

- **Introduction**
- **The Roots of Religious Liberty**
- **Religious Liberty in the Modern Era**
- **Freedom of Speech**
- **Freedom of the Press**
- **Privacy**
- **Trial by Jury**
- **Rights of the Accused**
- **Property Rights**
- **Equal Protection of the Law**
- **The Right to Vote**

Introduction: Rights of the People

We hold these Truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.

– United States Declaration of Independence

These words from the Declaration of Independence have always had a special meaning for the people of America. It is one of our charters of freedom, recited at countless gatherings every Fourth of July, memorized by generations of schoolchildren, invoked by politicians of every party, and frequently cited by the courts in their decisions. Its message, which resonates as forcefully today as it did over two centuries ago, is *that protection of the rights of the people is the antecedent, the justification, for establishing civil government*. The people do not exist to serve the government, as is the case in tyrannical societies, but rather the government exists to protect the people and their rights. It was a revolutionary idea when first propounded in 1776; it still is today.

John, Lord Acton, The History of Freedom and Other Essays (1907)

Liberty is not a means to a higher political end. It is itself the highest political end.

In the essays that follow, I have tried to explain what some of the more important of those rights are, how they are integrally connected to one another, and how as a matter of necessity their definition changes over time. We do not live in the world of the 18th century, but of the 21st, and while the spirit of the Founders still informs our understanding of constitutionally protected rights, every generation of Americans must recapture that spirit for themselves, and interpret it so that they too may enjoy its blessings.

In 1787, shortly after the Philadelphia convention adjourned, James Madison sent a copy of the new U.S. Constitution to his friend and mentor, Thomas Jefferson, then American ambassador to France. On the whole, Jefferson replied, he liked the document, but he found one major defect-it lacked a bill of rights. Such a listing, Jefferson explained, "is what the people are entitled to against every government on earth." Jefferson's comment surprised some of the men who had drafted the Constitution; in their minds, the entire document comprised a bill of rights, since it strictly limited the powers of the new government. There was no need, for instance, of any specific assurance that Congress would not establish a church, since Congress had been given no power to do so. But Jefferson, the chief architect of the Declaration of Independence, believed otherwise. Too often, in the past, governments had gone into areas where supposedly they had no power to act, and no authority to be, and the result had been a diminishing or loss of individual rights. Do not trust assumed restraints, Jefferson urged, make the rights of the people explicit, so that no government could ever lay hands on them. Many people agreed with Jefferson's sentiments, and several states made the addition of a bill of rights a condition of approval of the new Constitution.

At the very first Congress, Madison took the lead in drafting such a bill, and by 1791 the states had ratified the first 10 amendments to the U.S. Constitution, commonly called the Bill of Rights. But they are not the only rights listed in the document, and many of the amendments since then have done much to expand the constitutional protection of the rights of the people.

As we shall see in the essays following, many of the rights in those amendments grew out of the experience of both the British and the American colonists during the period of British rule. All of them reflect the Founding generation's understanding of the close ties between personal freedom and democracy. The First Amendment Speech Clause, for example, is universally recognized as a foundation stone for free government; in Justice Benjamin Cardozo's phrase, written in 1938, it "is the matrix, the indispensable condition, for nearly every other form of freedom." The various rights accorded persons accused of crime, all tied together by the notion of due process of law, acknowledge not only that the state has superior resources by which to prosecute people, but that in the hands of authoritarian regimes the government's power to try people could be a weapon of political despotism. Even today, dictatorships regularly use warrantless searches and arrest, lengthy detention without trial or bail, torture, and rigged trials to persecute and crush their political opponents. How the government acts in matters of criminal justice is a good indication of how democratic a government is, and how strongly the rule of law pertains.

Over the years, the definition of some rights has altered, and new concepts, such as privacy, added to the constitutional lexicon. But however defined, the rights of the people are at the core of what it means to be an American. In this way the United States is quite unique, and its tradition of rights very much reflects the American experience. Other countries define their national identity, what it means to be a citizen of that country, primarily through things held in common – ethnicity, origin, ancestry, religion, even history. But in these areas there is very little commonality among Americans – the most diverse nation in the history of the world. U.S. citizens come from every continent, every country on earth; they worship not in one church but in thousands of churches, synagogues, mosques, ashrams, and other houses of prayer. The history of the United States is not just that of the country itself, but the histories that millions of immigrants brought with them. Although there are some Americans who can trace their ancestors back to the *Mayflower* voyage in 1620 and others whose great-great-grandparents fought in the Civil War, there are others whose families were wiped out by wars in Europe and Asia in the 20th century and who came here with little more than the shirt on their backs.

What binds this diverse group of individuals together as *Americans* is the shared belief that individual liberty is the essential characteristic of free government. When Abraham Lincoln, in the midst of a bloody civil war, called the United States "the last, best hope of earth," he did not mean that the country or its inhabitants were morally superior to other peoples. Rather, the ideal of free government resting upon and protecting the rights of the people had to be preserved so that democracy itself could take root and grow.

One thing that will be clear from these essays is that while there are large areas of agreement among Americans as to the importance of these rights, there is also disagreement as to exactly what some rights mean in practice. Does freedom of speech, for example, protect burning the American flag or posting pornographic material on the Internet? Does the ban against the establishment of a church mean that there can be no governmental aid to religion, or only that it must be given out on a non-preferential basis? Does capital punishment come within the prohibition against cruel and unusual punishment?

For Americans these questions are worthy of public policy debate, a debate that in no way indicates that people do not value these rights. In a diverse society, moreover, one would expect there to be multiple interpretations of rights. One way to understand not only what the rights

mean but why the debates over meanings go on is to recognize that the concept of liberty, at least as it has evolved in the United States, is multi-faceted.

First, in all free societies there is a constant and unavoidable tension between liberty and responsibility. Every right has a corresponding duty. Sometimes the duty rests upon the person exercising the right; a common saying is that your right to swing your arm stops where my chin begins. Other times the exercise of a right by one person requires restraint on the part of others not to interfere; a man may be advocating radical ideas that do not sit well with his audience, but the police are restrained from interfering with his right to speak freely. The right to be secure in one's home means that the police are restrained from entering that abode unless they have secured a proper warrant.

Edmund Burke, on the difficulties of creating a free government (1790)

To make a government requires no great prudence. Settle the seat of power; teach obedience; and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a free government; that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought; deep reflection; a sagacious, powerful, and combining mind.

This tension needs to be seen in most instances as healthy, because it creates a balance that prevents liberty from degenerating into anarchy, and restraint from growing into tyranny. In a democracy people have to respect the rights of others, if not out of courtesy, then out of the basic understanding that the diminution of rights for one person could mean the loss of that right for all people.

A second problem in the practice of rights is that we often do not have a good definition of what the right entails. Chief Justice John Marshall once described the Constitution as a document "of enumeration, not definition." By this he meant that although Congress had been given certain powers under the Constitution, the list of those powers did not define them. For example, Congress has control over interstate commerce, but for more than two centuries there has been a debate over exactly what constitutes "interstate" commerce.

One reason that the lack of definition has not led to turmoil is that the Constitution provided a mechanism that interprets the document. Even if people do not agree with what the Supreme Court – the nation's chief court – says about the meaning of a specific right, adherence to the rule of law requires obedience to that meaning. Since the Court's composition changes over time, and since the men and women who become justices understand and reflect evolving notions of rights, the Court has over the years been the chief agent for keeping constitutional rights pertinent to the needs of the time.

A third issue involves the breadth of the right. If one were to write a history of the United States, one could easily focus on how rights have evolved and reached out to cover more and more of the population. Voting for example was at one time restricted to white, male property-owners over the age of 21; it has expanded to include nearly all persons over the age of 18, men and women, whites and people of color, property-owners and those without property.

Even what appears to be the relatively straightforward provision guaranteeing the free exercise of religion raises questions of breadth. Clearly, it means more than just adherence to mainstream faiths; it assures dissidents and even non-believers that they will be left alone. But how far does one go in protecting sects whose practices, such as animal sacrifice or polygamy, are foreign to the nation's values? The Supreme Court has wrestled with these and related issues for more than 200 years, and as Justice Kennedy's comments, below, in a flag-burning case indicate, the Court is still faced with very difficult questions interpreting how far particular rights extend.

Justice Anthony Kennedy, concurring in Texas v. Johnson (1989)

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

That, over the course of the nation's history, there have been lapses in the protection of the rights of the people cannot be denied. Mormons were hounded out of the Eastern states, and persecuted in the West until they abandoned polygamy. The black slaves freed by the Civil War soon found themselves caught up in an extensive pattern of legally enforced racial discrimination in the South known as Jim Crow. Fear of radicals led to Red scares that seriously curtailed First Amendment rights after both the First and Second World Wars. Japanese-Americans were rounded up and interned during World War II.

While all these events may sound strange in a country that is defined by rights, the lapses did not result from groups who wanted to abandon the Bill of Rights completely. Rather, they came from well-meaning people who found the restrictions of the Bill of Rights inconvenient when confronted by what they saw as either a greater objective or a major threat to American survival.

Another important issue relates to the standing of rights not spelled out specifically in the Constitution. Everyone agrees that those rights explicitly mentioned in the first 10 amendments and elsewhere in the document are clearly important, and fall within the ambit of constitutional protection. But what about rights that are not specifically listed? Do they exist? The answer depends on how one interprets the Constitution, and it is a measure of how seriously Americans take their rights that the meaning and interpretation of the Constitution is and always has been a major issue in public discourse.

On the one hand, there is a school that believes the Constitution means what it says, and no more. The rights enumerated are to be protected, but no new rights should be created without constitutional amendment. When the question of the right of privacy arose in the 1960s, Justice Hugo L. Black, a strict constructionist, declared that "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." But what about the Ninth Amendment, reserving unenumerated rights to the people? For some scholars and judges, the Ninth Amendment only refers to rights held by the people at the time of ratification in 1791, and without clear evidence of the existence of such a right at that time, then it cannot be imported into the constitution without the necessary amendment.

Opposed to this view are the adherents of what is often called "the living constitution," the belief that the Constitution must change and adapt to evolving political, social, and economic conditions in the country. Although interpretation still starts with the words in the text, the emphasis is less on the literal meaning of those words than on the spirit that animated them. For example, when the Supreme Court in the 1920s first heard a case involving wiretaps, a majority of the justices agreed that since the actual tap took place outside the building, then there had been no "search" within the meaning of that word as used in the Fourth Amendment, and therefore no need for a warrant. But eventually the Court recognized that new technology made it possible to invade the privacy of a home without actually entering it, so the Court reversed itself and ruled that wire-tapping constituted a search and required a warrant. In a famous remark, Justice William O. Douglas explained that the Framers could never have imagined a wiretap, because they had no idea of telephones. A "living constitution" takes these developments into account, and by finding that eavesdropping was in fact a search, expanded upon the intent of the Framers to guard the privacy of one's home. That same logic led a majority of the Court in the 1960s to agree that privacy had been one of the rights that the Founding generation had intended to protect.

Justice Robert H. Jackson, in the case of West Virginia Board of Education v. Barnette (1943)

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Like Jefferson, many of the Founders feared the power of the federal government and demanded a bill of rights to limit its powers. They knew that the idea of a bill of rights had a long history that stretched back to England's Magna Carta in 1215. The English promulgated a Bill of Rights in 1689, and in America the colony of Pennsylvania adopted a Charter of Liberties in 1701. Shortly after independence had been declared, Virginia adopted a declaration of rights authored by George Mason that both Jefferson and Madison had in mind when it came to drawing up the federal amendments. But by then a significant change had taken place, and there is an irony in that Madison and others saw the importance of a bill of rights not so much in restraining the government but in restraining the people.

The original declarations of rights in both England and her colonies had been designed to protect the people from the small elite that controlled the government. In the American colonies, however, government became more democratic in the 18th century, a development that in some ways triggered independence and that picked up momentum in the 1780s. Political power now resided in the hands of the many, and those who ruled did so not by the right of birth or wealth alone, but because they had secured the consent of the majority. So now the focal point of a bill of rights shifted to protecting the minority from the majority.

James Madison, letter to Thomas Jefferson (1788)

Wherever the real power in a Government lies, there is the danger of oppression. In our Government, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its

constituents, but from acts in which the Government is the mere instrument of the major number of Constituents.

