt a "Declaration of Rights and Fundamental Rules of the Delaware State." The delegates certainly had before them a final copy of the Pennsylvania Declaration of Rights, adopted August 16, and may have had access to a first draft of a proposed Maryland declaration. Both the Maryland and Pennsylvania declarations relied heavily on the declaration of rights drafted by George Mason and adopted by Virginia the previous June.

The former colonies did not operate in separate sealed compartments. Many early state constitutional conventions exchanged ideas and even entire draft constitutions. The celebrated colonial statesman, John Dickinson, played a key role in sharing ideas between Pennsylvania and Delaware. Dickinson served as a delegate to the Continental Congress from Pennsylvania during 1774-1776, and from Delaware, in 1779. In 1791 he served as chairman of the Delaware Constitutional Convention.

The governing documents produced by the states reflect this colonial "cross-fertilization." One of the few scholarly considerations of the Delaware Bill of Rights has commented on the "striking similarity" between the final versions of the Delaware, Maryland, and Pennsylvania bills.

Reaching back further: all of the American bills of rights had important common precedents in the Magna Carta and the English Bill of Rights. More recent models were found in the Declaration of Rights issued by the Stamp Act Congress in 1765 and the Declaration of the Continental Congress of 1774. These latter two declarations and the state declarations of rights expounded the views on the natural rights of man and the fundamental principles of government that prevailed in the revolutionary period. These views became the "platform on which the Revolution was fought."

Not all states have come to the independent construction of their bills of rights now followed in Delaware.

Contemporaneously with the Declaration of Independence, most of the colonies called special popularly chosen constitutional conventions. The resulting state constitutions and declarations of rights were seen as expressions of the popular will. Several state conventions, including those of Delaware, Maryland, Virginia, and North Carolina, debated and passed their bills of rights before considering their state constitutions. The delegates viewed the securing of individual liberties as their first goal and had broad philosophical agreement as to what those liberties were. Delegates to the Delaware Constitutional Convention took an oath to "endeavor to form such a system of government for the people of this state as in my opinion may be best adapted to promote their happiness and secure to them the enjoyment of their natural, civil and religious rights and privileges."

The text of the Delaware Declaration, itself, attests to this purpose. The first section states that it was meant to embody the universal principles of government: "That all government of right originates from the people, is founded in compact only and instituted solely for the good of the whole."

In 1775-1776, the Continental Congress debated drafting a uniform constitution for the new states, and, as we point out above, many state constitutions contain similar provisions and reflect the exchange of common ideas among the colonies. Yet, in the end, each of the colonies represented in the Continental Congress determined to adopt its own form of government separately under local direction. As royal authority collapsed, the Continental Congress sent out advice to the colonies on how to initiate local governments. Maryland, for example, rejected the uniform plan idea and conditioned its authority to its representatives to vote for independence by the resolution that "the people of this province have the sole and exclusive right of regulating the internal government and police of the province." Soon thereafter, a nearly identical clause appeared in the Delaware Declaration of Rights.

Delaware's Declaration of Rights made original contributions to the national constitutional form. Delaware was the first state to prohibit ex post facto laws and inspired federal provisions prohibiting the quartering of soldiers in private homes. Delaware's Declaration also contained some provisions not included in the later federal Bill of Rights and lacked others. For example, unlike the Pennsylvania Declaration, the Delaware Declaration limited its guarantee of religious tolerance, of "equal rights and privileges," to Christians, and lacked a provision expressly guaranteeing freedom of speech.

The first revision of the Delaware Constitution of 1776 occurred in 1792. At the time, the elected constitutional convention condensed, rewrote, and added several provisions to the 23 articles of the 1776 Declaration of Rights, but kept most of the original wording and content. The revised Declaration of Rights was made the preamble and first article of the new constitution.

One interesting alteration made in 1792, unusual for the time, was the addition of a clause to the earlier section 16 "Excessive bail shall not be required,

nor excessive fines imposed, nor cruel punishment inflicted," the phrase "and in the construction of gaols, a proper regard shall be had for the health of the prisoners." In 1831 and 1897, two more state constitutional conventions occurred. Delaware's constitutional history reflects the ease with which state constitutions have been revised and amended. Any expression, like the Delaware Bill of Rights, which has been consistently endorsed by four popularly constituted constitutional conventions quite clearly deserves great deference from the courts.

Some Exceptions to the Trend

As we have seen in the case of Maryland, not all states have come to the independent construction of their bills of rights now followed in Delaware. As the U.S. Supreme Court has moved recently to cut back the expansive protections established under its more liberal predecessors, especially in criminal procedure, several states have hewed close to the federal line. In Texas, for example, the Texas Court of Criminal Appeals in 1983 declared its intention to follow the Supreme Court's Fourth Amendment jurisprudence in interpreting criminal procedural protections under the Texas Constitution. Brown v. State 657 S.W. 2d 797, 798. The issue discussed in the present article did not go unnoticed, however. The judges who concurred criticized the plurality opinion for its "dangerous abdication of judicial duties," and the dissent lampooned the plurality's "implicit holding that the members of this Court now have the role of being nothing more than mimicking court jesters of the Supreme Court of the United States."

In some states, express popular will has led to state conformity to federal decisions. Florida, in 1982, by popular vote, adopted an amendment to the state constitution to require the Florida Supreme Court to follow the United States Supreme Court's Fourth Amendment jurisprudence in interpreting their own criminal procedural guarantees. Apparently, the voters were displeased with the state Court's broad interpretation of the exclusionary rule and sought to discipline its perceived liberal leanings. California, by referendum, adopted a similar measure in 1984 that limited the state exclusionary rule to the boundaries set by the federal Supreme Court. A far broader proposal, requiring California courts to afford no greater rights to criminal defendants than grant-

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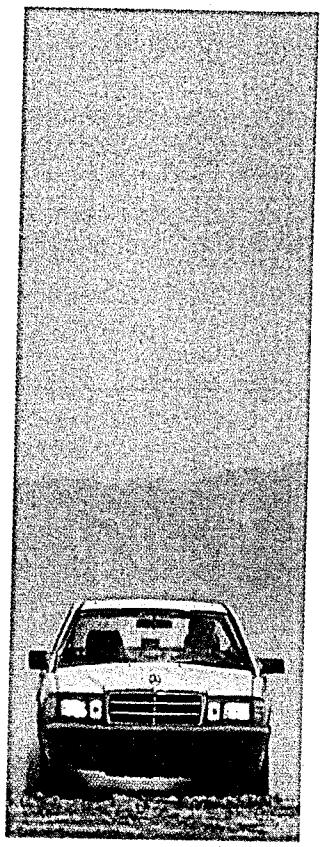

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ed under federal Court decisions, passed as a referendum in 1990. The California Supreme Court, however, invalidated the proposed constitutional amendment because it amounted to a fundamental constitutional revision which could only be accomplished by a new constitutional convention. A similar amendment to the Delaware Constitution was proposed last year by the State's Attorney General but it received institutional opposition from the state bar association and very little support in the General Assembly.

A diversity of views between states is frequently useful. It is widely argued that state constitutions and state judiciaries are excellent laboratories of the law. Justice Brandeis declared it to be "one of the happy incidents of the federal system that a single courageous state may, if its citizens so choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) Other reasons exist for diverse results between state and federal provisions. Some state judiciaries (although not in Delaware) are elected, and thus are seen to be more responsive to the public will; state constitutions are far easier to amend and state constitutional conventions more frequent. On the other hand, some have criticized this closeness to the popular will that makes state constitutional jurisprudence more susceptible to the whims of current causes or the concerns of special interests.

When faced with the alternatives either of independent determination of state constitutional questions or subservience to analogous federal decisions, the Delaware Supreme Court has now made quite clear its determination to assert its sovereign power to interpret independently its own constitution. The Delaware Court opinions express a respect for federal precedent if it is persuasive, but reserve the right to disagree with the U.S. Supreme Court's reasoning and results if they are confusing, inappropriate to local conditions, inconsistent with Delaware jurisprudence, or simply incorrect. It is hard to disagree. In so acting, the Delaware Court not only gives substance to the distinct history of state bills of rights generally and Delaware's bill of rights in particular, but also acts in accordance with the traditional concept of federalism as a contractual union of distinct sovereign states.

Constraints of space make it impossible to include the authors' extensive footnotes. The full footnotes will be made available upon request to the offices of this magazine.

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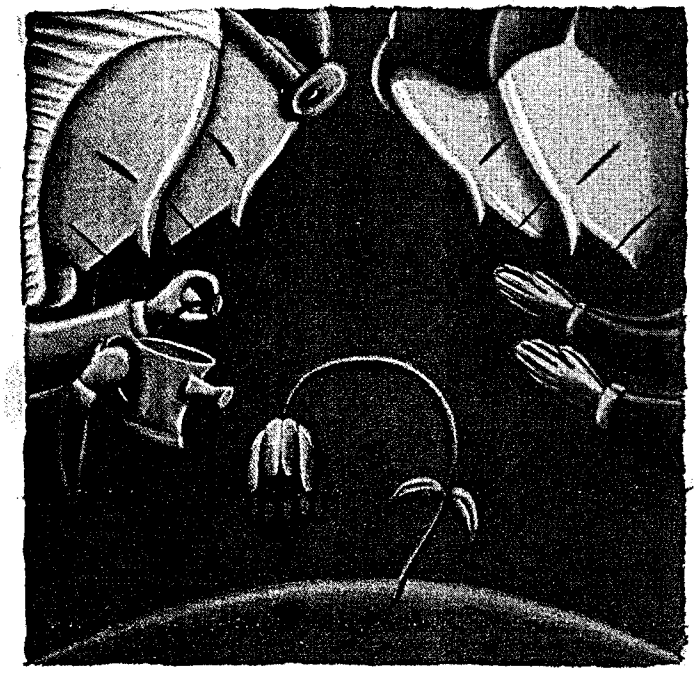
"The authors wish to express appreciation to Mark D. Collins, Esquire for substantial original research on which this article is based."

THE HONORABLE ANDREW G. T. MOORE, II

The Bill of Rights and the Freedom of Religion

A Hard Lesson Learned: *Newmark v. Williams*, Del Supr., 588 A.2d 1108 (1991)



The First Amendment guarantee a religious freedom is a complex and delicate right.

To many Americans, the Bill of Rights is only an abstraction. Understanding and appreciating the hard won freedoms that our Constitution guarantees against intrusive state action is not always easy. Of course, when the nation emerges from a foreign conflict like Operation Desert Storm, or when the President selects the latest United States Supreme Court nominee, we temporarily concern ourselves with our proud and rich constitutional heritage. But once these distractions fade from the national consciousness, we tend to become content, going about our daily lives with little thought about that old, faded document, which Delaware ratified over two hundred years ago.

Some people have a laissez-faire attitude toward the Constitution and the Bill of Rights. They just take them for granted. We expect government to leave us alone in the pursuit of our basic liberties. Generally, people do not concern themselves with the intricacies of constitutional jurisprudence, unless that is their usual business.

Our collective attitude toward the First Amendment guarantee of freedom of religion is a good example of this nation's seeming complacency. Surely, few people in this country routinely stop to consider their good fortune as they practice a rich diversity of religious beliefs free from state interference. One only has to look back at the restrictions our military was forced to impose on the soldiers fighting in the Arabian desert, prohibiting them from a public display of "offensive" religious symbols, to understand our unique position in the world.