This may sound strange to some, especially since democracy is often defined as rule by the majority. But "the majority" is a complex term. People who agree on one issue may strongly disagree on another. Democratic government is a series of compromises among shifting majorities so that in the end most of the people are satisfied with most of the results most of the time. But on any one issue, a person may be in the minority, so simple self-interest dictates that there be special protection for minorities. A person who demands that an unpopular speaker be silenced may some day find that he is the one advocating an unwelcome position; in order to safeguard his freedom to speak out against the majority, he must accede to protection for all other advocates of different views to be protected as well. Similarly, in order to preserve one person's right to free exercise of religion, one has to acknowledge the right of those with different religious views to be free as well.

In the pages that follow, there is frequent reference to decisions of the United States Supreme Court, and this is deliberate, because the Court has played a unique role in the expansion and protection of individual liberties. There is a certain irony in the fact that in a democratic society, nine persons named to their position for life, removable only for misbehavior, and unaccountable to the people, are the arbiters of what the rights of the people mean. But Constitutions and Bills of Rights need enforcers, they need someone to say that this is the meaning of free speech in this situation, or that is unacceptable behavior by the police. Chief Justice Charles Evans Hughes once commented that "the Constitution is what the Supreme Court says it is," and there is no question that the rights of the people have been largely defined by the courts.

The courts are, however, more than an enforcement mechanism. People may differ widely over what certain rights mean, but are willing to accept the adjudication of those rights from an impartial tribunal. The Court has not always been right, and the justices who have served on it for the last two centuries have not seen themselves as infallible. Some of their decisions have stood the test of time; others have given way to new developments. Above all, the Court has established what the ideals of our rights are, it has defined the place those rights play in our civic life, and on some occasions – such as Justice Brandeis's exposition of free speech in *Whitney v. California* (1927) – the eloquence of the exposition has become part of our very traditions.

But as the members of the Court would themselves acknowledge, neither democracy nor the rights of the people could survive without the deep attachment of the people themselves to those basic principles. These rights not only make a free society possible, they define who Americans are. That is no small thing.

The Roots of Religious Liberty



Illustrated by Richard Anderson

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

– First Amendment to the U.S. Constitution

Religious freedom is one of the most prized liberties of the American people, a fact that strikes some people as incongruous if they think of the United States as a secular society. That very phrase, however, is misleading, in that it implies a society in which religion and religious ideals are absent, and secular values alone govern daily conduct. Religion is not absent from daily life in the United States; rather, the Constitution has created a system in which each individual and religious group can enjoy the full freedom to worship, free not only from the rein of government but from pressures by

other sects as well. This combination of religious diversity and religious freedom is a complex matter, and the path toward this ideal has not always been easy, nor is it free from conflict today. But democracy is a process, not a finished product, and liberty in all its forms is also in development.

The concept of religious freedom is relatively recent in mankind's history. There have been societies that permitted some deviation from state-sanctioned and enforced official religion, but such toleration depended upon the whim of the majority or ruler, and could be withdrawn as easily as it had been given. Religious freedom requires, above all else, the divorce of a nation's religious life from its political institutions, and this separation of church and state, as it is called, is also of relatively recent vintage. One of the great social revolutions that accompanied America's rebellion from England and the adoption of the Constitution and Bill of Rights was the formal separation of church and state, first by the former colonies and then by the federal government. By embedding this idea, and the accompanying notion of a full freedom of religious exercise, in the Constitution, the Founding Generation transformed what had at best been a temporary privilege into a protected right. That did not mean that religious freedom, as we know it today, fully existed in 1791, but the seeds had been planted. The great flowering of those germinal ideas would come in the 20th century.

* * * * *

The history of western Europe, from whence came the early settlers of the American colonies, was marked by religious conformity from the fourth century until the Protestant Reformation, with the Catholic Church the "established" or official church. One might have expected that the Protestant Reformation would have led to some toleration, and in fact one can find in the writings of Martin Luther and John Calvin some passages that plead for tolerance and freedom of conscience. But in those areas where Protestants gained control, they quickly established their own churches. This should not be surprising, since Luther never objected to the notions that there is only one true faith, that all others need to be eradicated, or that in any state there can be only one church.

The Protestant Reformation did split the religious unity of Europe. In some countries, religious differences led to bitter civil wars, often lasting for decades. James Madison had this history in mind when he wrote that "torrents of blood have been spilt in the world in vain attempts of the

secular arm to extinguish religious discord, by proscribing all differences in religious opinion." Only in tiny Holland did the competing religious sects so balance each other that by the 17th century the good burghers had adopted a live-and-let-live policy that permitted not only Catholics and Protestants, but Jews as well, to live in a spirit of mutual toleration. The Americans of the Revolutionary generation knew all about Holland, but their actions were dictated primarily by their own colonial experience as British colonies.

* * * * *

In the early 17th century, the colonization of North America began, and Englishmen took their visions of the godly community to the New World. What is important is that in terms of religion, all of the new settlers believed in an established church, and soon after they set up their colonies, they established their churches. A famous example is from *New England's First Fruits*, a 1643 pamphlet describing the early years of the Massachusetts Bay colony, in which the author wrote, "After God had carried us safe to New England . . . we had builded our houses, provided necessities for our livelihood, reared convenient places for God's worship, and settled the civil government."

From the settlement of Jamestown in 1607 until the American Revolution in 1776, the British colonies in North America, with few exceptions, had established churches. In New York and the southern colonies, the Church of England enjoyed the same status as it had in the mother country, while in New England various forms of Congregationalism dominated. These colonies consistently discriminated against Catholics, Jews, and even dissenting Protestants.

In 1656, the General Court of Massachusetts Bay forbade the presence of Quakers in the colony; should any be found, they were to be jailed, whipped, and deported. But the Quakers were persistent, so the following year the legislature ordered that banished male Quakers who returned should lose one ear; if they returned a second time, the other ear. Females who came back were to be "severely" whipped, and on a third return, male or female should "have their tongues bored through with a hot iron." But the Quakers kept coming, so in 1658, the General Court prescribed death by hanging, the same penalty imposed upon Jesuits and other Catholic priests who returned after banishment. Between 1659 and 1661 one woman and three men were indeed hanged upon Boston Common.

As late as 1774, at a time when the colonists were strongly protesting British invasions of their rights, the Reverend Isaac Backus, leader of the Massachusetts Baptists, informed the governor and council that 18 Baptists had been jailed in Northampton, during the coldest part of the winter, for refusing to pay taxes for the support of the town's Congregational minister. That same year, James Madison wrote to a friend: "That diabolical, hell-conceived principle of persecution rages among some. . . . There are at this time in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. . . . So I must beg you to . . . pray for liberty of conscience for all."

Yet from the very beginning of settlement in America, pressures grew, especially in the northern colonies, against establishment and conformity. As early as 1645, a majority of the deputies in the Plymouth (Massachusetts) General Court wanted "to allow and maintain full and free toleration of religion to all men that would preserve the civil peace and submit until government; and there was no limitation or exception against Turke, Jew, Papist, Arian, Socinian, Nicholaytan, Familist, or any

other, etc." In nearby Rhode Island, Roger Williams founded a colony that allowed an environment of almost total religious liberty. Williams has been characterized as a prophet of modernity in this area, and by his actions he certainly deserves that title. Williams not only favored freedom of conscience, but he opposed religious establishment, and he did so in the belief that establishment harmed not only the civil society but religion as well. His was one of the few voices in the 17th century colonies to make this argument.

Although formal establishments lasted until 1776, in effect the colonies had to allow some degree of religious toleration. At first the settlers came from a relatively homogeneous background, but within a short time the lure of the New World brought immigrants from all over the British Isles as well as from northern and western Europe. Many came not because America offered any greater religious freedom than they enjoyed at home, but because of economic opportunity. Not all of them shared the Congregational faith of the Puritans or the Anglican views of the middle and southern colonies. Baptists, Jews, Catholics, Lutherans and others arrived and once here began protesting that they should not be subject to taxation for a church they did not attend or be forced to conform to a faith they did not share.

* * * * *

At the beginning of the Revolution, Virginia, like many other states, disestablished the Church of England, which many colonists identified with the hated royal government. The Virginia constitution of 1776 guaranteed to every person equality in the free exercise of religion but it stopped short of declaring a full separation of church and state, much to the disappointment of the largest dissenting group in the state, the Baptists. Other groups that still adhered to the Anglican faith (soon to be denominated as Episcopalians) believed that tax monies should support religion. Taxes, they thought, ought not go to just one sect, but should be used to support all (Protestant Christian) churches.

The fight in Virginia to establish full religious freedom is worth looking at for a moment, because it involved two of the great architects of the American nation, Thomas Jefferson, the author of the Declaration of Independence, and James Madison, known as the Father of the Constitution. Both men would later serve as president of the United States.

Thomas Jefferson had written a "Bill for Religious Freedom" that provided, among other things, "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." This bill was passed by the Virginia legislature. Jefferson believed religion to be a personal matter between an individual and God, and therefore beyond the reach of the civil government. He did not limit this freedom to Protestant sects, or even to Christians, but to all groups, and he considered this freedom not to be the gift of a legislative session, but one of the "natural rights of mankind." Jefferson's ideas were far more advanced in the 1780s than those of his countrymen, and even in his native Virginia there was much opposition to his proposal, especially from churches who wanted support from the state.

Jefferson left for Paris as American minister to France, and the fight for religious liberty devolved upon his friend and disciple, James Madison, who wrote one of the key documents in American religious history, the "Memorial and Remonstrance against Religious Assessments." Like Jefferson, Madison argued that the essentially private and voluntary nature of religion should not be subject to government in any manner. A tax assessment, even if divided among all religions, nonetheless

remained an establishment of religion, and should therefore be opposed, no matter how mild or beneficent it appeared. The arguments made over 200 years ago still ring strongly.

Memorial and Remonstrance (1786)

1. *Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. . . .*

2. *Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. . . .*

3. *Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. . . . We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? . . .*

The force of Madison's argument led the voters of Virginia to elect a state legislature that in fact opposed not only the establishment of a single church, but the taxation of the people for any and all churches. At its next session, the General Assembly adopted what is one of the foundational documents in American history, the Virginia Statute for Religious Freedom. The argument made by Thomas Jefferson is that religion is so important, and its free exercise so essential to mankind's happiness and well-being, that it must be fully protected from the state. People should not be taxed either for an established church that they do not support, or even for support of their own church. Religion thrives best when left to the devotion of its adherents.

Virginia Statute for Religious Freedom (1786)

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . .

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. . . . We are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Although today we give much of the credit for religious freedom to the First Amendment to the Constitution, in its own time the adoption of the Virginia Statute for Religious Freedom marked a greater step away from state support and enforcement of one particular religious belief and toward an open, tolerant society. The significance of the statute lay in its assumption that religious matters were of a totally personal nature, beyond the legitimate scope of the state. Thomas Jefferson personified this view when he wrote to a friend: "I never told my own religion, nor scrutinized that of another. I never attempted to make a convert, nor wished to change another's creed. I never judged the religion of others . . . for it is in our own lives and not our words that our religion must be read."

By the time the new government formed under the Constitution, the ideas embodied in these two documents had spread throughout the new American states. Even though some states would continue to have established churches for a few more decades, there was common agreement that the national government should not be involved in religion. As John Adams wrote, "I hope that Congress will never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year. Let every colony have its own religion without molestation."

Several states, in fact, had ratified the Constitution on condition that it be amended to include a bill of rights to make sure that Congress did not meddle, and to this task James Madison applied his considerable talents in the first Congress to meet under the new Constitution. From his labors came the 10 amendments, ratified in 1791 and known collectively as the Bill of Rights. The first of these amendments read:

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 redress of grievances.

The bundling of these various rights within the same amendment is far more than an act of literary economy. They all deal with the right of the people to express themselves, to be free of state coercion in voicing their political and religious beliefs, their ideas, and even their complaints. One should remember that at the time Madison drafted these amendments, religion and religious beliefs often comprised important political issues. Madison had had to win a political fight to get the Statute of Religious Freedom enacted, and similar *political* fights took place in other states as well. Not surprisingly, many of the First Amendment cases that would later come before the U. S. Supreme Court have cut across the artificially imposed categories of simple speech or press or religion; rather, they have dealt with the limits of governmental power to restrict a person's mind and the untrammelled right of expression.

The past 200 years have seen the playing out of this idea, of keeping government and religion separate, so as to allow each person the right to believe, or not to believe, according to the dictates of individual conscience. This is not to say that there has not been any religious prejudice in the United States. Catholics, Jews, and other groups have been the victims of discrimination, but it has been social discrimination that has been neither endorsed nor enforced by the state. Legal discrimination based on belief lasted a little beyond the Revolution, and then faded away.

It's true that from the time of the Revolution until well into the 20th century, despite great diversity among its peoples and religions, the majority of Americans subscribed to a Protestant Christian faith. Groups that deviated from that mainstream often found themselves the objects of suspicion, yet at all times these groups, especially Jews and Catholics, found champions among the Protestant majority to defend them and their right to worship freely according to the dictates of their conscience.

To take one well-known example, in New York in the early 19th century, a thief, repenting his sins, had confessed to a Catholic priest, Father Andrew Kohlmann, and asked him to return the stolen goods, which the priest did. Police demanded that Father Kohlmann identify the thief, but he refused to do so, claiming that information received under the seal of confession remained confidential to all save priest and penitent. Arrested for obstructing justice, Father Kohlmann was tried before the Court of General Sessions in New York City. Counsel on both sides, as well as the panel of judges, were Protestant, and the lawyer who defended Father Kohlmann made his argument in the broadest possible terms of free exercise of religion.

Argument of counsel in defense of seal of confession (1813)

I shall proceed to examine the first proposition which I undertook to maintain, that is, that the 38th Article of the [New York State] Constitution, protects the Reverend Pastor in the exemption which he claims, independent of every other consideration.

The whole article is in the words following:

"And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: This convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE AND DECLARE, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind. Provided, that the liberty of conscience hereby granted, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

Now we cannot easily conceive of more broad and comprehensive terms, than the convention have used. Religious liberty was the great object which they had in view. They felt, that it was the right of every human being, to worship God according to the dictates of his own conscience. They intended to secure, forever, to all mankind, without distinction or preference, the free exercise and enjoyment of religious profession and worship. They employed language commensurate with that object. It is what they have said.

Again there is no doubt that the convention intended to secure the liberty of conscience. Now, where is the liberty of conscience to the Catholic, if the priest and the penitent, be thus exposed? Has the priest, the liberty of conscience, if he be thus coerced? Has the penitent the liberty of conscience, if he is to be dragged into a court of justice, to answer for what has passed in confession? Have either the privilege of auricular confession? Do they freely enjoy the sacrament of penance? If this be the religious liberty, which the constitution intended to secure – it is as perplexing as the liberty which, in former times, a man had of being tried by the water ordeal, where, if he floated he was guilty – if he sunk he was innocent. . . .

By the early 19th century, therefore, at least some people who thought about what religious freedom meant had reached the essentially modern position. The judges in the *Father Kohlmann* case unanimously upheld the principle of confessional sanctity, and, in 1828, the New York legislature gave statutory enforcement to the old common law doctrine of priest-penitent confidentiality. Although Catholics alone have confession as a rite, the idea of confidentiality surrounding communications between a person and his or her spiritual advisor, be it priest, minister, rabbi, or imam, has been accepted in both statutory and common law throughout the United States. What started as a test of one religion's practices spread to enhance the freedom of conscience for all.

Catholics continued to have their defenders throughout the time when many Protestants viewed them suspiciously, remembering the bloody conflicts of Europe. John Tyler, the former president of the United States, opposed the Know-Nothing Party of the 1850s, a small but vocal group of nativists who opposed Catholicism. Writing to his son, Tyler condemned the Know-Nothings and praised Catholics who "seem to me to have been particularly faithful to the Constitution of the country, while their priests have set an example of non-interference in politics which furnishes an example most worthy of imitation on the part of the clergy of the other sects of the North, who have not hesitated to rush into the arena and soil their garments with the dust of bitter strife. The intolerant spirit manifested against the Catholics . . . will arouse a strong feeling of dissatisfaction on the part of a large majority of the American people; for if there is one principle of higher import with them than any other, it is the principle of religious freedom. . . ."

That is not to say that anti-Catholic prejudices disappeared. The great migrations of the late 19th and early 20th centuries brought millions of new immigrants to the United States, and many of them came from Catholic countries in southern and eastern Europe. Crowded into teeming cities, they seemed to many Protestants not part of the country's fabric, and although the United States never experienced the bloody religious wars of Europe, anti-Catholic sentiment ran high. Prejudice certainly contributed to the defeat of the first Catholic to run for president, Alfred E. Smith, in 1924. Thirty-six years later, when John Fitzgerald Kennedy received the Democratic nomination for the presidency, he recognized that in order to be elected, he would have to meet and defuse this prejudice head on. He asked for and received an invitation to speak to a meeting of Southern Baptist ministers about his beliefs as a Catholic and his duties as an American citizen. It is widely believed that this talk, which received national attention, did much to defuse the religious issue in the election.

John F. Kennedy on church and state (1960)

Because I am a Catholic, and no Catholic has ever been elected President, the real issues in this campaign have been obscured – perhaps deliberately in some quarters less responsible than this.

So it is apparently necessary for me to state once again – not what kind of church I believe in, for that should be important only to me, but what kind of America I believe in.

I believe in an America where the separation of church and state is absolute – where no Catholic prelate would tell the President (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote – where no church or church school is granted any public funds or political preference – and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.

I believe in an America that is officially neither Catholic, Protestant nor Jewish – where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source – where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials – and where religious liberty is so indivisible that an act against one church is treated as an act against all. . . .

This is the kind of America I believe in – and this is the kind of America I fought for in the South Pacific and the kind my brother died for in Europe. No one suggested then that we might have a "divided loyalty," that we did "not believe in liberty" or that we belonged to a disloyal group that threatened "the freedoms for which our forefathers died."

And in fact this is the kind of America for which our forefathers did die when they fled here to escape religious test oaths, that denied office to members of less favored churches, when they fought for the Constitution, the Bill of Rights, the Virginia Statute of Religious Freedom – and when they fought at the shrine I visited today – the Alamo. For side by side with Bowie and Crockett died Fuentes and McCafferty and Bailey and Bedillio and Carey – but no one knows whether they were Catholics or not. For there was no religious test there. . . .

I do not speak for my church on public matters – and the church does not speak for me.

Although Protestants did not fear a Jewish conspiracy (in fact, the early Puritans admired Judaism), Jews also suffered from centuries-long religious bigotry. The New World did not have to overthrow the medieval institutions that had sanctioned anti-Semitism; nonetheless, seeds of prejudice did cross the Atlantic, and the small Jewish communities that dotted the seaboard had to overcome their fruits.

Like the Catholics, Jews received aid from Protestants who firmly believed that, in the United States, no room existed for the type of religious persecution so prevalent in Europe. "Happily, the Government of the United States," George Washington told the Jewish community of Newport, "which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens." Jefferson and Madison offered similar assurances that in this country religious freedom – not tyranny – would be the rule.

But many Americans considered this a Protestant Christian country, and if they feared a Catholic conspiracy, they felt less than comfortable with Jews as well. In Maryland, as in other states, the post-revolutionary Bill of Rights provided a long step toward religious freedom, but limited it to Christians. Beginning in 1818 Thomas Kennedy, a member of the Maryland State Assembly, and a devout Christian, led the fight to extend liberty to Jews as well.

Thomas Kennedy seeking equal rights for the Jews of Maryland (1818)

And, if I am asked why I take so much interest in favour of the passage of this Bill – to this I would simply answer, because I consider it my DUTY to do so. There are no Jews in the county from which I come, nor have I the slightest acquaintance with any Jews in the world. It was not at their request; it was not even known to any of them, that the subject would be brought forward at this time. . . .

There is only one opponent that I fear at this time, and that is PREJUDICE – our prejudices, Mr. Speaker, are dear to us, we all know and feel the force of our political prejudices, but our religious prejudices are still more strong, still more dear; they cling to us through life, and scarcely leave us on the bed of death, and it is not the prejudice of a generation, of an age or a century, that we have now to encounter. No, it is the prejudice which has passed from father to son, for almost eighteen hundred years. . . .

There are very few Jews in the United States; in Maryland there are very few, but if there was only one – to that one, we ought to do justice.

Perhaps because Jews were so small a group, or perhaps because other states looked upon Jews as good citizens, or perhaps because the blatant prejudice offended many citizens, the battle for Jewish rights now received strong support from other states. Newspaper editorials called upon Maryland to redeem itself. The influential *Niles Register* weekly wrote: "Surely, the day of such things has passed away and it is abusive of common sense, to talk about republicanism, while we refuse liberty of conscience in matters so important as those which have relation to what a man owes his Creator." The pressure had its effect, and Maryland gave full political and religious rights to Jews in 1826. By the Civil War, only North Carolina and New Hampshire still restricted Jewish rights, and those disabilities disappeared in 1868 and 1877 respectively.

By the Civil War, then, the idea of religious freedom had expanded significantly from the early issue of disestablishment. Nearly all states had adopted and implemented bills of rights to provide individual liberty of conscience, and despite a pervasive sense that America was primarily a Protestant Christian nation, had removed civil and political disabilities from Catholics and Jews. The federal government, bound by the First Amendment, had never attempted to intrude into religious matters, and in religious matters as in political affairs, the United States appeared to those suffering from oppression in the Old World to be, as Abraham Lincoln put it, "the last best hope of freedom."

Religious Liberty in the Modern Era

After the Civil War, the United States underwent significant economic, social, and demographic changes, and with them came new problems of religious freedom. With the passage of the Fourteenth Amendment in 1868, the strictures of the First Amendment gradually came to be applied to the states as well. New questions relating to religious freedom arose, questions that might well have seemed incomprehensible to the Founding Generation. As Alexis de Tocqueville

noted long ago, in America, nearly all important issues ultimately become judicial questions. Starting in the latter part of the 19th century, and accelerating in the 20th, the courts had to resolve difficult questions relating to the meaning of the two "religion clauses" in the First Amendment.

For most of the first 150 years following the adoption of the Bill of Rights, Congress obeyed the injunctions of the First Amendment; as a result very few cases implicated the Establishment Clause, and those had little value as precedent. Then, in 1947, the Supreme Court ruled that both religion clauses applied to the states. Justice Hugo L. Black, in his majority ruling in *Everson v. Board of Education*, expounded at length on the historical development of religious freedom in the United States.

Justice Hugo L. Black, in Everson v. Board of Education (1947)

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

In this paragraph we find the root rationale for nearly every religion case decided by the Supreme Court in the last fifty years, whether it involves the Establishment Clause (which forbids the government to promote a religious function) or the Free Exercise Clause (which forbids the government to restrict an individual from adhering to some practice). And with the ruling, *Everson* began one of the most contentious public policy debates of our time, namely, What are the limits that the Establishment Clause puts on governmental action, not just in terms of monetary aid for programs, but on religious observances in the public sector?

To take but one example, for many years, a particular ritual marked the beginning of each school day all across America. Teachers in public schools led their students through the Pledge of Allegiance, a short prayer, singing "America" or the "Star-Spangled Banner," and possibly some readings from the Bible. The choice of ritual varied according to state law, local custom, and the preferences of individual teachers or principals. Most Americans saw nothing wrong with this widespread practice; it constituted part of America's historical heritage, an important cultural artifact of, as Justice William O. Douglas once wrote, "a religious people whose institutions presuppose a Supreme Being." In New York, the state had prepared a "non-denominational" prayer for use in the public schools, but a group of parents challenged the edict as "contrary to the beliefs, religions, or religious practices of both themselves and their children." By the 1960s, America's growing cultural as well as religious diversity made many people uncomfortable with the practice of forcing children to recite a prayer regardless of their – or their parents' – religious beliefs.

A group of parents went to court, and eventually the United States Supreme Court ruled in their favor in a case entitled *Engel v. Vitale*. In his opinion, Justice Hugo L. Black (who had taught Sunday school for more than 20 years) held the entire idea of a state-mandated prayer, no matter how religiously neutral, as "wholly inconsistent with the Establishment Clause." A prayer by any definition constituted a religious activity, and the First Amendment "must at least mean that [it] is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government [through the public school system]." Black went on to explain what he saw as the philosophy behind the Establishment Clause:

Justice Hugo L. Black, in Engel v. Vitale (1962)

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. [Its] most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion. [Another] purpose [rested upon] an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

For Black the content of the prayer, its actual words, or the fact that its non-denominational nature allegedly made it religiously neutral, had no relevance to the case. The nature of prayer itself is religious, and by promoting prayer, the state violated the Establishment Clause by fostering a religious activity which it determined and sponsored. The Court did not find evidence of coercion – no child had been forced to pray. Nor did the Court find that the prayer furthered the interests of any one denomination. Rather it was the state's promotion of religious practices in the public school in and of itself that violated the First Amendment.