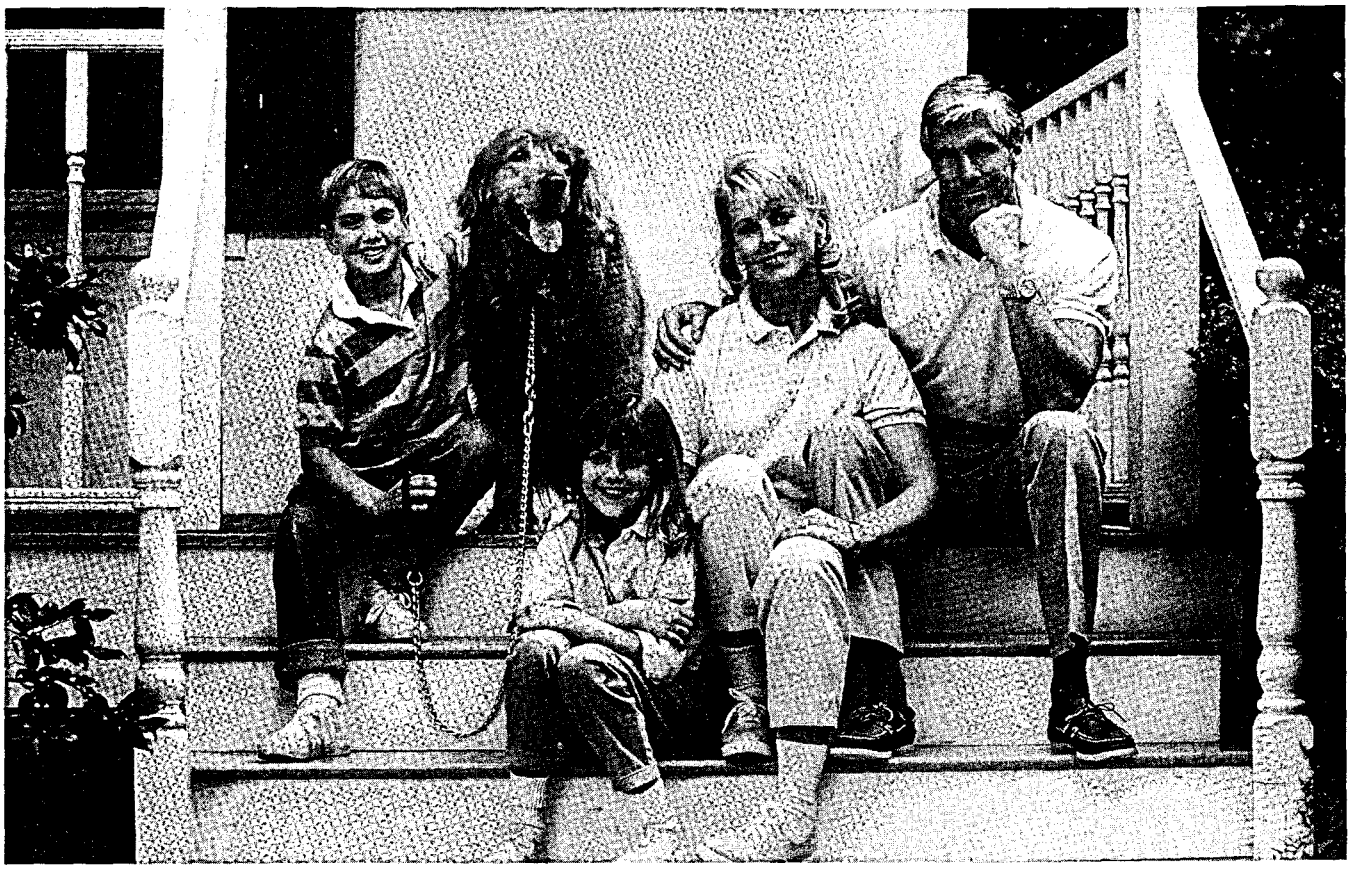
We simply to not think about our religious freedom until something goes wrong. As both a lawyer and judge, I am keenly aware of, but not immune to, this trend. While the Supreme Court of Delaware enjoys broad jurisdiction and often considers a wide variety of cases and issues, usually we are not confronted with cases implicating the religion clauses of the First Amendment. On the morning of September 14, 1990, however, all of that changed, and I was forced to confront one of the most emotionally and intellectually difficult cases of my entire legal career.

A.

Colin Newmark[1] was a three year old child suffering from Burkitt's Lymphoma, an aggressive and deadly form of pediatric cancer.[2] Colin's parents, both well educated and affluent, were members of the First Church of Christ, Scientist ("Christian Science").[3] Christian Scientists reject conventional medical care and instead treat most diseases with a regimen of prayer.

During the late summer of 1990, the Newmarks noticed that Colin had lost his appetite and had begun to experience prolonged periods of nausea and vomiting.[4] The Newmarks were reluctant to take their son to a medical doctor. Nonetheless, aware of cases from other jurisdictions holding parents criminally liable for the death of children treated with

Illustration by Dan Yaccarino



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spiritual healing alone, the Newmarks brought Colin to the Alfred I. duPont Institute, a renowned children's hospital.[5] A preliminary physical examination provided an inconclusive diagnosis and the Newmarks took Colin home. For the next week, the Newmarks entrusted Colin's care to a Christian Science practitioner.[6] When his symptoms failed to subside, they returned him to the hospital. After another examination and X-ray, the doctors discovered an obstruction in Colin's bowel.[7] A surgical operation removed the blockage.

A pathological examination of Colin's tissue samples confirmed the worst.[8] He was suffering from non-Hodgkins Lymphoma.[9] An attending specialist in pediatric cancers opined that Colin had a 40% chance of "survival" if he immediately underwent an extensive regimen of painful and invasive chemotherapy.[10]

The Newmarks, in conformity with their Christian Science beliefs, rejected chemotherapy treatments for their son, choosing instead to treat him under the care of a Christian Science practitioner.[11] The Delaware Division of Child Protective Services ("DCPS") learned of Colin's situation, and filed a petition in the Family Court seeking temporary custody of the child to force administration of the chemotherapy treatments.

The DCPS claimed that Colin was a neglected child because his parents refused to permit the chemotherapy treatments. The Newmarks maintained that their decision to entrust Colin to the care of a Christian Science practitioner was authorized by two Delaware statutes recognizing the right of parents to treat their children's illnesses "by spiritual means".[12] The Newmarks also argued that removing Colin from their custody, solely because of their decision to treat him according to the tenets of their faith, would violate the First Amendment guarantee of religious freedom. The trial court rejected the Newmarks' arguments and awarded custody of Colin to the DCPS.[13] the Newmarks then filed an emergency appeal in the Delaware Supreme Court, and we agreed to hear oral arguments in Wilmington two days later on September 14, 1990. The panel consisted of Justice Walsh, Justice Holland, and me.

The small hearing room on that fateful September morning was filled with indescribable tension. The Newmarks and their family were in attendance. The room was also packed with lawyers, our newly arrived law clerks, and media representatives. After oral argument, the members of the Court retired to consider the case. Time was of the essence. The DCPS claimed that Colin's chances of surviving the chemotherapy were steadily decreasing with each passing day. None of us ever felt a heavier burden.

After reaching a decision, we returned to the crowded hearing room. As senior justice of the panel, I read our order to the collected audience. It was hard to find my voice as I recited our decision to reverse the Family Court and return custody of Colin to his parents.[14] It was all over in a few minutes, but they contained moments of powerful emotion as the Newmarks embraced and one member of their appellate counsel team broke down into tears. The impact was palpable on the faces of everyone in that small courtroom.[15]

It is virtually axiomatic that any statute enacted to exclusively benefit one religious denomination without a compelling justification faces grave constitutional challenge.

B.

It now became our responsibility to articulate in a full written opinion the truncated views expressed in our oral decision. In due course, the Court issued its written opinion holding that the state's intervention on Colin's behalf was unjustified under the unique and egregious facts of the case.[16] The DCPS could not overcome the strong presumption in favor of parental autonomy, especially where the proposed chemotherapy offered Colin little chance of survival.[17]

As a result, the Court did not consider the constitutional aspects of the case. Nonetheless, a brief discussion of the First Amendment questions raised in *Newmark* is useful for a number of reasons. On a purely academic level, it helps illustrate the meaning of the First Amendment. More importantly, the Newmarks invoked the First Amendment not only to protect their own religious freedom, but also to immunize their decision to eschew traditional medical treatment for Colin. This additional significant factor distinguished the Newmarks' case, pushing First Amendment jurisprudence to its very limits.

II.

The First Amendment guarantees freedom of religion in two distinct and separate clauses. The first clause, commonly called the establishment clause, provides that "Congress shall make no new law respecting an *establishment* of religion..."[18] The second clause, or the free exercise clause, prevents Congress from making laws "prohibiting the free exercise" of religion.[19] The Newmarks' appeal interestingly placed both clauses of the First Amendment in issue.

The Newmarks argued in the trial court that the free exercise clause barred the DCPS from removing Colin from their custody simply because they treated him in conformity with their Christian Science beliefs. The Newmarks also claimed protection under two Delaware statutes that recognize the right of parents to treat their children's illnesses by "spiritual" means. Neither side touched upon the very serious question whether these laws violate the establishment clause.

A.

The free exercise clause is one of the most powerful and important sections of the Bill of Rights. Religious freedom is the cornerstone of our democratic and constitutional system of government. Indeed, the first European settlers arriving on the Mayflower fled the religious persecution raging in Europe to seek a new land to peacefully practice their faith.

The freedom of worship that the free exercise clause guarantees is not an unlimited right. Courts have narrowed its scope in a number of well-defined situations. This is particularly true when parents try to justify withholding medical treatment from their children on religious grounds.[20] A judge's reluctance to uphold a parent's religious objection to treating a child with traditional medical care is best explained when we consider the competing interests involved.

We start with the parents and the family. The Supreme Court of the United States has long respected the integrity of the familiar unit, and the necessity of insuring the privacy of parental decision making.[21] Indeed, the Court has stated:

It is cardinal with us that the

custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.[22]

The traditional judicial respect for the family reflects a recognition of the strong psychological bonds existing between a parent and child, and also represents an implicit concession that the state is an inadequate surrogate.[23]

The state also has an important interest in these cases. Under the common law doctrine of *parens patriae,* the state assumes the responsibility of protecting the interests of minor children who are incapable of protecting themselves. The *parens patriae* doctrine has evolved from its origins of insuring that minor children were adequately protected in certain marital and property disputes, to now justify state intervention when a parent puts the health and safety of a child or the public in jeopardy.[24] As the Supreme Court of the United States succinctly observed in an often-repeated quote:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[25]

Thus, a court cannot overlook the interests of the minor child. As *Newmark* held, "[a]ll children indisputably have the right to enjoy a full and healthy life."[26] A court typically has to decide what is in the child's "best interests" because minors presumptively cannot make their own informed choices. The determination of the child's "best interests" where a parent uses a religious justification for withholding medical treatment often resolves itself into an amorphous test. The court will balance the gravity of the child's illness against the risks of the proposed treatment. This inquiry ultimately provides the linchpin for resolving all conflicts between the state's interest in protecting children and the parents' First Amendment right to freely exercise their religious beliefs.

The parents' free exercise claim is at its weakest when the child is suffering from a life threatening injury or disease, and the proposed treatment is an accepted procedure offering a substantial likelihood of success.[27] The outcome of these cases is easily explained because the *parens patriae* concept is little more than an expression of the state's fundamental interest in preserving human life. The state's interest, when weighed against the parents' constitutional rights, becomes stronger as the prognosis for recovery increases.[28] In sum, a First Amendment challenge to the administration of effective medical care adds little to the traditional balancing test.[29]

B.

An objective review of the facts in *Newmark* begs the question whether the outcome would have been different even if the Court had explicitly considered the Newmarks' free exercise claim. Colin was gravely ill. He was suffering from an aggressive cancer that was in an advanced disseminated state. Additionally, the proposed chemotherapy treatments were almost barbaric and offered Colin little hope.

Few people in this country routinely stop to consider their good fortune as they practice a rich diversity of religious beliefs free from state interference.

Furthermore, the doctors could not even initiate the chemotherapy without first subjecting Colin to intravenous hydration treatments,[30] Assuming that the preliminary "treatments" did not kill him, the doctors planned to administer "maximum" chemotherapy.[32] They prescribed large doses of at least six different cancer fighting drugs.[33] These drugs are highly toxic and would have caused a number of terrible side effects.[34] The doctors planned to administer the treatments in cycles, effectively bringing Colin close to death each time, followed by a recovery period. Then the procedure would be repeated.[35]

Colin's agony would not end with hydration and chemotherapy. Although the Newmarks were a warm, loving family, the DCPS and doctors argued that the Newmarks' religious beliefs precluded them from taking proper care of Colin while he was recovering from the chemotherapy. The DCPS wanted to remove Colin from his home and place him in foster care during the entire course of treatment..[36]

A child oncologist admitted that Colin only had a 40% chance of "survival" despite this rigorous and aggressive course of treatment.[37] The relative meaning of the term "survival" as used in Colin's case spoke volumes about his long-term chances. The doctor explained that her estimate was based upon historical data collecting the survival rates of children who also had suffered from Burkitt's Lymphoma.[38] "Survival" really meant that Colin might live for two years after his treatment. In other words, after prescribing massively invasive and painful chemotherapy, the doctors only offered Colin a 40% chance of living two or more years.[39]

We explained in *Newmark* that no court in the United States had ever authorized the state to intervene and remove a child from its parents' custody where the proposed treatment was so invasive and the chances of its success were so low.[40] We concluded that under all of the circumstances, Colin's "best interests" would be served by remaining in the custody of his parents.[41]

Thus, one could reasonably ask whether the Newmark's free exercise claim would have significantly changed the Court's analysis. Perhaps the outcome would have been different if the treatment had not been so inherently dangerous, and doctors had offered Colin a better chance of survival. Nonetheless, our decision did not change the existing law, although the opinion makes clear that parental rights under the free exercise clause are not limitless.[42]

The state has an affirmative duty to intervene under the *parens patriae* doctrine when parents' religious beliefs intrude upon the health or safety of their children. A court then balances the competing interests under the unique facts of each case. The resolution of the child's "best interests" ultimately depends upon the invasiveness of the treatment and its chances of success. While important, a parent's religious objection to medically treating a child's illness is never determinative.

III.

The Newmarks' free exercise claim on appeal arose from their reliance on statutory provisions exempting parents, who treat their children's diseases "solely by spiritual means", from Delaware's child abuse statutes.[43] Given the compelling facts of the case, the Court never had to confront the issue,[44] although it noted

that a serious establishment clause problem was presented by the spiritual treatment statutes.[45]

A.