The *Engel* decision unleashed a firestorm of criticism against the Court which, while it has abated from time to time, has never died out. In the eyes of many, the Court had struck at a traditional practice which served important social purposes, even if it occasionally penalized a few non-conformists or eccentrics. One newspaper headline screamed "COURT OUTLAWS GOD." Protestant evangelist Billy Graham thundered, "God pity our country when we can no longer appeal to God for help," while Francis Cardinal Spellman of New York denounced the ruling as striking "at the very heart of the Godly tradition in which America's children have for so long been raised."

The Court had its champions as well. Many religious groups saw the decision as a significant move to divorce religion from meaningless public ritual, and to protect its sincere practice. The National Council of Churches, a coalition of liberal and orthodox denominations, praised the *Engel* decision for protecting minority rights. President John F. Kennedy, who had been the target of vicious religious bigotry in the 1960 campaign (from many of the groups now attacking the Court), urged support of the decision, and told a news conference:

We have, in this case, a very easy remedy. And that is, to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of all of our children.

The President's commonsense approach captured the Court's intent in *Engel*. The majority did not oppose either prayer or religion, but did believe that the Framers had gone to great lengths to protect individual freedoms in the Bill of Rights. To protect the individual's freedom of religion, the state could not impose any sort of religious requirement, even in an allegedly "neutral" prayer. As soon as the power and prestige of the government is placed behind any religious belief or practice, according to Justice Black, "the inherently coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The following year the Court handed down its decision in *Abington v. Schempp*. A Pennsylvania law required that "at least 10 verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." In addition, the students were to recite the Lord's Prayer in unison. This time Justice Tom Clark, normally considered a conservative, spoke for the majority in striking down the required Bible reading. The neutrality commanded by the Constitution, he explained, stemmed from the bitter lessons of history, which recognized that a fusion of church and state inevitably led to persecution of all but those who adhered to the official orthodoxy.

In the United States, rights are proclaimed in the Constitution, but they are defined by the Supreme Court, which the Constitution has established to provide a reliable and definitive interpretation of the law. The fact that a majority of citizens – even perhaps a large majority – may not be affronted by prayer in the school or Bible reading is, to a large extent, irrelevant in constitutional adjudication. The purpose of the Bill of Rights is not to protect the majority, but the minority. As Justice Oliver Wendell Holmes, Jr., once said of freedom of speech, it is not for the speech we agree with, but for the speech we detest. Freedom of religion, like freedom of speech, does of course protect the majority. However, the protection of the First Amendment's Establishment Clause is invoked in a meaningful way when the majority, attempting to use the power of the state, tries to enforce conformity in religious practice. Very often, to protect one dissident, one disbeliever, the majority may be discomfited; it is the price the Founding Fathers declared themselves willing to pay for religious freedom.

It is a view that many Americans still share, along with the belief that this protection of individual conscience is good for religion as well. Justice John Paul Stevens wrote in a modern case that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious belief or none at all. . . . Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."

While this view is not accepted by all Americans, a majority recognizes that in such a heterogeneous society as the United States is at the beginning of the 21st century, those who do not accept the norms of the majority, as Justice Sandra Day O'Connor wrote, may be characterized as "outsiders, not full members of the political community." That is a situation that the Framers of the First Amendment, members of the Court, and most Americans are determined to avoid. Religious dissenters in a free society are not to be merely tolerated and made to feel as inferior members of the society; their differences are to be valued as part of the tapestry of cultures that make the United States so unique.

While some religious groups have continued to oppose the decisions in *Engel and Schempp*, many of the mainstream religious bodies have come to see that the Court had actually promoted religion

rather than subverted it. James Madison, in the "Memorial and Remonstrance," written over 200 years ago, believed that not only the state's antagonism, but its efforts at assistance, could damage religion and religious liberty. Their intellectual descendants have argued along similar lines, and believe that the state can never help religion, but only hinder it. To establish any form of state-sanctioned religious activity in the schools threatens to introduce denominational hostility. Moreover, the sincere believer does not need the state to do anything for him except leave him alone; those with confidence in their faith do not need Caesar's assistance to render what is due to God.

There are also sincere believers who, while agreeing that belief is an individual matter, nonetheless see religion as an integral aspect of America's civic life. They do not seek to establish a religion, but rather want there to be an accommodation, in which state aid may be given to religiously *affiliated* organizations provided it is done fairly, with no preference given to any single group. The Supreme Court has wrestled with this problem of some state aid to charitable organizations for more than 50 years, and its decisions have been far from consistent. While it is settled that money may not be given for religious proselytizing, most churches and synagogues run a variety of social service and educational programs, whose loss would place great strain on the public systems. The Court has carved out exceptions to the general rule of no state aid in order to assist some of these programs, and in June 2002, took what many considered a major step toward the accommodationist position.

By a narrow margin, the justices approved the issuance of state vouchers to the families of school children, which could then be used to pay tuition in private schools, even if these schools were religiously affiliated. The decision removed a major legal hurdle facing proponents of vouchers, but the ultimate decision on whether to adopt a full voucher plan will rest on the legislatures of the 50 states. The debate will no longer be over the constitutionality of the plan, but instead will be over the political wishes of the citizenry, a majority of whom, according to the polls, oppose vouchers. How this issue plays out in the next decade will have a great deal to say about the nature of church and state relations in the United States.

* * * * *

There are two religion clauses in the First Amendment. The Establishment Clause prohibits government, even when acting on behalf of a majority, from attempting to impose a uniform religious practice. The Free Exercise Clause was specifically designed to protect dissident sects from government under the control of the mainstream religions. The value of protecting minorities will become ever more apparent as the United States, at the beginning of the 21st century, becomes the most pluralistic democratic country in history.

The Framers wanted not only to protect government from religion, but also to protect religion from government. James Madison not only fought to prevent the establishment of one dominant religion, he also intended for the government to stay out of all religious controversies. The Framers had both experience and knowledge of how potent a weapon government could be in the hands of religion, and they wanted nothing to do with it. Here again, one runs into the problem of how to reconcile keeping government totally neutral in religious matters with the strong role religion has played in American civic life. Religion is very important to many Americans as part of civic culture, and to pretend that government is completely uninvolved is quite unrealistic.

The Free Exercise Clause is a way to protect different sources of religious meaning and assure full and equal citizenship for believers – and non-believers – of all stripes. In other words, it helps to foster pluralism and thus allow each person and each group full play of their ideas and faiths. Although we tend to think of the colonies as having been settled primarily from the British Isles, in fact by 1776 immigrants had arrived from Scandinavia, western and central Europe, and, of course, from Africa through the slave trade. Although the new country was nowhere near as pluralistic as the United States would later become, compared to England and other European nations of the time, it was already a hodge-podge of nationalities and religions. Many scholars continue to believe that the intellectual cross-fertilization needed to remain a vibrant and democratic society is only possible if one of the most important aspects of each person's life – religious belief – is left untouched by government's hand.

Sometimes religious groups have been unpopular, and yet they persisted, and eventually the majority learned that religious freedom meant allowing even despised groups latitude in which they could worship God according to the dictates of *their* consciences. Sometimes the demands of the majority could not be swayed on moral grounds; opposition to polygamy, for example, led to one of the most significant early decisions on the meaning of free exercise.

The Mormons, or the Church of the Latter Day Saints, arose in the early 19th century in the United States, and offended many Christian groups by their enthusiasm for multiple marriage. Forced to migrate west to the frontier, the Mormons established a prosperous settlement in what is now the State of Utah. Eventually the colony grew to the point where it met the requirements to be admitted as a state into the Union, but this could not happen so long as Mormons continued to cling to polygamy. Federal law criminalized the practice, and the Mormons turned to the Supreme Court, claiming that the free exercise of their religion demanded that the government tolerate polygamy.

The Court clearly was unwilling to put the stamp of constitutional approval on a practice condemned by more than 95 percent of the country. On the other hand, the Constitution did seem to give unequivocal protection to religious exercise. Chief Justice Morrison Waite finessed the problem in a way that still affects all free exercise cases; he drew a sharp distinction between religious belief and practice. Waite quoted Thomas Jefferson that "religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinion." Following this reasoning, the Court held that "Congress was deprived of all legislative power over mere opinions, but was left free to reach actions which were in violation of social duties or subversive of good order." Polygamy, according to the Court, clearly was subversive of good order and Congress could thus make the practice a crime.

Chief Justice Morrison R. Waite, in Reynolds v. United States (1879)

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition. . . .

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a

necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Interestingly, this is one of the few cases where the Supreme Court ruled against the Free Exercise claims of a distinct and separate group, and it did so because the practice involved – polygamy – was seen as a threat to civil society. The distinction between action and faith, however, created an important constitutional principle, that faith in and of itself could not be attacked or outlawed.

Undoubtedly the most famous of the free exercise cases involved the Jehovah's Witnesses and their refusal to salute the American flag. Although only one of many small religious sects in the United States, the Witnesses understood the basic meaning of the Free Exercise Clause, and in their repeated visits to the Supreme Court, helped to turn that ideal into a reality.

The Witnesses were and are a proselytizing sect, and their efforts to gain converts and distribute their literature have often brought them into conflict with local authorities. They gained enormous notoriety just before World War II when, in obedience to their belief that saluting a flag violated the biblical command against bowing down to graven images, they instructed their children not to join in the morning ritual of saluting the American flag. For this adherence to their beliefs as war approached, many Witness children were expelled from school, and their parents were subjected to fines and criminal hearings. Listen to the words of Lillian Gobitas:

Lillian Gobitas

I loved school, and I was with a nice group. I was actually kind of popular. I was class president in the seventh grade, and I had good grades. And I felt that, Oh, if I stop saluting the flag, I will blow all this! And I did. It sure worked out that way. I really was so fearful that, when the teacher would look my way, I would quick put out my hand and move my lips.

My brother William was in the fifth grade at that time, the fall of 1935. The next day Bill came home and said, I stopped saluting the flag. So I knew this was the moment! That wasn't something my parents forced on us. They were very firm about that, that what you do is your decision, and you should understand what you're doing. I did a lot of reading and checking in the Bible and I really took my own stand.

I went first to my teacher, Miss Anna Shofstal, so I couldn't chicken out of it. She listened to my explanation and surprisingly, she just hugged me and said she thought it was very nice, to have courage like that. But the students were awful. I really should have explained to the whole class but I was fearful. I didn't know whether it was right to stand up or sit down. These days, we realize that the salute itself is the motions and the words. So I sat down and the whole room was

aghast. After that, when I'd come to school, they would throw a hail of pebbles and yell things like, Here comes Jehovah! They were just jeering at me. . . .

It has been more than fifty years since I took a stand on the flag salute, but I would do it again in a second. Without reservations! Jehovah's Witnesses do feel that we're trying to follow the Scriptures, and Jesus said, They persecuted me, and they will persecute you also. . . . The case affected our lives so much, and we have passed its lessons on to our children.

[Reprinted with the permission of The Free Press, a Division of Simon & Schuster Adult Publishing Group, from The Courage of Their Convictions by Peter Irons. Copyright ? 1988 by Peter Irons.]

The Supreme Court agreed to hear the case in 1939, and at a time when nearly everyone expected the United States would have to enter World War II, the value of promoting patriotism seemed a very important function of the public schools. Justice Felix Frankfurter, himself a Jew, found himself torn between his attachment to religious freedom for all groups and his belief that constitutionally the schools had a right to require students to salute the flag. To a colleague on the Court he wrote, "Nothing has weighed as much on my conscience, since I have come on this Court, as has this case. All my bias and pre-disposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view . . . but the issue enters a domain where constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other." Eight of the nine members of the Court voted to uphold the school district.

How helpless the Witnesses were soon became apparent. In the wake of the adverse decision, there were hundreds of attacks on Witnesses, especially in small towns and rural areas. By the end of 1940, more than 1,500 Witnesses had been attacked, and many beaten brutally in over 350 incidents, and this pattern continued for at least two years. It was not one of the nation's finest moments, but it was a learning experience. At the same time that Americans learned about the attacks on the Witnesses, they also learned about Hitler's mass murders of helpless minorities in Europe and of his "final solution" that would liquidate six million men, women, and children for no other reason than their religious beliefs. The Supreme Court agreed to hear another case on the flag salute, and this time, a new member of the Court, Justice Robert H. Jackson, later to be American prosecutor at the Nuremberg trials, upheld the right of the Witnesses to be different and the limits that the Constitution put on government action.

Justice Robert H. Jackson, in West Virginia Board of Education v. Barnette (1943)

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural

diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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. If there are any circumstances which permit an exception, they do not now occur to us.

There have been many other cases since the flag salute decisions, but all of them have built upon Justice Jackson's eloquent idea of a "fixed star," that no government official can prescribe what is orthodox. Not all decisions have gone in favor of the dissenting sects, but the notion that government cannot penalize thought remains as true today as it did a half century ago and at the time of the nation's founding.

* * * * *

Religion continues to play an important role in the civic and individual lives of American citizens. Some believe that it should play a greater role in the nation's public affairs, while others believe just the opposite. Laymen, scholars, legislators and jurists continue to debate where the line should be drawn between the activities of church and state, and how far dissenting groups may go in carrying out their religious beliefs. This debate is at the very heart of the democratic process. It does not always lead to consensus, and clearly not everyone can win every debate. But the sincerity and enthusiasm that Americans bring to this debate, as they do in dealing with the limits of free speech, is what makes the constitutional liberty stronger. Religious freedom is not an abstract ideal to Americans; it is a vibrant liberty whose challenges they confront every day of their lives.

For further reading:

Gregg Ivers, *Redefining the First Freedom: The Supreme Court and the Consolidation of State Power* (New Brunswick: Transaction Books, 1993).

Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (2nd ed., Chapel Hill: University of North Carolina Press, 1994).

John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley: University of California Press, 1998).

Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton: Princeton University Press, 1976).

Melvin I. Urofsky, *Religious Freedom* (Santa Barbara: ABC-CLIO, 2002).

Freedom of Speech



Illustrated by Richard Anderson

Congress shall make no law . . . abridging the freedom of speech....

– First Amendment to the U.S. Constitution

If there is one right prized above all others in a democratic society, it is freedom of speech. The ability to speak one's mind, to challenge the political orthodoxies of the times, to criticize the policies of the government without fear of recrimination by the state is the essential distinction between life in a free country and in a dictatorship. In the pantheon of the rights of the people, Supreme Court Justice Benjamin

Cardozo, who served from 1932 to 1938, wrote of free speech that it is "the matrix . . . the indispensable condition of nearly every other freedom."

If Americans assume that free speech is the core value of democracy, they nonetheless disagree over the extent to which the First Amendment protects different kinds of expression. Does it, for example, protect hate speech directed at particular ethnic or religious groups? Does it protect "fighting words" that can arouse people to immediate violence? Is obscene material covered by the First Amendment's umbrella? Is commercial speech – advertisements or public relations material put out by companies – deserving of constitutional protection? Over the last several decades, these questions have been part of the ongoing debate both within the government and in public discussion, and in many areas no consensus has yet emerged. That, however, is neither surprising nor disturbing. Freedom is an evolving concept, and, as we confront new ideas, the great debate continues. The emergence of the Internet is but the latest in a series of challenges to understanding what the First Amendment protection of speech means in contemporary society.

* * * * *

Freedom of speech was not always the all-encompassing right it is today. When Sir William Blackstone wrote his famous *Commentaries on the Laws of England* in the mid-18th century, he defined freedom of speech as the *lack of prior restraint*. By that he meant that the government could not stop someone from saying or publishing what he believed, but once a person had uttered those remarks, he could be punished if the type of speech was forbidden. The English, like the ancient Greeks, had established legal restrictions on three types of speech – sedition (criticism of the government), defamation (criticism of individuals), and blasphemy (criticism of religion) – each of which they called "libels." Of these three, the one that is most important in terms of political liberty is seditious libel, because ruling elites in Blackstone's era believed that any criticism of government or of its officials, *even if true*, subverted public order by undermining confidence in the government. While the government, according to Blackstone, could not stop someone from criticizing the government, it could punish him once he had done so.

During the 17th and 18th centuries, the British Crown prosecuted hundreds of cases of seditious libel, often imposing draconian penalties. When William Twyn declared that the people had the right to rebel against a government, he was arrested and convicted of sedition and of "imagining the death of the King." The court sentenced him to be hanged, emasculated, disemboweled,

quartered, and then beheaded. Given the possibility of such punishment after publication, the lack of prior restraint meant little.

The English settlers who came to North America brought English law with them, but early on a discrepancy arose between theory and practice, between the law as written and the law as applied. Colonial assemblies passed a number of statutes regulating speech, but neither the royal governors nor the local courts seemed to have enforced them with any degree of rigor. Moreover, following the famous case of John Peter Zenger (discussed in the chapter on "Freedom of the Press"), the colonists established truth as a defense to the charge of seditious libel. One could still be charged if one criticized the government or its officials, but now a defendant could present evidence of the truth of the statements, and it would be up to a jury to determine their validity.

From the time the states ratified the First Amendment (Congress shall make no law...abridging the freedom of speech, or of the press..." in 1791, until World War I, Congress passed but one law restricting speech, the Sedition Act of 1798. This was an ill-conceived statute that grew out of the quasi-war with France and which expired three years later. Yet although this act has been widely and properly condemned, one should note that it contained truth as a defense. During the American Civil War of 1861-1865, there were also a few minor regulations aimed at sedition, but not until the Espionage Act of 1917 and the Sedition Act of 1918 did the real debate over the meaning of the First Amendment Speech Clause begin. That debate has been public and has involved the American people, Congress, and the President, but above all it has been played out in the courts.

The first cases to reach the Supreme Court grew out of these wartime measures aimed against disruption of the military as well as criticism of the government, and the Court initially approved them. The justices seemed to say that while freedom of speech is the rule, it is not absolute, and at certain periods – especially in wartime – speech may be restricted for the public good.

Justice Oliver Wendell Holmes, Jr., in Schenck v. United States (1919)

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular [pamphlet] would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

Holmes's test of a "clear and present danger" seemed to make a great deal of sense. Yes, speech ought to be free, but it is not an absolute freedom; common sense (the obvious need to punish someone who shouts the word "fire" in a crowded theater) as well as the exigencies of war make it necessary at times to curtail speech. The clear-and-present-danger test would be used in one way or another by the courts for nearly 50 years, and it seemed a handy and straightforward test to determine when the boundaries of speech had been overstepped. But there were problems with the test from the start, and the tradition of free speech in the United States was so strong that

critics challenged the government's campaign against antiwar critics as well as the Court's approval of it.

One of the great voices in the history of free speech belonged to a mild-mannered Harvard law professor, Zechariah Chafee, Jr., the scion of a rich and socially prominent family who throughout his life defended the right of all people to say what they believed without fear of governmental retaliation. He suggested what to many people then and now is a radical idea – that free speech must be kept free even in wartime, even when passions are high, because that is when the people need to hear both sides of the argument, not just what the government wishes to tell them.

Zechariah Chafee, Jr., Freedom of Speech (1920)

Nor can we brush aside free speech by saying it is war-time and the Constitution gives Congress express power to raise armies. The First Amendment was drafted by men who had just been through a war. If it is to mean anything, it must restrict powers which are expressly granted to Congress, since Congress has no other powers, and it must apply to those activities of government which are most apt to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

In war-time, therefore, speech should be free, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Chafee had made this argument earlier in articles, and, following Holmes's decision in *Schenck*, met with the jurist and convinced him that he had been wrong. When another sedition case came before the Court later that year, a majority used the clear-and-present-danger test to find the defendants guilty of seditious libel. But surprisingly, the author of that test, joined by his colleague, Justice Louis D. Brandeis, entered a strong dissent.

Justice Oliver Wendell Holmes, Jr., dissenting in Abrams v. United States (1919)

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of

the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Holmes's dissent in the *Abrams* case is often seen as the beginning of the Supreme Court's concern with speech as a key right in democratic society, and it put forward the notion of democracy as resting upon a free marketplace of ideas. Some ideas may be unpopular, some might be unsettling, and some might be false. But in a democracy, one has to give all of these ideas an equal chance to be heard, in the faith that the false, the ignoble, the useless will be crowded out by the right ideas, the ones that will facilitate progress in a democratic manner. Holmes's marketplace analogy is still admired by many people, because of its support for intellectual liberty.

The "marketplace of ideas" theory also relates to one of the foundations of democracy, the right of the people to decide. Two centuries ago, Thomas Jefferson based his belief in democracy upon the good judgment of the people to choose for themselves what would be the right thing to do. The people, and not their rulers, should decide the major issues of the day through free discussion followed by free elections. If one group is prevented from expressing their ideas because these notions are offensive, then the public as a whole will be deprived of the whole gamut of facts and theories that it needs to consider in order to reach the best result.

Neither Holmes nor anyone else has suggested that there are *no* limits on speech; rather, as we shall soon see, much of the debate in the last several decades has been over how to draw the line between protected and non-protected speech. At the heart of the debate has been the question, "Why should we extend the umbrella of constitutional protection over this type of speech?" The one area in which there has been general consensus is that whatever else the First Amendment Speech Clause covers, it protects political speech. It does so because, as Jefferson and Madison so well understood, without free political speech there can be no democratic society. The rationale for this view, and what remains as perhaps the greatest exposition of free speech in American history, is the opinion Louis D. Brandeis entered in a case involving a state seditious libel law.

A majority of the Court, using the clear-and-present-danger test, upheld California's seditious libel law as constitutional because, it held, the state has the power to punish those who abuse their right to speech "by utterances inimical to the public welfare, tending to incite crime, disturb the

public peace, or endanger the foundations of organized government and threaten its overthrow." Brandeis, along with Holmes, disagreed, and in his opinion Brandeis drew the lines that connected the First Amendment to political democracy, and in fact made it, as Cardozo later wrote, "the indispensable condition" of other freedoms.

Justice Louis D. Brandeis, in Whitney v. California (1927)

To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

To Brandeis, the most important role in a democracy is that of "citizen," and in order to carry out the responsibilities of that role a person has to participate in public debate about significant issues. One cannot do that if he or she is afraid to speak out and say unpopular things; nor can one weigh all of the options unless other people, with differing views, are free to express their beliefs. Free speech, therefore, is at the heart of the democratic process.

This truth seems so self-evident that one might wonder why it is not universally accepted even in the United States; the reasons are not hard to find. It takes civic courage to stand up for unpopular ideas, and as both Holmes and Brandeis pointed out, the majority rarely wants to hear ideas that challenge accepted views. To prevent the majority from silencing those who oppose it is the reason the Framers wrote the First Amendment. The principle of free thought, as Holmes famously wrote, is "not free thought for those who agree with us but freedom for the thought we hate."

This is not an easy concept, and in times of stress such as war it is often difficult to allow those who would assault the very foundations of democracy to use democratic tools in their attack. Certainly the lessons Holmes and Brandeis tried to teach seemed to be lost during the early years of the Cold War. In the late 1940s the government prosecuted leaders of the American Communist Party for advocating the forceful overthrow of the government and conspiring to spread this doctrine. A majority of the U.S. Supreme Court, which since the 1920s had seemed to take an ever more speech-protective view of the First Amendment, now apparently reversed itself. Though admitting that American communists posed little clear and present danger, the Court ruled their words represented a "bad tendency" that could prove subversive of the social order.

Just as Holmes and Brandeis had come to the defense of unpopular socialists a generation earlier, so now Hugo Black and William O. Douglas took their places as defenders of free expression and protectors of minority rights.

Justice William O. Douglas, dissenting in Dennis v. United States (1951)

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction. Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. . . .

In America [Communists] are miserable merchants of unwanted ideas; their wares remain unsold. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent.