A description of the relevant statutory scheme is necessary to fully appreciate the problem. Delaware law proscribes child abuse.[46] The code defines abuse to include "nontreatment" causing "physical injury".[47] Delaware law also contains two spiritual treatment exemptions to the abuse statutes.[48] These statutes provide:

> No child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of *a recognized church or religious denomination by a duly accredited practitioner* thereof shall for that reason alone be considered a neglected child for purposes of this chapter.[49]

The limited available legislative history, interpreting the spiritual healing exemptions, indicates that the General Assembly enacted them to provide parents with a "safe harbor" to practice their religious beliefs free from state intervention.[50] While obviously well intentioned, these exemptions raise serious establishment clause issues.[51] Facially, the statutes appear to have been adopted for the primary benefit of Christian Scientists. A particular concern is that the exemptions also force a court to explicitly evaluate the legitimacy of an individual's religious convictions.

B.

The specific wording of the statutes is interesting. Making the exemptions available to parents, who authorize a "duly accredited practitioner" to administer the spiritual treatments, parallels Christian Science convention. Christian Scientists only permit practitioners trained at the Christian Science Mother Church to conduct spiritual healing.[52] The similarity between the wording of the spiritual healing exemptions and the tenets of the Christian Science faith do not appear to be coincidental.

The Delaware statutes, which are almost identical to similar exemptions in at least forty other states, were apparently enacted through the direct lobbying efforts of the Christian Science church.[53] If that is so, then it is virtually axiomatic that any statute enacted to exclusively benefit one religious denomination without a compelling justification faces grave constitutional challenge.[54] This problem is further emphasized by the fact that both exemptions protect only those par-

ents who treat their children "in accordance with the tenets and practices of a *recognized* church or religious denomination."[55] A court reviewing a parent's claimed exemption under these statutes would first have to rule whether the parents were practicing a "recognized" religion. This inquiry is fraught with constitutional difficulties in two distinct but fundamental ways.

Courts have interpreted the establishment clause to mandate strict governmental neutrality. The establishment clause effectively prevents the state from sanctioning any particular religious belief. Indeed, the United States Supreme Court has stated that the establishment clause:

> [E]mbraces the right to maintain theories of life and death ... which are rank heresy to followers of the orthodox faiths ... [y]et the fact that [a religion] may be beyond the ken of mortals does not mean that they can be made suspect before the law.[56]

The Court, in recognition of the neutrality principle, has held that statutes tending to distinguish between classes of people according to their religions are inherently suspect and cannot survive judicial scrutiny without a "compelling governmental interest."[57]

Over the years, many courts have also found that the establishment clause neutrality principle applies with equal force to the judiciary.[58] In most such cases, the courts invalidated statutes giving a preference to members of a "recognized" religion.[59] The courts found that merely inquiring whether society "recognized" a certain religion would "contravene" the fundamental purpose of the establishment clause and violate the "principle of governmental neutrality regarding different religious beliefs."[60]

The United States Supreme Court eventually incorporated the neutrality standard into a tripartite "test". The Court now considers whether the disputed statute: (1) has a secular purpose; (2) effectively "neither advances nor inhibits religion"; and (3) does not excessively entangle government with religion.[61] When applied to the Delaware statutes the constitutional problems come clearly into focus.

The inherent dangers of such an inquiry are as obvious today as they were to the people who drafted the Bill of Rights over two centuries ago. A court could not objectively evaluate an individual's religious beliefs without imposing its own

view of morality. Judges are not gods, and in their official capacities, at least, are not supposed to be religious philosophers either.

IV.

Newmark was a tragic case lacking the traditional clear winners and losers so often associated with many other decisions of this Court. *Newmark* was also especially important and interesting because of the fundamental First Amendment issues that unexpectedly arose during the course of our deliberations. In retrospect, the case illustrates that the First Amendment guarantee of religious freedom is a complex and delicate right.

The free exercise clause and the establishment clause operate in tandem to keep the competing interests of government and individual religious freedom in balance. The establishment clause helps guarantee neutrality and prevents the oppression that usually follows from officially sanctioned state religion. The establishment clause also bans the judiciary, as a government instrument, from assessing the merits of an individual's religion.

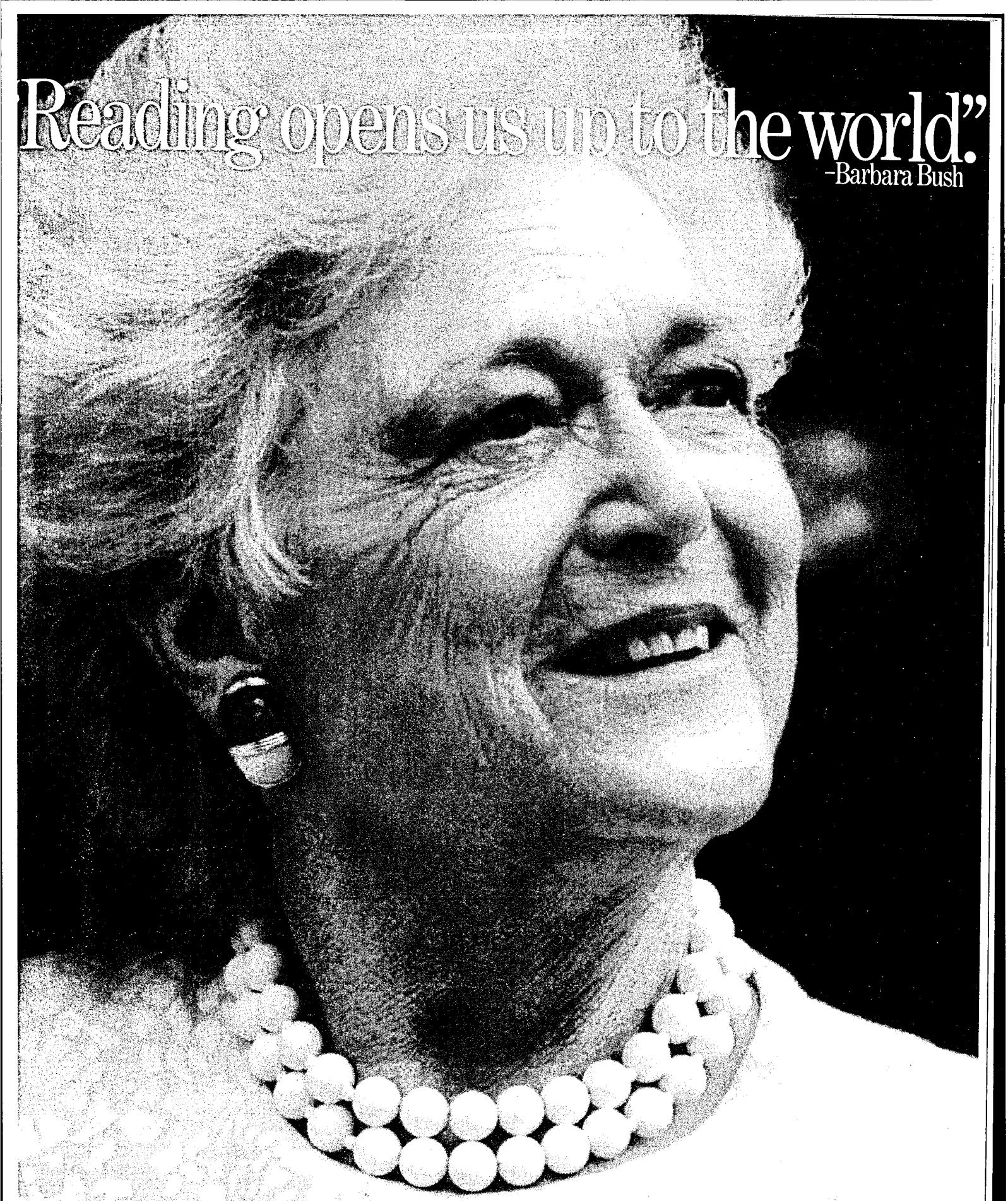
The free exercise clause also protects our right to entertain a vast multitude of religious beliefs free from state interference. However, as *Newmark* implicitly recognized, there are certain well-defined circumstances where the state may have a legitimate basis to intervene.

The First Amendment strikes a precarious balance between the freedom of worship and the state's authority to intrude into that very personal aspect of our lives. *Newmark* inevitably reminds us that the Bill of Rights is not a mere abstraction. the hard lessons learned, both historically and judicially, are important reminders that the Bill of Rights is the most effective buffer between an individual and the state.

FOOTNOTES

I express special thanks and appreciation to my excellent law clerk, Seth D. Rigrodsky, for his valuable assistance in the preparation of this article.

1. The Court used a pseudonym to protect the privacy of the family.
2. *See* Newmark v. Williams, Del. Supr., 588 A.2d 1108, 1109 (1991)
3. *Id.*
4. *Id.* at 1110.
5. *Id.*
6. *Id.*
7. *Id.* at 1110-1111.
8. *Id.* at 1111.
9. *Id.*
10. *Id.*
11. *Id.*
12. 10 *Del. C.* .. 901(11) & 16 *Del. C.*.. 907.
13. *See* Williams v. Newmark, Del. Fam. Cit., No. CN90-9235, Conner, J., slip op. (Sept. 12, 1990)>
14. *See* Newmark v. Williams, Del. Supr., No. 325, 1990, Moore, J. (Sept. 14, 1990)(ORDER).



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15. Colin died just a few weeks after oral argument.
16. Newmark, 588 A.2d 1108.
17. *See id.* at 1119-1121.
18. U.S. CONST. amend. I.
19. *Id.*
20. *See* Newmark, 588 A.2d at 1116 (collecting cases).
21. *See* Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 554, *reh'g denied,* 435 U.S. 918, 98 S. Ct. 1477 (1978); Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, *reh'g denied,* 321 U.S. 804, 64 S. Ct. 784 (1944).
22. Prince, 321 U.S. at 166, 64 S. Ct. at 442.
23. *See* Newmark, 588 A.2d at 1115.
24. *Id.* at 1116.
25. Prince, 321 U.S. at 170, 64 S. Ct. at 444.
26. Newmark, 588 A.2d at 1116.
27. *See id.* at 1117 (collecting cases).
28. *Cf. In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied,* 429 U.S. 922, 97 S.Ct. 319 (1976)>
29. *See* Capron, *The Authority of Others to Decide About Biomedical Interventions With Incompetents.* in WHO SPEAKS FOR THE CHILD 115, 144 n.62 (W. Gaylin & R. Macklin eds. 1982).
30. Newmark, 588 A.2d at 1118.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*at 1119.
36. *Id.*
37. *Id.*
38. *Id.* at 1119 n.11.
39. *Id.* at 1119 n.12.
40. *Id.* at 1119.
41. *Id.* at 1120-21.
42. *Id.* at 1116-18.
43. 10 *Del. C.* ·· 901(11) & 16 *Del. C.* ·· 907.
44. *See* Newmark, 588 A.2d 1112-1114.
45. *Id.* at 1112-13.
46. *See* 10*Del.C.*·· 901(11) & 16 *Del.C.* ·· 902.
47. 16 *Del.C.* ·· 902.
48. 10 *Del.C.*·· 901(11) & 16 *Del.C.* ·· 907.
49. *Id.* (Emphasis added).
50. *See* Newmark, 588 A.2d at 1111.
51. *Id.*See Schneider, *Christian Science and the Law: Room for Compromise?,* 1 COLUMB. J.L. & SOC. PROBS. 81, 81 (1965).
53. *See In Child Deaths, a Test for Christian Science,* N.Y. Times, Aug. 6, 1990, at 1, col. 2.
‹f›54. *See* Newmark, 588 A.2d at 1111-13.
55. 10 *Del.C.*·· 901(11) & 16 *Del.C.*·· 907 (emphasis added).
56. U.S. v. Ballard, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886 (1944).
57. Larson v. Valente, 456 U.S. 228, 251, 102 S.Ct. 1673, 1687, *reh'g denied,* 457 U.S. 1111, 102 S.Ct. 2916 (1982).
58. *See e.g.,* Davis v. State, 294 Md. 370, 381, 451 A.2d 107, 113 (Md. 1982); Maier v. Besser, 73 Misc.2d 241, 245, 341 N.Y.S.2d 411, 414 (N.Y. Sup. Ct. 1972); Dalli v. Bd. of Ed., 358 Mass. 753, 759, 267 N.E.2d 219, 222-23 (Mass. 1971).
59. *Id.*
60. Davis, 294 Md. at 381, 451 A.2d at 113.
61. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24 (1971).

Mr. Justice Moore, an associates justice of the Delaware Supreme Court, is a valued contributor to this magazine and a director of Delaware Bar Foundation .

THE HONORABLE RANDY J. HOLLAND

The Bill of Rights and John Vining, the First State's First Congressman

The skills of one who is both a lawyer and an historian illuminate a significant corner of the Delaware past, known only to the few, but essential to the many who live under the Bill of Rights. Justice Holland's account of John Vining's odyssey and consequent change of views confirm the old saw that travel (yes, even intellectual travel) is broadening. The Justice's account, as an historical adventure story about the origin of some of our most precious rights, is also a scholarly work of distinction. DELAWARE LAWYER will make available copies of the original manuscript with footnotes and extensive citations to those who wish to pursue this topic in greater depth.

The plainness and simplicity of style of the Bill of Rights can be attributed in part to John Vining.