As the hysteria of the Cold War passed, Americans came to see the wisdom in the arguments that Holmes and Brandeis, and later Black and Douglas, put forth. The cure for "bad" speech is not repression, but "good" speech, the repelling of one set of ideas by another. Truly, many things believed right and proper in today's world were once considered heretical, such as the abolition of slavery or the right of women to vote. Although a majority will always find itself uncomfortable with radical ideas attacking its cherished beliefs, as a matter of constitutional law, the policy of the American democracy is that speech, no matter how unpopular, must be protected. In 1969, the Court finally put an end to the whole idea of seditious libel, and that people could be prosecuted for advocating ideas the majority condemned as subversive.

* * * * *

During the height of the protest against American involvement in Vietnam, many civil libertarians wondered if the fact that the United States was at war would once again let loose forces of repression, as had happened in World War I and during the Cold War. To the surprise of many who feared the worst, the country took the protests in stride. This is not to say that all Americans liked what the protesters were saying, or that they did not wish that some of them could be silenced or even jailed. Rather, they accepted the notion that in a democracy people had the right to protest – loudly, in some cases in a vulgar manner, but that in the great debate taking place over whether the United States should be in southeast Asia, all voices had to be heard.

Thirteen-year-old Mary Beth Tinker and other students wore black armbands to high school in Des Moines, Iowa, as a symbol of their opposition to the war in Vietnam, and school authorities suspended them, on grounds that the action disrupted the learning process. In fact no disruption had taken place; rather, school officials worried about the town's response if it appeared that they were permitting antiwar protests in the school.

In one of the most important cases that grew out of the war, the Supreme Court held that when it came to political speech, high school students did not lose their constitutional rights when they entered the school door. Rather, if schools are indeed the training ground for citizenship, then it is necessary that students have the opportunity to learn that they also have the right to express unpopular political views and not be punished by the school authorities.

Mary Beth Tinker

There was a teen group that had its own activities . . . and we decided to wear these black armbands to school. By then [1965] the movement against the Vietnam War was beginning to grow. It wasn't nearly what it became later, but there were quite a few people involved nationally. I remember it all being very exciting; everyone was joining together with this great idea. I was a young kid, but I could still be part of it and still be important. It wasn't just for the adults, and the kids were respected: When we had something to say, people would listen.

So then we just planned this little thing of wearing these armbands to school. It was moving forward and we didn't think it was going to be that big a deal. We had no idea that it was going to be such a big thing because we were already doing these other little demonstrations and nothing much came of them. . . .

The day before we were going to wear the armbands it came up somehow in my algebra class. The teacher got really mad and he said, If anybody in this class wears an armband to school they'll get kicked out of my class. The next thing we knew, the school board made this policy against wearing armbands. . . . Any student who wore an armband would be suspended from school.

The next day I went to school and I wore the armband all morning. The kids were kind of talking, but it was all friendly, nothing hostile. Then I got to my algebra class, right after lunch, and sat down. The teacher came in, and everyone was kind of whispering; they didn't know what was going to happen. Then this guy came to the door of the class and he said, Mary Tinker, you're wanted out here in the hall. Then they called me down to the principal's office.... The principal was pretty hostile. Then they suspended me.

[Reprinted with the permission of The Free Press, a Division of Simon & Schuster Adult Publishing Group, from *The Courage of Their Convictions* by Peter Irons. Copyright 1988 by Peter Irons.]

Years later, opponents of a different administration's foreign policy burned an American flag in protest, and were immediately arrested. They pursued their legal defense in this case all the way to the Supreme Court, which held that their action, reprehensible as it was to most Americans, nonetheless represented "symbolic political speech" and as such was protected by the First Amendment. Perhaps the most interesting opinion in that case is one by a conservative member of the Court, Anthony Kennedy, who explained why he believed the Court had to allow the flag-burner to go free, even though he along with millions of Americans found the act distasteful.

Justice Anthony Kennedy, concurring in Texas v. Johnson (1989)

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. . . .

Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

Although there was a hue and cry over the decision, it died down over time, as voices of common sense began to be heard. And none was more poignant in its defense of free speech than that of James H. Warner, a former prisoner of war in Vietnam.

James H. Warner, letter to Washington Post, 11 July 1989

As I stepped out of the aircraft [after being released from captivity in Vietnam], I looked up and saw the flag. I caught my breath, then, as tears filled my eyes, I saluted it. I never loved my country more than at that moment. . . . I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. . . .

I remember one interrogation [by the North Vietnamese] where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No," I said. "That proves I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist on the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag against him. . . .

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. . . . Don't be afraid of freedom, it is the best weapon we have.

The lesson Justice Brandeis taught more than 70 years ago has borne fruit—the response to bad speech is more speech, so that people may learn and debate and choose.

* * * * *

If the people in general accept the notion of untrammelled political speech, what about other forms of expression? Is the First Amendment prohibition absolute, as Justice Hugo Black (on the Court between 1937 and 1971) argued, so that government cannot censor or punish any form of speech? Or are certain types of speech outside the umbrella coverage of the Speech Clause? May the writer or artist or business person, the bigot or protester or Internet correspondent say anything, no matter how offensive or unsettling, claiming protection of the Constitution? There are no easy answers to these questions. There is no public consensus, nor are there definitive rulings by the Supreme Court in all areas of speech. As public sentiments change, as the United States becomes a more diverse and open society, and as the new electronic technology permeates every aspect of American life, the meaning of the First Amendment appears to be, as it has so often been in the past, once again in flux, especially in relation to non-political speech.

In the early 1940s the Supreme Court announced in rather definitive terms that the First Amendment did not cover obscene or libelous speech, fighting words, or commercial speech. Yet in the last few decades it has addressed all of these issues, and while not extending full protection, has certainly brought many aspects under the protection of the Speech Clause. The decisions have not been without criticism, and it is safe to say that just as the Court has wrestled with these areas, so there has been confusion and disagreement in the sphere of public comment as well. This, again, is as it should be. The Supreme Court cannot hand down dicta and simply expect the people to obey. Rather, the Court often reflects changing social and political customs; while trying to discover what the original intent of the Framers may have been, the justices must also attempt to apply the *spirit* of that intent to the *facts* of modern life. Sometimes this is relatively easy to do, but even when the Court hands down a difficult and controversial opinion, such as in the flag burning case, there must be some reservoir of public understanding as to why this decision is necessary and how it fits into the broader tapestry of contemporary life.

The difficult question for the Court and for the people is where one draws the line between protected and non-protected speech. In some areas, such as obscenity, the effort to draw a legal distinction has not garnered public support, because obscenity itself is not an objective and easily defined subject. As the Court noted, one man's obscenity is another's lyric; what offends one person may not offend another. But is this the type of material the First Amendment was intended to protect? Is artistic expression, especially when it goes against current aesthetic or moral norms, the type of expression the Framers intended the First Amendment to protect?

Similarly, there has been debate in the United States for more than two decades about the allegedly corrosive effect that money has on the electoral process. There have been several efforts to control how money for election campaigns is raised and spent, and to impose limits on the amount that any one contributor could give. But the Supreme Court held years ago that money is in some ways speech, and when money is used to further the expression of political ideas, it cannot be controlled. Here one finds another area in which it is not clear just how far one can take the notion of free speech without running head-on into other and equally cherished concepts of democracy, such as fair elections.

Perhaps the most daunting task facing the American people as well as the judicial system is to determine how the First Amendment will apply to the new electronic technology. Is the Worldwide Web just another example of Justice Holmes's marketplace of ideas? Does the likelihood that some day every household in the world will have access to material already on the Web, and that each individual will have the opportunity to go online and say to the whole world what he or she wants make the First Amendment irrelevant?

These and other questions continue to be debated in the United States – in the courts, in congressional hearings, in presidential commissions, in universities, in public forums, and in individual households. Among the rights of the people none is so treasured as that of free speech, and none is so susceptible to changing views. Most Americans recognize, however, that as Justice Brandeis pointed out, their responsibilities as citizens require them to have the opportunity not only to propose unpopular views but also to hear others espouse their beliefs, so that in the end the democratic process can work. And while people are not always comfortable with the idea, they admit the truth that Justice Holmes declared when he said that the First Amendment is there not to protect the speech with which we agree, but the speech that we hate.

For further reading:

Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002).

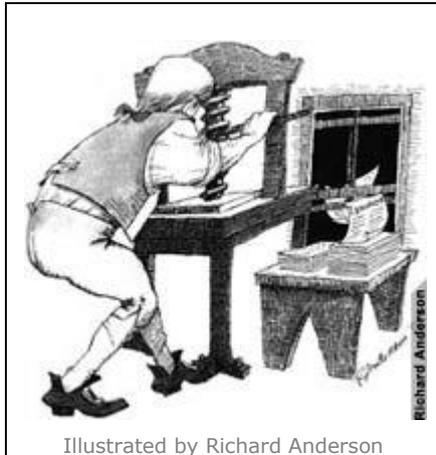
Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge: Harvard University Press, 1941).

Michael Kent Curtis, *Free Speech: The People's Darling Privilege* (Durham: Duke University Press, 2000).

Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988).

Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993).

Freedom of the Press



Congress shall make no law . . . abridging the freedom of speech, or of the press.

- First Amendment to the U.S. Constitution

Although a cherished right of the people, freedom of the press is different from other liberties of the people in that it is both individual and institutional. It applies not just to a single person's right to publish ideas, but also to the right of print and broadcast media to express political views and to cover and publish news. A free press is, therefore, one of the foundations of a democratic society, and as Walter Lippmann, the 20th-century American columnist, wrote, "A free press is not a privilege, but an organic necessity in a great society."

Indeed, as society has grown increasingly complex, people rely more and more on newspapers, radio, and television to keep abreast with world news, opinion, and political ideas. One sign of the importance of a free press is that when antidemocratic forces take over a country, their first act is often to muzzle the press.

Thomas Jefferson, on the necessity of a free press (1787)

The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

* * * * *

The origins of freedom of speech and press are nearly alike, because critical utterances about the government, either written or spoken, were subject to punishment under English law. It did not matter whether what had been printed was true; government saw the very fact of the criticism as an evil, since it cast doubt on the integrity and reliability of public officers. Progress toward a truly free press, that is, one in which people could publish their views without fear of government reprisal, was halting, and in the mid-18th century the great English legal commentator, Sir William Blackstone, declared that although liberty of the press was essential to the nature of a free state, it could and should be bounded.

Sir William Blackstone, Commentaries on the Laws of England (1765)

Where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by English law ... the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

But what constituted "blasphemous, immoral, treasonable, schismatic, seditious or scandalous libels"? They were, in fact, whatever the government defined them to be, and in essence, any publication even mildly critical of government policy or leaders could lead to a term in prison or worse. In such a subjective judgment, truth mattered not at all.

The American colonists brought English common law across the Atlantic, and colonial officials had as little toleration for the press as did their masters back home. In 1735, the royal governor of New York, William Cosby, charged newspaper publisher John Peter Zenger with seditious libel for criticizing Cosby's removal of a judge who had ruled against the governor's interests in an important case. Under traditional principles as enunciated by Blackstone, Zenger had a right to publish his criticism, but now had to face the consequences. However, Zenger's attorney, Andrew Hamilton, convinced the jury to acquit Zenger on the grounds that what he had published was true. Although it would be many years before the notion of truth as a complete defense to libel would be accepted in either English or American law, the case did establish an important political precedent. With American juries unwilling to convict a man for publishing the truth, or even an opinion, it became difficult for royal officials to bring seditious libel cases in the colonies. By the time of the Revolution, despite the laws on the books, colonial publishers freely attacked the Crown and the royal governors of the provinces.

Whether the authors of the Press Clause of the First Amendment to the Constitution intended to incorporate the lessons of Zenger's case is debatable, since nearly all the new American states adopted English common law, including its rules on the press, when they became independent. When Congress passed a Sedition Act in 1798 during the quasi-war with France, it allowed truth as a defense to libels allegedly made against the president and government of the United States. The law, however, was enforced in a mean and partisan spirit against the Jeffersonian Republicans. Federalist judges in effect ignored the truth-as-defense provision, and applied it as their English counterparts would have done, punishing the very utterance as a libel. As one example, Matthew Lyons, a Vermont newspaper publisher, criticized President John Adams for his "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." For these comments, he received a \$1,000 fine and languished in jail for four months until he could raise the funds to pay the fine.