John Vining was born in Dover, Delaware, on December 23, 1758. He was the son of Chief Justice John Vining. He studied law with George Read of New Castle, and was admitted to the Bar in New Castle County February 21, 1782.

"Soon after his admission to the Bar, he began to develop intellectual faculties of more than ordinary character, which gave him a prominent position and reputation throughout the State. Having scarcely reached the age constitutionally required to qualify for office under the new federal Constitution, Delaware elected him as its member of the first United States House of Representatives. Following Vining's election, it was written: "a brother of great promise was elected to represent this State in Congress..." Those words were prophetic indeed.

The part that one of Virginia's first Congressmen, James Madison, played in the enactment of the Bill of Rights is well known. Less well-known is the role of Delaware's first Congressman, John Vining.

The antecedents to the Bill of Rights existed long before the Constitution was ever drafted or even ratified. Delaware had enacted a Declaration of Rights on September 11, 1776. By 1787, almost every state constitution included protections for those rights considered to be fundamental. In fact, most of the provisions of the federal Bill of Rights were derived from those various state Declarations of Rights. Delaware's Declaration of Rights, for example, was the first to prohibit ex post facto laws.

The movement to add a Bill of Rights to the federal Constitution began at the Philadelphia Convention. On September 12, 1787, during the course of the debates at the Constitutional Convention, Elbridge Gerry, an Antifederalist (the popular name for those opposing the Constitution) made a motion to appoint a committee to prepare a bill of rights. The motion was unanimously defeated.

Thereafter, another Antifederalist, George Mason, wrote his Objections to the Constitution. Mason started his Objections by the assertion: "There is no declaration of rights," and "the declaration of rights, in the separate states, are no security" since federal laws are supreme. In response to Mason's Ob-

Photograph Courtesy of Delaware State Museums

jections, a Federalist delegate to the Philadelphia Convention, Roger Sherman of Connecticut, argued that a federal Bill of Rights was unnecessary because "the State Declarations of Rights are not repealed by his Constitution ... and being in force are sufficient."

The Federalists' view prevailed at the Convention in Philadelphia and the Constitution was submitted to the States for ratification without a Bill of Rights. During the ratification process, both the Federalists and the Antifederalists inundated the populace with writings and speeches about their respective assessments of the advantages and the defects of the proposed federal Constitution. Many of those writings addressed the Bill of Rights issue.

"The Antifederalists strongly criticized the absence of a Bill of Rights, asserting that without one, the Constitution was inadequate to protect individual rights and liberties." Conversely, James Madison and other Federalists argued that a Bill of Rights was unnecessary, because all powers not expressly granted to the federal government in the proposed Constitution were retained by the people. In particular, the Federalists continued to emphasize that the Constitution did not give the new federal government the power to infringe upon each state's own Declaration of Rights. The most well-known Federalist writing on the Bill of Rights issue was by Alexander Hamilton in The Federalist No. 84 (1788), reprinted in 1 B Schwartz, The Bill of Rights: A Documentary History 578. One of the other leading Federalists who wrote in favor of the Constitution's ratification was John Dickinson of Delaware.

Delawareans found the Federalists' arguments persuasive. On December 7, 1787, Delaware became the First State when it ratified the Constitution. It did so unanimously and without any comment on the absence of a Bill of Rights. Unanimous action ratifying the Constitution was subsequently taken by the states of Georgia, New Jersey, and Connecticut. However, the reaction in the other State ratifying conventions was most often neither swift nor unanimous.

On December 20, 1787, less than two weeks after Delaware's ratification, Thomas Jefferson, who had been in Paris as Minister to France while the Constitution was being drafted in Philadelphia, wrote a letter to James Madison stating Jefferson's general approval. However, Jefferson also noted with dissatisfaction the absence of a Bill of Rights. In that letter, Jefferson specifically rejected the argument that a Bill of Rights was unnecessary because the Federal Government created by the Constitution only had the powers that had been delegated to it.

Consequently, Jefferson was initially opposed to ratification until a Bill of Rights was added. However, Jefferson subsequently became convinced that the course of action followed by Massachusetts was preferable to non-ratification. (When Massachusetts ratified the Constitution, it had transmitted proposals for amendments along with its approval.) With Jefferson's encouragement, four other states followed the Massachusetts example, and submitted recommendations for amendments to the Constitution when they transmitted their ratification notices. The widespread demand for a Bill of Rights was also reflected in the recommendations for amendments submitted by five states as well as by the Pennsylvania minority, the Maryland Committee, and the conditional amendments voted upon by the North Carolina Convention. In Madison's and Jefferson's home state of Virginia, the sharp division over the Bill of Rights issue resulted in ratification of the Constitution by a closely divided vote.

Following the formal ratification of the Constitution, the enthusiasm that Delawareans had displayed for the new federal union on December 7, 1787 continued, notwithstanding the actions proposing amendments in the other states. In fact, there "never was a party in Delaware opposed to the Constitution," although different views regarding its interpretation and implementation did develop. In the elections that followed ratification, the Federalist group, which had led Delaware into becoming the First State of the new government, had no difficulty in securing the election of George Read and Richard Bassett to the United States Senate and John Vining to the House of Representatives.

Unlike their counterparts in Delaware, the Federalist candidates in Virginia faced strong opposition. The sharp debate about amending the Constitution, which had taken place in Virginia during the ratification process, continued in its first Congressional elections. James Madison was one of the Federalist candidates for Congress. The Antifederalists opposed Madison's election with their own popular candidate, James Monroe. The Antifederalists and Monroe campaigned against Madison as a person who opposed amending the Constitution.

Thus, although Madison himself had originally been reluctant to add a Bill of Rights to the Constitution, he was induced by both his correspondence with Jefferson and by political realities to modify his attitude. "The ratification struggle showed him the need to concede amendments to provide 'every desirable safeguard for popular rights,' in order to reconcile at least the more moderate Antifederalists to the new governmental system." Consequently, as a part of his own closely contested campaign against Monroe in Virginia, for election to Congress, Madison specifically came out in favor of adding amendments to the Constitution.

When the national results were tabulated, the elections in the various states had resulted in an overwhelmingly Federalist first Congress. Nevertheless, the fact that a majority of the states had ratified the Constitution by following the Massachusetts approach of recommending amendments, convinced "a very responsible portion of the [F]ederalists" to favorably consider the addition of a Bill of Rights to the Constitution. In fact, in his first message to Congress, one of the matters addressed by President George Washington, himself a Federalist, was the widespread demand for amendments to the Constitution. However, he declined to make "particular recommendations on this subject," leaving it to Congress to decide what to do on the matter.

When the first Congress under the Constitution assembled in 1789, it was James Madison, no doubt acting in fulfillment of his own campaign pledge, who was the catalyst for the Congressional response to the widespread demand for a federal Bill of Rights. On June 8, 1789, Madison delivered his famous speech explaining his proposals for amendments to the Constitution and why they were necessary. Madison began with remarks about the need to reconcile those who had opposed the new federal Constitutional system of government on the Bill of Rights issue: "Is it desirable to keep up a division among the people of the United States on a point in which they consider their most essential rights are concerned?" Madison then answered his own question:

> prudence itself requires the House not to let its first session pass "without proposing some things to be incorporated into the

constitution, that will render it ... acceptable to the whole people of the United States." It is desirable to quiet the apprehensions felt by many that the Constitution does not adequately protect liberty. "We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution."

Jefferson had once written to Madison that one argument for a bill of rights "which has great weight with me, [is] the legal check which it puts into the hands of the judiciary.'" Madison included Jefferson's point in his June 8, 1789 comments, arguing to his colleagues that "'independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights ... expressly stipulated for in the Constitution by the declaration of rights'".

Madison then specifically outlined the amendments he proposed. He concluded his initial comments by stating that he would "advocate them until they should be finally adopted or rejected by a constitutional majority of this House." Madison then moved that the House go into committee of the Whole to consider the matter of amending the Constitution.

To many members of the Federalist majority in the first Congress, Madison's proposal to amend the Constitution seemed less pressing than setting up the details of the new federal system of government it had created. Therefore, Madison's motion was opposed by several Federalist Congressmen, who objected to interrupting, for example, the revenue business upon which the House was engaged. Among those who objected was the Delaware Congressman, John Vining.

As he sat in the House on June 8, 1789 and listened to the debate on Madison's motion, Vining found himself in a delicate situation. He was not only concerned about the subject of amending the Constitution generally but, in particular, about Madison's proposal for the House to proceed to consider that subject as a committee of the Whole. Vining's constituents in Delaware had somewhat prejudged the question of amendments that had been raised by Madison. Delaware had not only ratified the Constitution unanimously, without suggesting any amendments thereto, but had thereafter overwhelmingly elected an entirely Federalist delegation to represent its interests.

It is reported that Vining's own sense of the need for amending the Constitution accorded with the sense that had already been declared by the State of Delaware during the ratification process and the elections that had followed. Therefore Vining was "doubly bound to object to amendments which were either improper or unnecessary." However, Vining thought that there was another good reason for opposing the consideration of even proper alterations to the Constitution. In his opinion, proposing amendments at this time and considering them as a committee of the Whole would result in suspending the operations of the House. Vining feared that such a hiatus might lead to the ruin of the new federal government. Because of his relative youth and the fact that he came from a small state, Vining was undoubtedly concerned that his sentiments would not be given the same weight as those of his elders or of Congressmen, like Madison, who spoke on behalf of much larger states. Nevertheless, Vining decided to ask Madison if he would be responsible for the risk the new federal government would run of being injured by an interregnum.

Therefore, on June 8, 1789, Congressman Vining rose and spoke in opposition to Madison's motion for the House of Representatives to consider amendments to the Constitution as a committee of the Whole.

Mr. Vining. I hope the House will not go into a

Committee of the Whole. It strikes me that the great amendment which the Government wants is expedition in the dispatch of business. The wheels of the national machine cannot turn, until the impost and collection bill are perfected; these are the desiderata which the public mind is anxiously expecting. It is well known, that all we have hitherto done amounts to nothing, if we leave the business in its present state. True; but, say gentlemen, let us go into committee; it will take but a short time; yet may it not take a considerable proportion of our time?

... Though the State I represent had the honor of taking the lead in the adoption of this Constitution, and did it by a unanimous vote; and although I have the strongest predilection for the present form of Government, yet I am open to information, and willing to be convinced of its imperfections. If this be done, I shall cheerfully assist in correcting them. But I cannot think this a proper time to enter upon the subject, because more important business is suspended; and, for want of experience we are as likely to do injury by our prescriptions as good. I wish to see every proposition which comes from that worthy gentleman on the science of Government; but I think it can be presented better by staying where we are, than by going into committee [of the Whole] and therefore shall vote against his motion.

Following the comments of John Vining, Madison withdrew his motion for consideration of amendments to the Constitution by the House as a Committee of the Whole. Instead, Madison moved that a select committee be appointed to consider his proposals.

Mr. Madison. I am sorry to be accessary to the loss of a single moment of time by the House. If I had been indulged in my motion, and we had gone into a Committee of the Whole, I think we might have rose and resumed the consideration of other business before this time;... As that mode seems not to give satisfaction, I will withdraw the motion, and move you, sir, that a select committee be appointed to consider and report such amendments as are proper for Congress to propose to the Legislatures of the several States, conformably to the fifth article of the Constitution.

On July 21, six weeks after Madison introduced his amendments, the House voted to send the amendments proposed by Madison, as well as the amendments that had been proposed by the various states during the ratification process, to a select committee, "to consist of a member from each state," with instructions to consider the subject of amendments, "and to report thereupon to the House." A Committee of Eleven (North Carolina and Rhode Island had not yet ratified the Constitution) was appointed. The committee members were Congressmen Baldwin, Benson, Boudinot, Burke, Clymer, Gale, Gilman, Goodhue, Madison, Sherman, and Vining.

The Committee of Eleven honored John Vining by choosing him, rather than Madison as chairman. The Committee was confronted with a formidable

assignment: it has been calculated that 210 different amendments were proposed by various states during the ratification process, and, with duplications omitted, these included nearly 100 different substantive provisions. Nevertheless, the Committee of Eleven proceeded with its assignment. It soon found that the prospect of producing a draft of the Bill of Rights, from the plethora of state-recommended amendments, was more manageable than it had first appeared. "That was true because the state proposals reflected the consensus that had developed among Americans with regard to the fundamental rights that ought to be protected by any Bill of Rights worthy of the name.

Under the leadership of John Vining, despite the magnitude of its task, the Committee completed its work in one week. On July 28, Vining gave the Committee report to the House. It is fair to say that the Committee of Eleven's recommendations made no significant alteration in the substantive amendments that had been prepared and proposed originally by Madison.

However, with Vining's leadership, the Committee of eleven did make certain stylistic changes, which brought the amendments that it recommended to the House closer to the form of final version that became the Bill of Rights. "The most important of these are: the direct use of the term "freedom of speech, and of the press"; the change to what was to be language of the Just Compensation Clause of the Fifth Amendment; the use of almost the exact language ultimately contained in the Ninth Amendment; and the adoption of the substance of what was to be the language of the Seventh Amendment." Following Vining's presentation, the report "was ordered to lie on the table."