The Sedition Act expired in 1801, and the federal government, with the exception of some restrictions during the Civil War, did nothing to violate the Press Clause for the next century. Libel gradually became more a matter of civil than criminal law, in which prominent individuals took it upon themselves to institute lawsuits to protect their reputations. Congress passed another Sedition Act during World War I, and as noted in the chapter on free speech, cases arising out of that act were treated primarily as speech and gave rise to the clear-and-present-danger test. But in terms of a free press, we do not get any significant developments until the early 1930s, when the doctrine of prior restraint was reinvigorated. In developing a truly free press, newspapers found they had a powerful ally in the Supreme Court, which turned a single phrase, "or of the press," (contained in the First Amendment to the U.S. Constitution) into a potent shield for press freedom.

* * * * *

Modern Press Clause jurisprudence begins with the landmark case of *Near v. Minnesota* in 1931, and while, at first glance, it would appear to do little more than restate Blackstone's views on prior

restraint, in fact it is the first step in building upon that doctrine to create a powerful and independent press.

The state of Minnesota had passed a law, similar to laws in other states, that authorized the suppression as a public nuisance of any "malicious, scandalous or defamatory" publications. In this case, however, the law had been passed to shut down a particular newspaper, the *Saturday Press*, which in addition to carrying racist attacks against blacks and other ethnic groups, had also carried a series of exposes about corrupt practices by local politicians and business leaders. The state court gladly shut down the *Saturday Press*, which in turned appealed to the Supreme Court. There Chief Justice Charles Evans Hughes applied the reach of the First Amendment Press Clause to the states (it had previously applied only to Congress), and reiterated the idea that no government, except in the case of a wartime emergency, can curtail a newspaper's *constitutional right* to publish. This did not mean that newspapers could not be punished on other grounds, or sued by individuals for defamation. But it laid the groundwork for two significant developments more than three decades later that are the pillars on which a modern free press stands.

The first grew out of the civil rights movement in the 1960s. At that time most states had laws that in effect imposed no prior restraints, but did allow civil suits for defamation of character if the information printed was malicious or even just in error. There had been clashes between civil rights advocates and police in Montgomery, Alabama, and a group of rights organizations and individuals took out a full page advertisement in the *New York Times* entitled "Heed Their Rising Voices," which detailed the difficulties civil rights workers faced and asked for funds to help the cause. Although I.B. Sullivan, the police commissioner of Montgomery, Alabama, was not mentioned by name in the ad, he nonetheless sued the *Times* on the basis that the ad contained factual errors that defamed his performance of his official duties. A local jury found for Sullivan, and awarded him damages of \$500,000 against the Times.

Sullivan had gone against the newspaper not because the errors amounted to very much (one sentence said that Dr. Martin Luther King, Jr., had been jailed seven times, when in fact it had only been four), but because Southerners saw the press as an adversary in the civil rights struggle. Every time protesters were beaten or arrested, the press reported it not only to the rest of the nation but to the world. The *Times* was not only the foremost newspaper in the country, but also one of the largest and most successful. If it could be punished with a heavy fine (and \$500,000 was a great deal of money in 1964), then smaller and less prosperous papers would have to think twice about reporting on the civil rights movement. To allow the judgment to stand, in other words, would have a severe "chilling" effect on the First Amendment right of a free press.

Not only did the high court overturn the judgment, but in doing so it went a great deal further than the simple prior restraint rule that had been inherited from Great Britain; it did away with any punishment for publication when the stories involved public officials and the performance of their duties, except when a paper, knowing something was untrue, nonetheless printed it with the malicious intent of harming the official's reputation. While not allowing the press to print anything at all, and while still granting private citizens the right to sue for libel, the decision addressed a major issue of a free press, namely, its ability to report on government and governmental officials fully and freely. That there might be inadvertent mistakes from time to time would not matter; as the Court explained, mistakes often happen in the "hot pursuit" of news. But the citizenry needed to be informed, and threats of libel against a newspaper for doing its job could not be allowed.

Justice William Brennan, Jr., in New York Times v. Sullivan (1964)

We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially not one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. . . . Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

The second modern pillar is the so-called Pentagon Papers case, arising out of publication of documents pilfered from the Defense Department by a civilian employee who opposed American involvement in the Vietnam War. The papers were part of a large-scale review that had been ordered in 1967, and they carried no secret information relating to current military activities in southeast Asia. They did, however, expose the mindset of the policy planners as well as errors in judgment that had led to the growing American commitment during the administration of Lyndon Johnson. Although a new president now sat in the White House, Richard Nixon nonetheless opposed the publication of the papers, on the grounds that it might adversely affect national security interests.

The *New York Times* began publication of the Pentagon Papers on June 13, 1971, and when the government secured a temporary injunction shortly afterwards, the *Washington Post* started publication of its copy of the Pentagon Papers. After the government went to court to stop the *Post*, the *Boston Globe* picked up the baton. Since the lower courts disagreed on whether such a prior restraint could in fact be imposed, and since the government wanted to resolve the issue quickly, the Supreme Court agreed to take the case on an expedited basis. Although there have sometimes been criticisms of the judiciary for its slowness, the justices moved with astounding speed this time. They agreed to take the case on a Friday, heard oral argument the next day, and handed down their decision the following Tuesday, only 17 days after the *Times* had begun publication.

The decision provided the clearest statement yet that government had no business trying to censor newspapers or prevent the disclosure of what might prove embarrassing information. Three of the justices believed the government should never have gotten injunctions in the lower courts, and criticized the lower courts for condoning such an effort at prior restraint. While the Court did not say that in no circumstances could prior restraint be imposed (the exception of clearly sensitive information during emergencies such as wartime remained in place), it was clear that the material in the Pentagon Papers did not fall into that category.

Justice William O. Douglas, concurring in New York Times v. United States (1971)

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. . . . The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. A debate of large proportions goes on in the Nation over our posture in Vietnam. Open debate and discussion of public issues are vital to our national health.

Not everyone agreed, and former general and ambassador to Vietnam Maxwell Taylor expressed the resentment of many in the government at the Court's decision. A citizen's right to know, he declared, is limited "to those things he needs to know to be a good citizen and discharge his functions," and nothing more. But the whole purpose of the Court's decision was, in fact, to allow the citizen to do his duty. Justice Douglas pointed out that there was an important national debate going on over the American role in Vietnam. How were citizens to do their duty and participate intelligently in this debate if they were denied important information?

* * * * *

The *New York Times*, the *Washington Post*, and other major newspapers, however, are not individuals, but large corporations, with thousands of employees and assets that run into the millions of dollars. How does giving such great latitude to the press – often in the form of business entities – relate to the rights of the people? One needs to recall the words of Justice Brandeis about the duties of a citizen, discussed in the chapter on Free Speech, "that public discussion is a political duty; and that this should be a fundamental principle of the American government." Yet in order to enter that discussion, to carry out one's responsibilities as a citizen, one must be informed. Accurate information will not always come directly from the government, but may be offered by an independent source, and the maintenance of freedom and democracy depends upon the total independence and fearlessness of such sources.

Thomas Carlyle on the press (1841)

Burke said that there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or witty saying; it is a literal fact, – very momentous to us in these times.

By calling the press a "fourth estate," Burke meant that its abilities to influence public opinion made it an important source in the governance of a nation. In modern times, we see the role of a free press differently, but still in quasi-institutional terms. Justice Potter Stewart saw the role of a free press as essential in exposing corruption and keeping the political process honest. His colleague on the high court, William O. Douglas, echoed this sentiment when he explained that the press enables "the public's right to know. The right to know is crucial to the governing process of the people."

Justice Potter Stewart, on the role of a free press (1975)

The Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. . . . In contrast, the Free Press Clause extends protection to an institution.

A good example of how the press fulfills this structural role involves the criminal justice system. Aside from the protection of the rights of the accused, discussed in other chapters, the citizen needs to know if the administrative processes of justice are working. Are trials fair? Are they conducted with dispatch or are there delays that cause hardships? But the average person does not have the time to go down to the local courthouse and sit in on trials, nor even spend hours watching the telecast of some trials on cable television. Rather information is gathered from the press, be it the morning newspaper or the evening television or radio news. And if the press is barred from attending trials, then it cannot provide that information which "is crucial to the governing process of the people."

But what about the necessity for a fair trial? If the crime is particularly heinous, if local emotions are running high, if excessive publicity may damage the prospects for selecting an impartial jury, then should not the press be excluded? According to the Supreme Court, the answer is no. "Prior restraints on speech and publication," according to Chief Justice Warren E. Burger, "are the most serious and least tolerable infringement on First Amendment rights." Judges have a variety of means at their disposal to handle such issues, including gag orders on the defense and prosecution lawyers, change of venue (location) to a less emotional environment, and sequestering of juries.

The key case in press coverage of trials is known as *Richmond Newspapers, Inc. v. Virginia (1980)*, and it solidified the people's right to know through the efforts of a free press. A man had been arrested for murder, and through a variety of problems, there had been three mistrials. So when the fourth trial began, the judge, prosecution, and the defense attorney all agreed that the courtroom should be closed to both spectators and the press.

The local newspaper filed suit challenging the judge's ruling, and in a major decision the Court balanced the interests of the First and Sixth Amendments against each other – the right of a free press as against the right of a fair trial –and found that they were compatible. The Sixth Amendment guarantee of "a speedy and public trial" meant not only the protection of the accused against secret Star Chamber trials, but also the right of the public to attend and witness the trial. Since it was manifestly impossible for all of the people of Virginia, or even of Richmond, to attend the trial, then the press had to be admitted to report on the proceedings, and to help ensure that the trial had been carried out fairly.

Chief Justice Warren E. Burger, in Richmond Newspapers, Inc. v. Virginia (1980)

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chose to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas. What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak

equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Although this case dealt with a criminal trial, the same philosophy applies to civil trials as well. Oliver Wendell Holmes (a Supreme Court justice from 1902 to 1932) commented that public scrutiny provided the security for the proper administration of justice. "It is desirable," he wrote, "that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Recent technological developments have brought the notion of public attendance at a trial into a new setting. Although at present there is no constitutional right to have cameras in the courtroom, many states have passed laws that permit the broadcasting of trials. When television first began, this was impracticable because of the size of the cameras, the necessity for bright lights, and the need to connect everyone to a microphone. Today, the entire courtroom can be covered by a few small cameras that are practically hidden, with controls in an adjacent room or in a parked van. Although begun as an experiment, TV coverage of trials has proven quite popular, and there is an American cable television network known as Court TV that broadcasts trials as well as commentary by lawyers and law professors. In this instance, the media continue to serve as the intermediary between the public and the justice system, but in a new way that gives the viewer a better sense of what is happening.

(In a similar manner, proceedings of both houses of Congress, congressional hearings, and state legislatures are normally carried on cable networks, in particular C-SPAN, another example of the media serving to connect the people with the business of the government.)

* * * * *

The concept of a "right to know" inferred from the First Amendment Speech and Press Clauses is a relatively new one in American political and judicial thought, but once again we can see democracy and its attendant liberties not as a static condition, but one that evolves as society itself changes. The "people's right to know" is intimately involved with press freedom, but it rests upon the broader concerns of democracy. If we take democracy to mean, as Abraham Lincoln put it, a "government of the people, by the people, and for the people," then the government's business is in fact the people's business, and this is where the structural role of a free press and the democratic concerns of the citizenry intersect. It is not a straightforward proposition. Neither the people nor the press ought to know everything that goes on in the government. Matters relating to national security, foreign affairs, and internal debates about policy development are not, for obvious reasons, amenable to public scrutiny at the time. As law school professor Rodney A. Smolla, an authority on the First Amendment, has written, "Democratic governments should be largely open and transparent governments. Yet even the most open and democratic government will in certain settings require some measure of secrecy or confidentiality to function appropriately."

While this sounds commonsensical, the fact of the matter is that there are two competing forces at work. On the one hand, government officials at every level, even in a democratic society, would

just as soon not share information with the press or the public; on the other, the press, backed by the public, often wants to secure far more information than it legitimately needs. To resolve this tension, the U.S. Congress passed the Freedom of Information Act, commonly called FOIA, in 1967. The law passed at the behest of press and public interest groups who charged that existing federal law designed to make information available to the public was often used to just the opposite effect. As the law has been interpreted, the courts have consistently ruled that the norm is for information to be made public, and that federal agencies must respond promptly and conscientiously to requests by citizens for information. Supplementing the federal law, all states have passed similar Freedom of Information statutes, regarding the workings of state government and its records.