Several weeks after Vining had given the Committee's report, despite pleas from Madison, the House had still not acted. Although Vining had been reluctant initially to support Madison's proposal to amend the Constitution, he was obviously of a different opinion after leading the work of the Committee of Eleven. Vining had become convinced of the imperfection of a Constitution without amendments.

Vining now not only endorsed Madison's proposal to amend the Constitution but agreed that the amendments recommended by the Committee of Eleven should take precedence on the House agenda. Impressed by Madison's anxiety for having the subject of amendments to the Constitution considered by the House as a committee of the Whole, Vining was even willing to yield the House floor to Madison. Vining agreed to waive the call, which he was "authorized to make, for the House to take into consideration the bill to establish a Land Office for the disposal of the vacant lands in the Western Territory."

However, on Thursday, August 13, Congressman Lee moved successfully "that the House now resolve itself into a Committee of the Whole, on the report of the committee of eleven," on the subject of amendments to the Constitution. In its report, the Committee of eleven had endorsed what had been Madison's original proposal to insert any amendments directly into the text of the Constitution. The August 13 debate began with a discussion about that procedural recommendation.

Congressman Roger Sherman argued that the Madison/Committee of Eleven approach of weaving the amendments into the body of the Constitution was not the proper mode: "We might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogenous articles; the one contradictory to the other." Sherman made a motion that the amendments be adopted as a series of separate articles to be added at the end of the Constitution. Madison replied that "there is a neatness and propriety in incorporating the amendments into the constitution itself..." At this stage of the debate, a majority supported Madison and the Committee of Eleven's recommendation to amend the text of the Constitution. The Sherman motion for separate amendments was defeated on August 13, "only to be revived on August 19 when it was carried."

In the interim, on Saturday, August 15th, the House again went into the Committee of the Whole to consider the Committee of Eleven's report. Congressman Gerry was opposed to taking what appeared to him to be precipitous action on the report.

> Mr. Gerry. Gentlemen seem in a great hurry to get this business through. I think, Chairman, it requires a further discussion; for my part, I had rather do less business and do it well, than precipitate measures before they are fully understood.
>
> ...
>
> The gentlemen who were on the committee, and brought in the report, have considered the subject, and are also ripe for a decision. But other gentlemen may crave a like indulgence. Is not the report before us for deliberation and discussion, and to obtain the sense of the House upon it; and will not gentlemen allow us a day or two for these purposes, after they have forced us to proceed upon them at this time? I appeal to their candor and good sense on the occasion, and am sure not to be refused; and I must inform them now, that they may not be surprised hereafter, that I wish all the amendments proposed by the respective States to be considered. Gentlemen say it is necessary to finish the subject, in order to reconcile a number of our fellow-citizens to the Government. If this is their principle, they ought to consider the wishes and the intentions which the convention has expressed for them....

Vining responded to Gerry's remarks forcefully. Vining was convinced that the Committee of Eleven had carefully considered all of the amendments proposed by the various states and had synthesized them into the amendments recommended by its report. Vining not only defended the recommendations contained in the report by the Committee of Eleven but again joined Madison in now urging prompt action on that report by the House as a Committee of the Whole.

> Mr. Vining. If, Chairman, there appears on one side too great an urgency to despatch this business, there appears on the other an unnecessary delay and procrastination equally improper and unpardonable. I think this business has been already well considered by the House, and every gentleman in it; however, I am not for an unseemly expedition.
>
> The gentleman last up has insinuated a reflection upon the committee for not reporting all the amendments proposed by some of the State conventions. I can assign a reason for this. The committee conceived some of them superfluous or dangerous, and found many of them so contradictory that it was impossible to make any thing of them; and this is a circumstance the gentleman cannot pretend ignorance of.
>
> Is it not inconsistent in that

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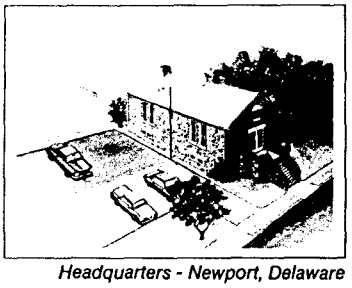

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honorable member to complain of hurry, when he comes, day after day reiterating the same train of arguments, and demanding the attention of this body by rising six or seven times on a question? I wish, sir, this subject discussed coolly and dispassionately, but hope we shall have no more reiterations or tedious discussions; let gentlemen try to expedite public business, and their arguments will be conducted in a laconic and consistent manner.

On August 19, the House again began its consideration of the proposed amendments to the Constitution, as reported by Vining on behalf of the Committee of the Whole. The debate started with a renewal by Sherman of his motion to add the amendments by way of supplement at the end of the Constitution. Congressman Livermore endorsed Sherman's suggestion "that whatever amendments were made to the Constitution, they ought to stand separate from the original instrument." "We have no right," said he, "to alter a clause, any otherwise than by a new proposition. We have well-established precedents for such a mode of procedure in the practice of the British Parliament and the State Legislatures throughout America."

John Vining responded to Congressman Livermore with a defense of the proposal by Madison, which had also been recommended by the Committee of Eleven, to incorporate any amendments into the text of the Constitution. Congressman Vining stated that he "disliked a supplementary form, and chastised Livermore for urging the practice of former ages, when there was a more convenient method of doing the business at hand." He pointed out that he had seen

> an act entitled an act to amend a supplement to an act entitled an act for altering part of an act entitled an act for certain purposes therein mentioned. If gentlemen were disposed to run into such jargon in amending and altering the constitution, he could not help it; but he trusted they would adopt a plainness and simplicity of style on this and every other occasion, which should be easily understood. ... The constitution being a great and important work, ought to be brought into one view and made as intelligible as possible.

Notwithstanding the arguments of Congressmen Vining, Madison, and the

recommendation by the Committee of Eleven, the Sherman motion was cried on August 19 by two-thirds of the House.

By August 24, in accordance with Congressman Sherman's successful motion, the substance of the amendments, which had been recommended by the Committee of Eleven, had been put in the form of seventeen supplementary amendments to the Constitution. On that same date, the House approved those seventeen supplementary amendments. The Clerk of the House was then ordered to carry a copy of those amendments to the Senate with a request for its concurrence.

Consequently, the impetus for having the federal Bill of Rights in its present form, as a series of separate amendments following the original Constitution, can be attributed to Sherman. However, the "plainness and simplicity of style" of the text of the Bill of Rights can be attributed, in part, to the suggestion of John Vining. "The House amendments were formally read in the Senate on August 25, the day after House approval."

"When the Senate finished its debate on the matter, it had reduced the seventeen House amendments to twelve in number." "The most important substantive change made by the Senate was the elimination of the amendment which Madison considered 'the most valuable amendment in the whole lot' — that prohibiting the states from infringing on freedom of conscience, speech, press, and jury trial. The result was that, as the United States Supreme Court was to hold in 1833, the Bill of Rights as adopted imposed limitations only upon federal (not state) power. "In addition, the Senate made a significant change in form, combining the two House amendments covering freedom of religion and freedom of speech, press, assembly and petition into one amendment — the form that was ultimately to be retained in the First Amendment."

On September 10, 1789, the Clerk of the House reported the Senate's message that it had agreed to the House amendments, "with several amendments; to which they desire the concurrence of this House." "The House considered the subject on September 19 and 21. On the later date, they voted on the Senate changes, 'some of which they agreed to, and disagreed to others.' The House then resolved that 'a committee of conference was desired with the Senate, on the subject matter of the amendments disagreed to.'"

Vining, Madison, and Sherman, the

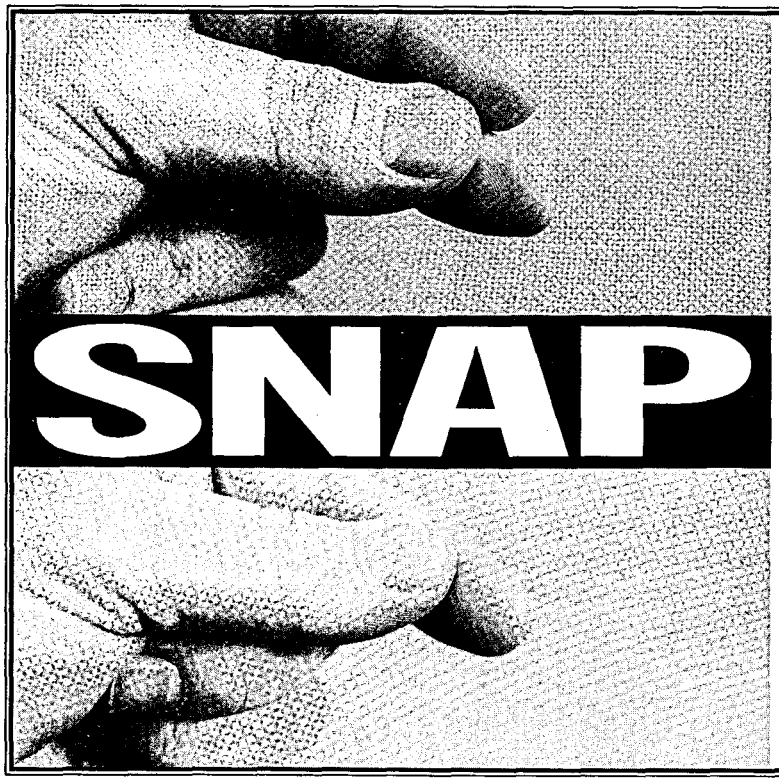
three Congressmen who were recognized as having played the largest part in the House debate on amending the Constitution, were appointed by the House to represent it on the important Senate-House Conference Committee. Senators Oliver Ellsworth, Charles Carroll, and William Paterson were named as the Senate conferees. Some of the problems dealt with by the Conference Committee may be seen in Madison's letter to Edmund Pendleton, dated September 23, 1789.

On September 23, Madison made the Conference Report to the House. It provided that the House would accept all the Senate amendments, and provided for three further changes. The first was a minor alteration in the amendment on representation. The second change made by the Conference Committee was of great importance — to replace the weakened Senate version of the religious freedom guarantee by the simple yet strict prohibitions of what are now the Establishment and Free Exercise Clauses of the First Amendment. The third gave the final form to the Sixth amendment and reincluded in it the right to a jury trial of the locality (though not restricted to the vicinage) which the Senate had omitted.

On September 24, the House voted to agree to the Conference Report. On the same day, Ellsworth made the Conference Report to the Senate. The Senate concurred in the amendments as voted by the House the next day. The Senate also acquiesced in a House resolution requesting the President to transmit copies of the [twelve proposed] amendments to the states." September 25, the day on which the Congressional approval of the twelve proposed amendments was completed, is celebrated as one anniversary of the Bill of Rights.

The first two amendments proposed to the states did not receive the required number of votes for ratification. The other ten amendments became effective when they were ratified by the State of Virginia on December 15, 1791. Those ten amendments, renumbered to reflect the non-ratification of the first two, now constitute the federal Bill of Rights.

Many of John Vining's efforts contributed to the final form and substance of text of the federal Bill of Rights. He was a moving force in establishing the Committee of Eleven procedure by which Madison's proposals for a Bill of Rights, as well as the amendments that had been proposed by the states, were initially reviewed by the United States House of Representatives. Thereafter, as



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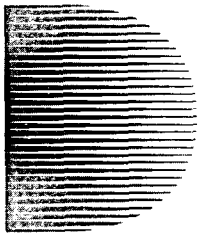

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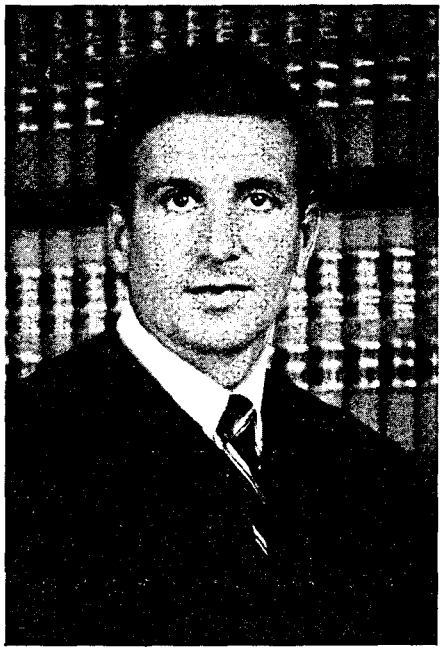
the chairman of the Committee of Eleven, Vining had a prominent role in debating and developing the substantive content of its report to the House. He was recognized as one of the leading advocates when the House debated the proposed amendments to the Constitution as a Committee of the Whole. Finally, Vining was one of the three Congressmen appointed to the joint Senate-House Conference Committee, which put the proposals into final form for he amendments to the Constitution that became the Bill of Rights.

Delaware, the First State has good reason to be proud of the significant contribution that its first Congressman, John Vining, made to the Bill of Rights. Vining's contemporaries expressed their gratitude for his dedicated public service in 1793, when they elected him to represent Delaware in the Senate of the United States. There, he also performed his duties faithfully and with distinction. He died at Dover, Delaware, in 1802.

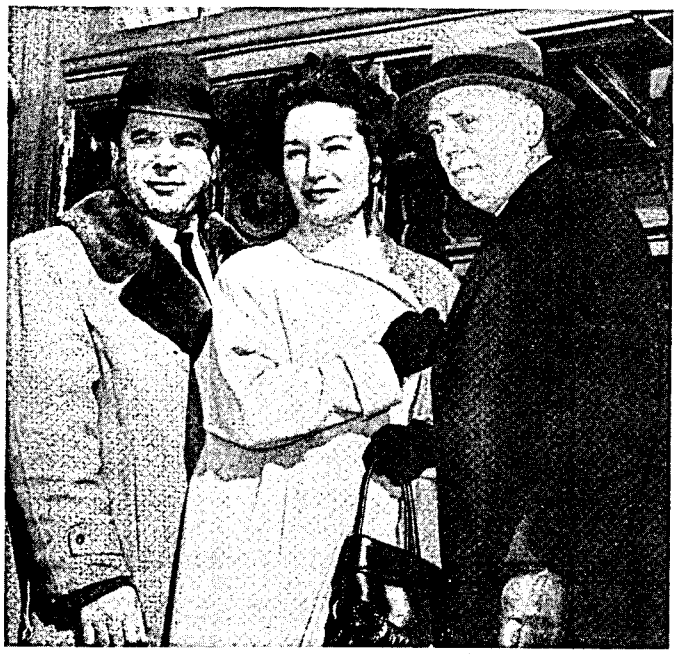


Justice Randy J. Holland, an Associate member of the Supreme Court of the State of Delaware, is a serious student of Delaware history. His article "The Untold Story - Sussex County Delegates to the Ratification Convention", written in collaboration with Vice Chancellor William B. Chandler, III, appeared in the Constitutional Bicentennial issue (Volume 6, Number 2) of this magazine. Justice Holland, who lives in Sussex County, was a member of the firm of Morris, Nichols, Arsht & Tunnell before his appointment to the Delaware Supreme Court.

MARIE TORRE

Going to Jail for the First Amendment

When I went to jail in 1959 for refusing to reveal a news source, only twelve states had shield laws. Today there are twenty-eight states with statutes affording journalists the privilege of protecting their sources. A more than double rise in over thirty years!



The author, Marie Torre, flanked by federal marshalls, on her way to jail.

But news die-hards-myself included-are hardly atingle. If press freedom is the lifeblood of democracy, as the speechmakers keep telling us, why don't ALL states have shield laws? If press freedom is essential to the basic right to know, why isn't there a Federal shield law? Why has the U.S. Supreme Court refused over the years to interpret the First Amendment as mandating a news reporter's privilege, as in state shield laws?

> If newspapers become legally obligated to tell where they get their information for any news story that gets into court, their ability to serve the public will be badly undercut.

Offering anonymity in exchange for useful information is a fundamental element of the craft of journalism. Some of journalism's proudest moments have depended on anonymous sources. The Pentagon Papers, a classified account of this country's role in Vietnam, for example, was leaked by an anonymous tip to The New York Times. There would not have been a Watergate without Deep Throat.

And there are always stories like the recent one about the Congressional delegation of 100, including members, spouses, and aides, going to the big Paris Air Show at taxpayers' expense. After the press blew the whistle on the junket, all but two had second thoughts and stayed home, saving taxpayers more than $1 million.

And yet, over the years, the courts have refused to admit that the rights conferred on the press by the First Amendment are absolute rights. Too often, the attitude of the courts has been that freedom of the press must yield on occasion to other and "higher" freedoms. It cannot, for example, be used to delay the courts of justice or to deny to a court the information it needs for a fair verdict. In such cases, when reporters refuse to reveal the names of confidential sources, they are held in contempt.

That was my crime - contempt of court, and it came with a ten-day jail sentence.

For the first time in the history of the United States, a Federal judge ordered a reporter to reveal a news source. For the first time in the history of the United States, a reporter went to jail for refusing to reveal a news source.

Is this as it should be? Is this what most Americans want? Should we not expect a uniform national standard rather than the current hodgepodge?

Perhaps a recounting of the events that led to my incarceration will induce enlightened answers.

I was a syndicated television columnist for the New York Herald Tribune, writing a column that dealt with TV reviews, news, and commentary. One day, I received a tip about problems between Judy Garland and CBS

Photograph Courtesy of United Press International Photo

concerning a scheduled special program.

Hardly earth-shaking or memorable news, granted, but it was news to a television reporter and her readers. Immediately, I phoned a CBS executive, a personal friend as well as an invaluable news source.

"What about the Judy Garland special?" I asked.

"Oh, it's a mess!" he responded.

"What's the matter?"

"Well, we've had a number of meetings with Judy, and we tossed around half a dozen ideas," he explained, "but she won't make up her mind about anything. We just think she doesn't want to work."

Seeking elaboration, I asked why he thought she did not want to work. He speculated that "something is bothering her."

"What's bothering her?" I pressed.

"I don't know," he said, "but I wouldn't be surprised if it's because she thinks she's terribly fat."

Before writing my column, I phoned Sid Luft, who was Garland's husband and business manager.

"They're not ready at CBS," was the way Luft described the reason for the show delay. He further explained that his wife and CBS were "still talking" about a TV format, never indicating there were problems between them.

When my column ran on the following day, however, Luft phoned and he was angry - not with me but with CBS. The network, he said, had done Judy great wrong. He challenged the veracity of the "half dozen ideas" suggested to his wife by CBS.

"CBS came up with only two plans - one amounted to the same thing she did at the Palace Theater, the other was a combination of her acts at the Palace and Las Vegas. And Judy did her Palace show on TV once before. Is she wrong in wanting to come before the public in something new, something different?"

Luft's defense of Garland was dealt with in full in my column the following day (the very story he was unwilling to give me the day before). No one at CBS came forward to refute or deny the charges and accusations. As far as I was concerned the Garland special was a closed matter.

Not for the Lufts, however.

About six weeks later, I read a story in the Daily News about Judy Garland filing a suit against CBS for $1,393,333, charging libel and breach of contract. The report did not mention me or the Herald Tribune, but noted that the suit was based on a newspaper column that quoted an unnamed CBS executive. I recognized some of the quotes from my column.

I wasn't alarmed. For one thing, I could not believe I would be dragged into any lawsuit involving Judy Garland and CBS. For another, I felt certain the case would never go to court because, at that time, TV networks invariably settled cases.

The judge was impressed. Where he prevously dismissed me with a talk-or-go-to-jail mandate, he now called me "the Joan of Arc" of my profession.

I was wrong on both counts. On the very morning I gave birth to my first child, Adam, I received a call from my city editor, Luke Carroll.

Still groggy from the anesthesia, I listened as he said that we were "involved in the suit Judy Garland has filed against CBS," that the Herald Tribune lawyers wanted to talk with me.

I remember saying, "I just had a baby, Luke. Can't they wait until I get home from the hospital?"

On the very day I left the hospital, I was visited by a young attorney named Sheldon Oliensis, a junior member of the law firm of Cahill, Gordon, Reindel and Ohl, which handled the Herald Tribune's legal business.

His expression was grave. He said that I should expect to be intensely questioned by attorneys for Judy Garland and CBS.

"And what happens if I refuse to answer?" I inquired with mocking skepticism.

Oliensis did not smile. "You'll be taken to court and ordered to name your CBS source. You could go to jail, if you refuse to answer."

"Mr. Oliensis," I said, with impatience and disbelief. "No judge in the land would ask a reporter to reveal a news source! That's the first thing a reporter learns. Never reveal your source of information. Everybody knows that, even some lawyers."

As I later discovered, I had a lot to learn about press freedom.

I was equally in the dark as to how vital the name of my source was to Garland's suit. The plaintiff (Garland) could not proceed with her case until she established the existence of the CBS executive. Until she did, the defendant (CBS) was within its legal right to attempt to discredit me and my reporting, its position being that for all it knew, I might have quoted a CBS mail clerk, if anybody.

Oliensis did not underestimate the exhaustive questioning by Garland's attorney. He had steely blue eyes, and it came easy for him to say, "This is no threat, but..." My refusal to talk, he said, might result in a lawsuit against my employer ("This is no threat, but..."). Now that worried me, especially since I had no idea at the time of the paper's stand on the matter.

I was worried enough to call Sid Luft that evening in the hope of persuading him to call off the inquiry.

"Sid, you've put me in a precarious position," I said. "I can't give you the source's name. I'd be ostracized by the newspaper profession, and people I rely on for information will never talk to me again. I'll go to jail before I give the source's name."

He laughed. "Oh, Marie, don't be so dramatic. You're not going to jail."

He said that he and his wife decided to file the suit because they were "sick and tired" of "all the terrible things" printed about her in the newspapers. He promised, though, to discuss the matter with her, and get back to me the next day.

The Lufts boarded a European liner the morning after. He never called.

But their attorney did. He phoned my lawyer to apprise him of the date for my deposition, an experience I would indeed call grueling.

Subsequently, I was served with papers ordering my appearance in court. Oliensis approved of what I planned to say, that I could not betray a confidence, that I could not continue writing the kind of column I had, that all my other sources would not trust me again, if I gave the name of my CBS informant.

That's what I said to Judge Sylvester J. Ryan when I went before him at the Federal Court House in Foley Square, concluding with: "If I give the name of

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the CBS source, nobody in the business will talk to me again."

Judge Ryan smiled, and I took heart. "Oh, I don't think you need worry about people talking to you. They will, they will," he said, smiling still.

Then he lowered the boom. The court, he said, required me to give the name of the CBS source. If I failed to do so, I would be held in criminal contempt and sent to jail -again and again, until I decided to talk (no double jeopardy here).

I was thunderstruck. I knew I was in trouble. As I left the court house with Oliensis, I was too numb to say anything. At the elevators, we met the CBS attorney, and he sensed my anxiety.

"Look, why don't you call this CBS guy and explain to him the fix you're in," he said. "If it's who I think it is, I think he'll tell you to give his name."

The professional fate of my CBS source was one of the two major concerns of mine, the other being the unknown position of the Herald Tribune. If I persisted in my refusal to name the source, would the Herald Tribune ask me to quit? Or would my editors insist that I talk? And if I did talk, could I face the source again? Could I live with myself? How would my children feel about Mom being a snitch (I was pregnant again)?

Soon after I returned to my office, I was summoned by phone to the office of Ogden R. Reid, then editor and publisher. He said he had just learned what happened in court.

"I don't want you to feel that the Herald Tribune wants you to talk," he said. "That's your decision. But if you want to hold your silence, we'll back you to the hilt-up to the Supreme Court, if necessary. As far as I'm concerned, there's a very basic principle involved here."

Suddenly, life was beautiful! But not for long! A few days later, I was invited to Reid's office again, at a meeting attended by Oliensis and two of the leading members of the Cahill, Gordon, Reindel and Ohl law firm - Reindel and Mathias F. Correa (a former U.S. Attorney).

They suggested Reid drop the case. They did not feel the situation was ideal for a test case. And they spoke with disdain about a legal hassle with an actress. They gave me some fearful moments, but again Reid saved the day.

"Gentlemen," he said forcefully, "you don't understand. I want to fight this case."

End of meeting!

On the following Monday morning, I reappeared in Judge Ryan's chambers in style. Now, I was accompanied by Correa, who knew the judge well, Oliensis, and a Herald Tribune reporter and photographer.

The judge was impressed. Where he previously dismissed me with a talk-or-go-to-jail mandate, he now called me "the Joan of Arc" of my profession.

After Correa stated my position, he noted that no federal court of appeals, including the U.S. Supreme Court, had passed on the question. Judge Ryan agreed that the question of privilege for newspaper reporters should be reviewed by higher federal courts.

"I will facilitate matters as much as I can," he said, "so that you may proceed without inflicting too much hardship upon the lady who willingly steps forward as the Joan of Arc of her profession."

Garland's attorney made a fuss about the decision and spoke of suing me and the Herald Tribune. But he was put down by Judge Ryan, who, with furrowed brow, warned that if he did sue, he would change the entire situation, possibly even overturning my conviction and sentencing.

End of threat!

Next morning's edition of the Herald Tribune gave generous page one attention to what had taken place in court.

Among the many calls I received in response was one from my CBS informant, who phoned me at home in the evening. "I'm very proud of you," he said. He did not refer to the Judy Garland matter. It was his last phone call to me.

During the fifteen months that elapsed between my first appearance before Judge Ryan and my arrival at the Hudson County Jail, I was a frequent news subject. Life, Look, Time, Newsweek, United Press International, Associated Press, newspapers in and out-of-town called for interviews.

And I did not like all that I read. Many of the stories contained misquotes and distortions. It was not only painful, but it also troubled me to think that while I was upholding press freedom, I was a victim of journalistic irresponsibility.

I developed a new perspective on the glass house existence of celebrities. It must be hell to live with the media lies that swirl around them.

When Judge Ryan paved the way for my appeal to the U.S. Court of Appeals, he adjudged me in criminal contempt of court and handed down a ten-day jail sentence, releasing me on my own recognizance pending an appeal.

And then we waited. After deliberating almost a year (during which time my daughter Roma was born), the Court of Appeals announced a decision, which unanimously upheld the contempt conviction imposed on me by Judge Ryan.

Written by Potter Stewart, who later was appointed to the U.S. Supreme Court, the opinion was that while it would represent a curtailment of press freedom to force a reporter to talk, the individual's right to fair trial was a more "precious" freedom.

The opinion prompted a rash of newspaper editorials all over the country, most of them expressing the hope that an appeal would be taken to the U.S. Supreme Court.

"While we disagree with the conclusion of the court," said Reid in his announcement of the appeal, "we are happy to see clear recognition that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news.'"

Not all editors agreed with Reid. Some held that reporters should protect their sources only to the jailhouse door. Others were content for reporters in such cases to decide whether they wanted to talk or go to jail.

But many of the major newspapers supported Reid.

The New York Times said, in part: "The specific issue that arises in the Torre case has never been judicially settled, and so it will be of great help in clarifying this matter."

The Daily News said: "If newspapers become legally obligated to tell where they got their information for any news story that gets into court, their ability to serve the public will be badly undercut."

The World-Telegram & Sun noted: "Policies, laws and rulings concerning a reporter's right (or lack of it) to protect sources of information with anonymity are a hodge-podge of contradictions and variance, depending on what court in what state one goes to."

In Washington and New York, bills were introduced to grant to reporters the privilege of refusing to name sources. None passed or was pursued after my case was no longer news.

In time, the U.S. Supreme Court announced that it would not review my case, noting that Justice William O. Douglas was a dissenter. This meant that he felt so strongly about the need to review the case he wanted to go on record as a dissenter when the majority voted no.

So it was back to Judge Ryan in Federal Court. Now, he wasn't calling me Joan of Arc. After Correa said that I "respectfully declined" to give the name of my informant, Judge Ryan gave me a tongue-lashing. At the time, there had been an outbreak of anti-semitism in the South, and Judge Ryan compared me to "the trouble-makers in the South, who bomb synagogues." Even worse, he added, because I was "a member of that profession which molds public opinion," and that it behooved me to set a better example.

"Get the Marshal," he commanded.

I was stiff with fear.

"But your honor," said Correa. "I led Miss Torre to believe that she would have at least two weeks to get her affairs in order."

Judge Ryan, whose anger apparently had something to do with the adverse mail he had been receiving from people who wanted to know why he was sending "a young mother" to jail, responded by issuing another call for the marshal.

"But your honor," Correa persisted. "Miss Torre has two young children. She has to make arrangements for them.

Mention of the children caused Judge Ryan to relent. He ordered me to "surrender" in five days.

The five days were unreal. So much to do! I had to line up guest columns to be run in my absence. My mother and father planned to stay at the apartment during my incarceration, and I had a live-in housekeeper, so the children would be all right. The phone calls from friends, acquaintances, and strangers were never-ending. And what do I pack to go to jail?

I knew about one item, thanks to a call from a Herald Tribune operator, who apparently knew about prison life. "Honey," she said, "let me give you a tip. Take a pair of comfortable shoes."

A cousin of my husband's who was warden of Rikers Island in New York phoned to give me advice on prison behavior: do as you're told, and don't ask for anything, and you'll get along all right."

On the eve of my surrender, I also was called by a gentleman for whom I had great respect - Joseph N. Welch, the Boston attorney, who acquitted himself brilliantly in the Army-McCarthy televised hearings of the 1950's.

We had conversations about my stand, and Welch always said I would go to jail for it. But now that jail was imminent, he felt an emotional tug for his errant friend. He was upset.

"Miss Torre," he said, "you're behaving like an agitated mother, you're going above and beyond the call of duty..."

A Herald Tribune operator who knew about prison life, said, "Let me give you a tip. Take a pair of comfortable shoes."

"Well, Mr. Welch," I said, "I suppose it's difficult for anyone outside of the news business to understand, but my mind is made up. I have no choice. My only fear is if they send me back to jail after I get out."

"Your only fear! It's a certainty they'll send you back. You'll spend the rest of your life in jail."

Suddenly, I didn't feel so good.

Welch then asked me to call one of three New York lawyers for whom he had much respect, and to talk things over with him. I called Harrison Tweed, and he was familiar with my case through the newspapers.

"I think," Mr. Tweed said, "that you did the right thing I don't believe there was anything else you could have done. But I am not sure that I would want this privilege you represent for your profession."

Why not? "Because there is so much irresponsibility in the press today. I would not want to give refuge to further irresponsibility. As for sending you back to jail, I don't think this would happen because it would be in the nature of persecution."

After hanging up with Tweed, I reported back to Welch. "Oh, Miss Torre," he said, with a sigh of relief, "I think I needed a lawyer more than you did."

Leaving home that cold morning of January 5, 1959, was one of the most difficult things I've ever had to do My mother cried easily, so it was arranged for her to stay away until after my departure. My children were now nine months and twenty one months, and I could barely kiss them goodby for the tears. My husband quickly ushered me out for the trip to the Federal Court House.

The courtroom was packed, and it pleased me to see the faces of many familiar journalists. The court proceedings mere mercifully brief. In the car enroute to Hudson County Jail in Jersey City, N.J., the matron accompanying me helped ease the tension.

"Do you know," she said with a straight face, "there were more reporters and photographers for you today than there were for Frank Costello." A dubious distinction, but she made me laugh.

I did a bit of daydreaming on the way to the jail. Wishful thinking, no doubt, but I imagined that my source would be outside the jail when I arrived and, just like in novels, he would step forward and say, "I told her!"

Was it a disappointment to me that my source never revealed himself? Not really. I did what I felt I had to do, and my informant was entitled to the same privilege. But I also realized I had misjudged him.

I had previously regarded him as a man of moral character -just, strong, and independent. During the many months of litigation, he proved to be weak and insecure. We were no longer friends. Perhaps he did not want to see me and my husband because we reminded him of his weakness.

This is not to say there was anything wrong with the information he had given me. It was correct, all right, as it had always been. The Garland special was never produced.

One more thing about the CBS informant. In the beginning, his professional welfare was one of my prime concerns. Halfway through my jail sentence, I came to realize that this concern had been misplaced.

My awakening came about as a result of three incidents. One of them was a heavy flow of visitors from members of the clergy. Why did they come? The were interested in my case because they felt that if a reporter could be forced to talk that this was a threat to their own confidential immunity.

Then I learned that in the fifteen years of New Jersey's shield law, no case had come along to test it.

"If you had talked," said the Sheriff of

Hudson County, a former newsman, "you would have weakened or cast doubt on our statute." The Manchester Guardian went further. It said "the statutes in twelve states" would have been in jeopardy.

And, finally, there was an outpouring of letters from all over the country. One message came through in those letters:

"I don't know what the principle involved is, but just to know that someone is willing to go to jail for a principle is good enough for me."

These sentiments, plus the groundswell of public opinion that came to my support, were euphoric. Suddenly, my incarceration did not matter. The CBS source did not matter. Corny though it may sound, I felt like a symbol, selfless, chosen to represent a cause.

The revelation also made me tolerant of the negatives of press freedom - news distortions, sloppy reporting, hatchet jobs, scandal mongering. They do not matter. It is better that a few get away with questionable reporting than the basic right to know be jeopardized for all the people.

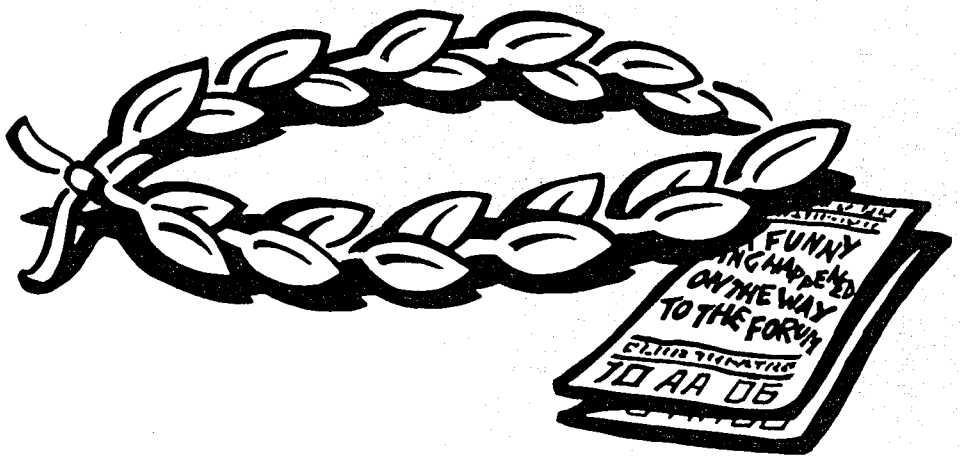
Nor do I share Harrison Tweed's concern that a shield law gives "refuge to further irresponsibility." With or without a shield law, reporters are still subject to libel laws.

As for the Judy Garland/CBS incident not being ideal for a test case, maybe not. Unfortunately, ideal test cases do not occur on cue. No doubt there would have been more suitable news stories among the many I later covered as a reporter/anchor at KDKA-TV in Pittsburgh. But to diminish the importance of the issue because the story involved "an actress" is not to see the forest for the trees.

And what happened to the case? CBS eventually counter-sued. Almost two years after that, both parties canceled their suits and signed a new contract.

As for me, I was now free of further jail threats - free, at last!

Marie Torre, who describes herself as "a communicator" is actually a multi-media event with nearly forty years experience in newspapers, magazines, radio, and television. On the air she is both a writer and a talented speaker, who has won two Emmy awards. Today she conducts a weekly program ("Newsmakers") for WILM news radio and, in collaboration with her daughter, is presenting a series of TV specials for WQEX-TV of Pittsburgh, Pennsylvania.



1962 *A Funny Thing Happened on the Way to the Forum* opens May 8th (with 964 performances to follow) at the Alvin Theater on Broadway. The play stars Zero Mostel, Jack Guilford, book by Burt Shevelove and Larry Gelbert, music and lyrics by Stephan Sondheim including the song "Comedy Tonight."

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DELAWARE TODAY 30 YEARS

THE HONORABLE JOSEPH T. WALSH

The First Amendment and the Promise of Religious Freedom

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.

Despite the broad thrust of its language, the religious guarantee of this First Amendment was initially viewed as having no application to state governments, whose citizens looked primarily to their own constitutions.

It was not by happenstance that when Congress turned its attention to the drafting of a Bill of Rights amending the newly ratified Constitution it gave primary attention to limiting the Federal Government's power to restrict the expression of individual conscience in worship, speech, and writing. The long history of friction between colonists seeking freedom of expression and the efforts of the mother country to secure conformity with an established religion and loyalty to the Crown were constant reminders of the need to provide constitutional assurance that past abuses would not be repeated. In breadth and aspiration, the First Amendment was a truly noble effort to achieve that assurance. This article will address but one aspect of the First Amendment, the religious freedom provision, its background, and some of the perplexing constitutional problems it has spawned.

I The aphorism that law is shaped by history is aptly applied to the religious clause of the First Amendment. The earliest immigrants, of whom the Pilgrims are the obvious examples, came to the new world, in large part, to escape religious persecution. Colonial life offered a degree of freedom of worship, but religious intolerance existed in the sectarian attitudes of communities founded by adherents of specific sects or religions. These communities looked with suspicion and distrust upon fellow immigrants who did not join in the locally established Church. Moreover, the power of the Church of England extended to the colonies under the auspices of the Crown and the official preference given the Anglican Church was a matter of resentment by other Christian sects.

With the advent of independence, colonial legislatures lost little time in formulating laws to ensure religious freedom. As usual, Virginia led the way. In June, 1776, the Virginia legislature adopted a Bill of Rights, which provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience.." Within a few years, Virginia also adopted legislation that eliminated the official preference for the Anglican Church and repealed compulsory tithe requirements. By 1786, a year before the convening of the Constitutional Convention in Philadelphia, Virginia enacted its "Statute of Religious Liberty" drafted by Thomas Jefferson, whose tombstone attests it as one of the three works for which he sought to be remembered. Declaring the right "hereby asserted is one of the natural rights of mankind" the statute defined religious freedom in expansive terms:

> II. Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

Virginia was not the only state to anticipate the national Constitution in

the formulation of freedom of religion. On September 11, 1776, the legislature of "the Delaware State, formerly stiled The Government of the counties of New Castle, Kent and Sussex upon Delaware" enacted a "Declaration of Rights and Fundamental Rules." The Delaware "Bill of Rights" devoted two sections to the subject of religious freedom. In Section 2, the entitlement was broadly stated:

> SECT. 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

Section 3 of the document was apparently designed to eliminate any religious test for office:

> SECT. 3. That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.

Whether by design or inadvertence, equality of office and citizenship was thus limited to those of Christian persuasion. This discriminatory element was later eliminated in the Delaware constitution of 1792, which provided simply that: "No religious test shall be required as a qualification to any office, or public trust, under this state."

The Delaware preference for Christianity was not unusual. While religious liberty was widely understood among early state governments as insuring freedom of conscience, the participation by government in the affairs of Christian churches was not considered unusual. After Thomas Jefferson and James Madison succeeded in persuading the Virginia legislature to eliminate public funding for the Anglican Church, Patrick Henry sponsored legislation authorizing a tax for the support of "Christian teachers" with the right of the taxpayer to designate the particular "society of Christians" who would receive the grant. No less a personage than John Marshall, then a practicing

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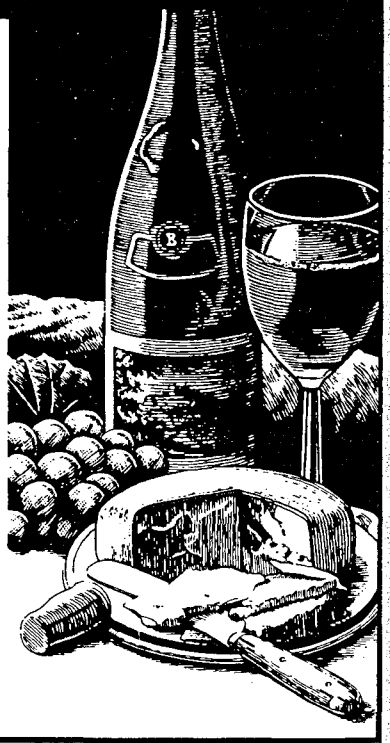

lawyer and legislator, supported the proposal, which was not successful in the face of opposition by Madison and Jefferson. In later years, while serving as Chief Justice of the United States, Marshall had not changed his views on the place of Christianity. "The American population is entirely Christian," he wrote in a letter in 1833, "and with us, Christianity and Religion are identified."

Although the early state constitutions with their local guarantees or bills of rights undoubtedly influenced the language of the religious clause of the First Amendment of the national constitution, they did not reflect a broad consensus of religious tolerance. Religious freedom, for the most part, meant freedom to practice Christianity, and financial support of certain churches continued in at least two states, South Carolina and Massachusetts, after the Bill of Rights was adopted. Indeed, Massachusetts maintained an established church until 1833. There is little doubt, however, that when Madison took the floor of the House of Representatives on June 8, 1789 to propose a list of amendments to the national constitution (twelve were adopted by the Congress but only ten ratified by the states), the proposal to restrict the power of the federal government in the area of religious freedom was one he viewed as having special significance.

Most constitutional scholars agree that the Bill of Rights was more the product of the reaction of the states than of the general populace. Indeed, certain states conditionally ratified the basic document with the understanding that a set of amendments ensuring rights already reflected in state constitutions would be promptly affixed to the national constitution. However, in contrast to the rather elaborate religious freedom guarantees of some state constitutions, the First Amendment's religious freedom provision simply and directly prohibited Congress from enacting any "law respecting an establishment of religion, or prohibiting the free exercise thereof." Also, unlike most state constitutions, the federal religious freedom provision did not stand alone, but was part of a larger declaration embracing freedom of speech, press, and the right of assembly and petition.

The freedom of religion guarantee of the First Amendment is bifurcated, with the first part of the provision referred to as the "establishment" clause and the second the "free exercise" clause. Some legal scholars have questioned why there was need for an establishment clause if there was a free exercise guarantee. If every citizen had the right freely to exercise his or her religion why was it necessary to prevent the government from establishing an official religion? The answer, of course, lies in the colonial experience previously noted. The efforts of the Crown to secure and maintain the Church of England was so incompatible with "government by the consent of the governed" that no declaration of rights, however broad its guarantee of freedom of conscience, would be complete without an express prohibition on the establishment of a state church.

Despite the broad thrust of its language, the religious guarantee of the First Amendment was initially viewed as having no application to state governments, whose citizens looked primarily to their own constitutions. In Delaware, for example, succeeding constitutions in 1792, 1831, and 1897 guaranteed freedom of religion in the same form, but in more expansive language, than the federal counterpart:

> Section 1. Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.

While religious animosity existed in the first half of the century following the adoption of the Bill of Rights, as evidenced by the difficulties of the Mormons and the agitation of the Know Nothing Party, the concept of religious freedom became firmly embedded in the national fabric. To a foreigner viewing the emerging democracy from an Old World perspective, the sense of religious liberty was striking. As Alexis de Tocqueville recorded in his "Democracy in America," in America, as contrasted with France, "the spirit of religion and the spirit of freedom" were "intimately united, and they reigned in common over the same country." Discussions with clergy of all persuasions led Tocqueville to attribute this harmony to the separation of church and state.

II The First Amendment's guarantee of religious freedom created a political environment in which religious pluralism flourished, but it has been the source of controversy and division as well. Although there has been no change in the language of the religious liberty clause since its adoption 200 years ago, in recent times its language has been subject to new interpretations. Changing construction has sparked a clash between religious values and government practices, placing the establishment clause and the religious freedom clause in constant tension.

James Madison had no illusions that his handiwork in the Bill of Rights would be self enforcing. He envisioned that enforcement would come from the judiciary: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." Enforcement of the religious freedom provision of the Bill of Rights at the state level came, however, only with the emergence in the last half century of the incorporation theory applying the Fourteenth Amendment guarantee of due process.

In 1925, the Supreme Court first confronted directly the effort of a state to limit religious instruction. In Pierce v. Society of Sisters, 268 U.S. 510, 535, the Court unanimously struck down an Oregon statute that forbade children between ages eight and sixteen from attending private, i.e., parochial schools. The Court equated the right of the parents to "nurture" the child in "additional obligations" as flowing from the "fundamental theory of liberty." Later that same year in Gitlow v. New York, 268 U.S. 652, 667, the Court formally announced the incorporation doctrine implicit in Pierce, that limitations on the national power contained in the First Amendment apply equally to the states.

Thus, the First Amendment, intended in its original form as a limitation on the power of the federal government, has in recent years been most often applied to limit the activities of the states. Challenges to state action in such areas as released time, financial aid to parochial schools, and tax exemption for churches ultimate-

ly required the Supreme Court to gauge the delicate balance between the establishment of religion and its free exercise. The Court's 1962 decision in Engel v. Vitale, 370, U.S. 421, 444, invalidating prayer in public schools, engendered a storm of controversy, which is reflected to this date in proposed constitutional amendments to permit the practice. Most recently, controversies over Christmas creches and school lunch programs have tested the limits of the establishment clause. The Supreme Court's jurisprudence on state-church matters now turns on such refinements as "secular legislative purposes" and "excessive governmental entanglement with religion" as the Court struggles to define the limits of the 200 year old relationship between the State and the Church in America.

In the United States, religion historically has been a matter of individual conscience. The religious freedom provision of the First Amendment has provided a constitutional bulwark against governmental interference with religious beliefs. But the very strength of religious beliefs has led to the effort to permit, even encourage, the government to embrace religious and moral beliefs as societal goals. Such efforts, as Justice Brennan noted in his concurring opinion in Engel v. Vitale, perhaps acceptable at a time when the Nation was "far more heterogeneous religiously" no longer found acceptance in an age of religious diversity. He commented that: "In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."

There is no question that the metaphorical wall separating Church and State in America is more firmly affixed than ever before in our history. Critics of recent rulings complain that the spirit of governmental neutrality in things religious has been replaced by an attitude of hostility. But as Justice Douglas noted in Zorach v. Clauson, "[w]e are a religious people whose institutions presuppose a Supreme Being." 343 U.S. 306, 313. The religious clause of the Bill of Rights has served us well in permitting those institutions to promote religious freedom without advancing the interests of any religion or sect. Although tension will exist, a system of jurisprudence that prides itself on being more responsive to experience than to abstract principles should be equal to the task.

Justice Joseph T. Walsh's long and distinguished career on the bench, first as Superior Court Judge, next as Vice Chancellor of the Court of Chancery, and now as Associate Justice of the Supreme Court of Delaware, qualifies him to speak with a special force and weight on topics of constitutional law and civil liberties. Justice Walsh serves as Co-chair of the Long Range Courts Planning Committee.

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1 Always ask the "why?" question. You have to know why a client has chosen you. If it's because of your particular expertise or reputation—great. But, if it's because several other firms have withdrawn or because it's known that you're just a little too hungry—watch out!

2 Trust your instincts. If you're being asked to do something that doesn't seem just right, turn down the business.

3 Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

4 Don't keep a client you can't handle. If your client has outgrown your capabilities, be smart enough to recommend another firm. And, if you can no longer trust a client—withdraw!

5 Avoid misunderstandings. Use engagement and disengagement letters. Agree on what has to be done and what it will cost. Once fees have been established bill regularly.

6 Know your client's problems. You are trained to ascertain the facts and analyze them. Use this skill *before* accepting representation.

7 Go back to school. Continuing education courses can be very important to you.

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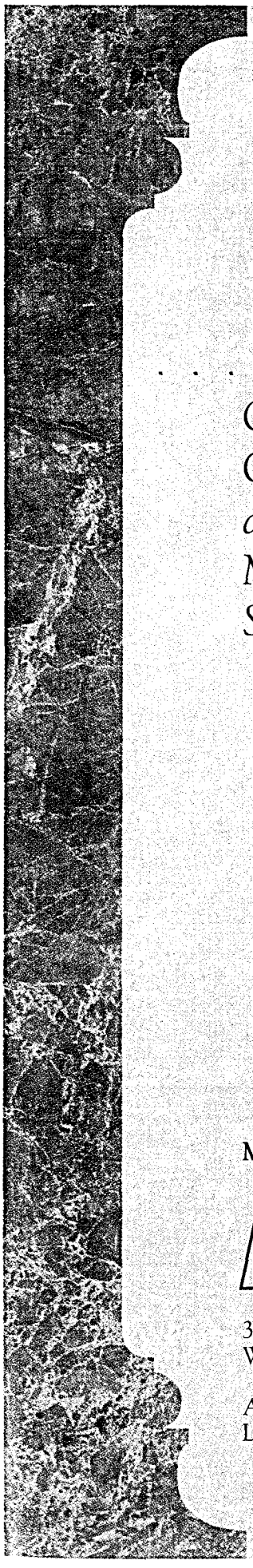

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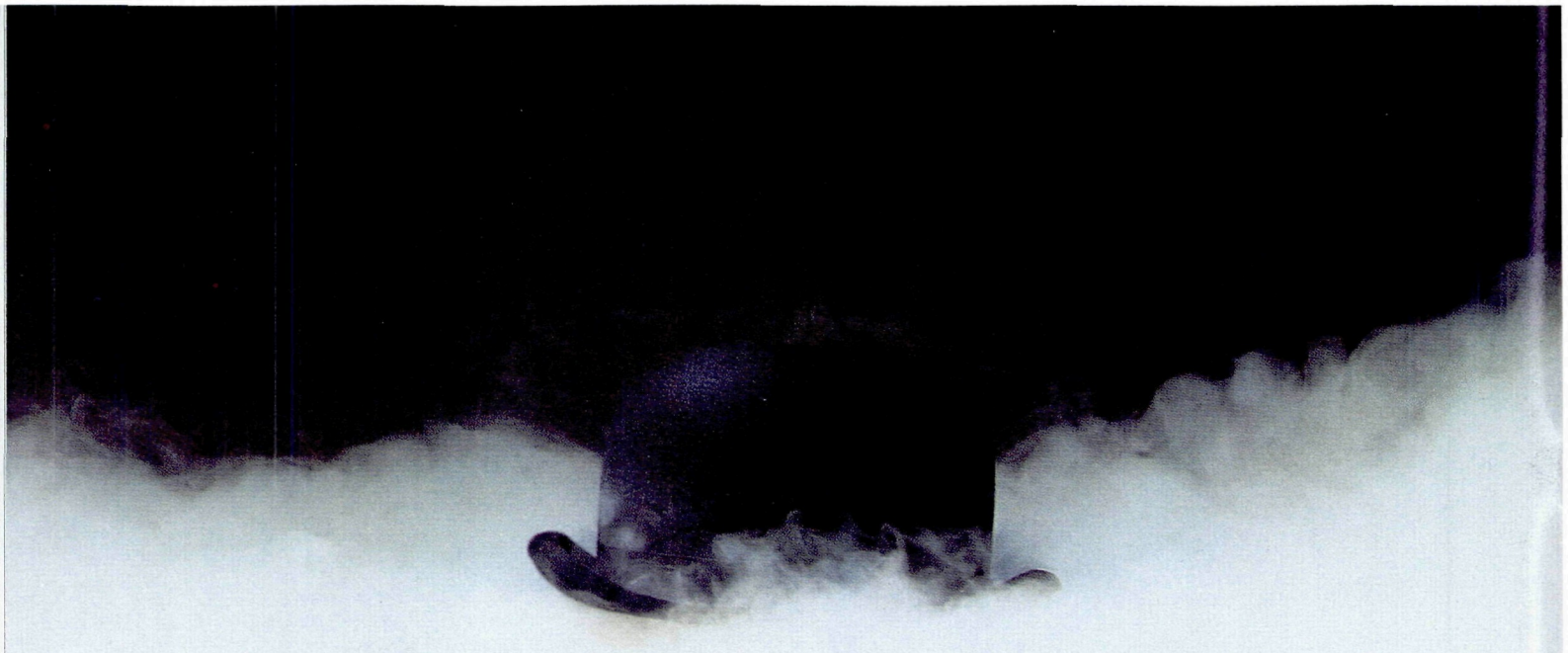

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