Under the law, both individual citizens and the press may file FOIA requests, but in practice the vast majority are submitted by the press. One individual, even a trained researcher, can track down only a limited number of leads upon which to base an FOIA request, while newspapers and television stations, with large staffs, can put teams to work on a problem; they also have the resources to pay for the copying costs of large numbers of documents. Clearly it is beyond the capacity of the media, print as well as broadcast, to investigate every governmental transaction, cover every trial, report on every legislative hearing, but that very impossibility is what makes a free press essential to democracy. An individual can benefit from the combined coverage that goes out on wire services or is published by the local press, watch hearings or trials on television, and even benefit from the many news and commentary sites on the Internet. Not since humans lived in small villages has it been possible for a single citizen, if he or she desires, to be so well informed about the workings of the government. This knowledge is what enables that person to cast an intelligent ballot, to sign a petition for or against some proposal, write letters to the legislature, and in general fulfill the obligations of a citizen. And it would be impossible without the presence of a free press.

* * * * *

But can the press go too far? Any liberty carried to an extreme can lead to license. While there are many who applaud the work of the press in uncovering governmental corruption, they also bemoan the invasions of privacy that have accompanied the drive to know everything about all public officials and personalities. The concern is real, and it has been answered primarily by the courts, who have on the one hand expanded the parameters of the First Amendment and, at the same time, placed some limits on it. While news organizations tend to bemoan each and every one of these limits as somehow undermining the constitutional guarantee of a free press, on the whole most of these restraints indicate a commonsense attitude that a free press is not free from all normal restraints on society. These restraints involve limits on reporters keeping their sources confidential when the state needs evidence in criminal prosecutions, liability for civil action in cases where private individuals and not public officials are defamed, and limits on access to certain governmental facilities, such as prisons. In addition, the press has complained that when the United States has been involved in military operations, reporters have been denied access to the front lines. Perhaps the best way to look at this is to ask whether these same restraints, placed on an individual, would make sense, and in most cases they do. It's difficult to conceive of a compelling reason for letting any individual walk around a prison, or stroll up to the front lines of a battle. While we expect the press to gather information for us, we also recognize that there are limits on that ability.

There has also been criticism of the invasion of privacy of public officials, with the press reporting on matters that have little or nothing to do with their ability to conduct the business of their offices. In recent years, particularly with the growth of the Internet and cable television, there have been countless stories about the private lives of government officials, from the president on down, and a lively debate over how far this trend will or should go. The public spectacle is disturbing to many people, who believe there should be a sharp distinction between the public and the private, with full spotlights on the public behavior and a total disregard of the private life. Others respond that there can be no such distinction. How men or women conduct their private lives is a key to their moral character, which in turn is a factor that people have the right to consider when voting for public officials.

In the late 1980s, reporters uncovered a story about a U.S. senator planning to run for president who was having an extra-marital affair. The story sank any hopes he might have had for higher office, and he castigated the press, charging that "this is not what the Founding Fathers had in mind 200 years ago." While his charge struck many people as true, in fact the same type of expose-minded press dogged the footsteps of some of the Founders. Both Alexander Hamilton and Thomas Jefferson found their amorous affairs the subject of vicious press articles, yet neither one thought that the answer lay in muzzling the press.

Hamilton responded to the stories by using the press himself, and while admitting to an affair with Maria Reynolds, refuted other charges against him. Just before he met his death, Hamilton defended a New York publisher who had been convicted in a trial court of libel. Hamilton delivered a ringing defense of the values of a free press, declaring that "the liberty of the press consists of the right to publish with impunity Truth with good motives, for justifiable ends." Jefferson, on the other hand, chose to remain silent about allegations of his liaison with one of his slaves, Sally Hemmings. Yet even when he believed the press was filled with nothing but invective against him and his allies, he maintained his faith in the necessity of a free press in a democratic society. "They fill their newspapers with falsehoods, calumnies and audacities," he told a friend. "I shall protect them in their right of lying and calumniating."

* * * * *

At the beginning of the 20th century, new technology has transformed some of the old verities and assumptions about the role of a free press. For many years, for example, radio and television were treated as less protected parts of the press, since it was erroneously believed that there were severe technical restrictions on how many stations could be carried on the airwaves. As a result Congress decided, and the courts agreed, that the airwaves belonged to the public, and that stations would be licensed to broadcast on certain frequencies. In return for these licenses, radio and later television stations had to submit to certain government regulations that often hamstrung them in their ability to either gather news or to air editorial opinion. The development of cable and satellite distribution systems has put an end to the notion of broadcasting as a limited resource, and the broadcast media has begun to take its full place alongside traditional print media.

The arrival of the Internet raises many questions whose answers will not be known for years to come. For the first time in history, a single person, with a minimal investment, can put his or her views out, not only before the local populace, but before the entire world! While one person may not have the news-gathering capacity of a newspaper or television station, in terms of opinion he or she can shout quite loudly to anyone who wants to listen. Moreover, some individuals have

formed Internet news services that provide specialized information instantaneously about politics, weather, the stock market, sports, and fashion. In addition to the print and broadcast media, the world now has a third branch of the press, the on-line service.

In terms of the rights of the people, one can argue that there is no such thing as too much news. Across the masthead of many American newspapers are inscribed the words from Scripture, "You shall know the truth and the truth shall make you free." The Founding Fathers believed that a free press was a necessary protection of the individual from the government. Justice Brandeis saw a free press as providing the information that a person needed to fulfill the obligations of citizenship. Probably in no other area is the nature of a right changing as rapidly as it is in the gathering and dissemination of information by the press, but the task remains the same. The First Amendment's Press Clause continues to be a structural bulwark of democracy and of the people.

For further reading:

Fred W. Friendly, *Minnesota Rag* (New York: Random House, 1981).

Elizabeth Blanks Hindman, *Rights & Responsibilities: The Supreme Court and the Media* (Westport: Greenwood Press, 1997).

Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Random House, 1991).

Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkeley: University of California Press, 1991).

Bernard Schwartz, *Freedom of the Press* (New York: Facts on File, 1992).

Privacy



The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

– Fourth Amendment to the U.S. Constitution

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

– Ninth Amendment to the U.S. Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

– Fourteenth Amendment to the U.S. Constitution

Rights, while often perceived as absolute, are never static or unchanging. Freedom of speech means that people for the most part have the right to say what they think, but the means by which they say it, the opportunities they may have to express themselves, do change over time, and as a result the nature of the right also changes. Technological developments, as well as social and cultural evolution, may affect how we think of particular rights, and these changes may also determine how those rights are defined. No better case exists than the right to privacy, a right that is not mentioned in the Constitution, and yet a right that the courts and the people have invested with constitutional status.

* * * * *

Sir William Pitt, Earl of Chatham, on the right of an Englishman to be secure in his home (1763)

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement.

Pitt's famous comment sums up what until recently many people saw as the heart of privacy, the right to be let alone within one's home, safe from the powers of the government. In America, the Fourth Amendment to the U.S. Constitution establishes this notion that the people have a right to be safe in their own homes, and it is a notion reinforced by the Third Amendment's command that soldiers shall not be quartered in private residences. The notion of privacy as security from prying, from having one's personal behavior or business displayed in public for all to see and comment on, is the invention of the industrial age. In ancient times, and indeed up to the 18th century, privacy in the sense of solitude, isolation, of space for one's self, was unknown except for the rich or the nobility. Most people lived in small, bare housing, the entire family often sleeping together in one room. Indeed, as a legal concept, "privacy" originally referred to a form of defamation, the appropriation of one's name or picture without that individual's permission.

But as Western society grew wealthier, as a middle class grew with the means to afford larger houses where members of a family could have separate spaces of their own, the meaning of privacy also changed. Now it became a matter of individuality, of people assuming that what they did beyond the arena of public life was no one's business except their own. Neither the government, the media, nor in fact anyone else had any business knowing about their private life.

Privacy, in its modern meaning, is very much related to individuality, and is a right of the person, not of the group or the society. "Without privacy," the political scientist Rhoda Howard has written, "one cannot develop a sense of the human individual as an intrinsically valuable being, abstracted from his or her social role." The opposite is also true: Without a sense of individuality, there can be no perception of a need for privacy.

Privacy, like most rights, relates directly to democracy. Human beings have a need both for discourse and interaction with others, as well as time and space for themselves. Privacy is not isolation or exile, but rather a self-chosen desire to be alone or with a few other people of one's choice. Solitary confinement in prison, for example, is not privacy, but wandering alone or with a

friend in the mountains conjures up what we mean by the word. In solitude we can think through ideas, free from pressures of the government or the market. George Orwell understood perfectly the relationship of freedom and privacy when in his classic novel of totalitarianism, 1984, he abolished privacy and substituted the all-seeing omni-present eye of the government.

Although privacy is not specifically mentioned in the Constitution, it is evident that the Founding Generation knew and valued the concept. A few years before the Revolution, for example, Massachusetts enacted an excise tax that required homeowners to tell the tax collectors how much rum had been drunk in their houses the prior year. The people immediately protested, on the grounds that a man's home was his castle, and what he did there was none of the business of the government.

Pamphlet Protesting excise tax in Massachusetts (1754)

It is essential to the English Constitution, that a Man should be safe in his own House; his House is commonly called his Castle, which the Law will not permit even a sheriff to enter into, but by his own Consent, unless in a criminal case.

The idea of privacy could be found in the political philosophy of John Locke, as well as that of Thomas Jefferson and others of the Founding Fathers. Federalist Papers 10 and 51 laud the idea of privacy, and the liberty embedded in the Constitution was that of liberty from the government. Whatever else it may mean, the Fourth Amendment clearly protects the privacy of the individual in his or her home against unwarranted governmental intrusion. As for the failure to mention privacy by name, it was not the only right that is implicitly rather than explicitly protected, and to make sure that people did not misunderstand, Madison in the Ninth Amendment pointed out that the listing of certain rights did not in any way mean that the people had given up other rights not mentioned.

* * * * *

Up until the middle of the 19th century if one had stopped the average American and asked what privacy meant, the answer surely would have centered on the inviolability of the home. Starting after the Civil War, the country absorbed millions of immigrants into its cities, creating more crowded and congested living conditions. Space in a modern city is at a premium, and the notion of privacy began to change as people's living conditions changed. Technology also threatened privacy, as the telephone made it possible for people to enter other people's homes without going there. One used to have to go to someone's home, to physically be there, in order to converse; now one merely had to call. Other technological inventions such as inexpensive cameras and cheap window glass made it possible for people to literally look into others' homes and pry into their affairs.

The greatest threat to privacy in the late 19th century came from the rise of daily newspapers, whose editors discovered that the poorer classes loved to read about the social lives of the rich and famous. Not only could their doings now be made public, but in exposing private foibles, the new mass media could also ruin reputations. Thus, at first, the law of privacy dealt primarily with reputation, and the law was used to keep busybodies, reporters, and others from publicizing private aspects of a person's life in such a way as to humiliate them.

It was this threat to reputation that led two young Boston lawyers, Samuel D. Warren and Louis D. Brandeis, to write an article in 1890 urging that the old common law proscriptions on invasion of privacy be expanded to include the modern forms generated by the Industrial Revolution. Although legal scholars and others discussed the proposal, little happened at the time. Americans were still getting used to the differences that technology had made in their lives, and had not yet recognized just how intrusive modern life could be.

Beginning in the 1920s, however, the Supreme Court began to conceive of a constitutional right of privacy, and if the issues involved seem a little removed from current concerns, these decisions nonetheless lay the foundation for the current constitutional definition. In one case, the Court chastised federal agents for seizing private papers without an appropriate warrant. If police could act this way against a citizen, Justice William R. Day explained, then "the protection of the Fourth Amendment declaring his right to be secure [in his home] might as well be stricken from the Constitution."

In addition to the Fourth Amendment, the Fourteenth Amendment's Due Process Clause also provides a legal basis for privacy. According to the interpretation given by the Court, "due process" not only refers to the procedural rights associated primarily with criminal cases, but also includes "substantive" rights relating to personal liberty. Thus in a case striking down a state law prohibiting the teaching of foreign languages, Justice James C. McReynolds held that this liberty included "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." The issues McReynolds listed are basically private matters – marriage, child-rearing, conscience.

The most far-reaching statement came in a case engendered by the new technology of the telephone. Police had taken to listening in on – wire-tapping – conversations of people they suspected of criminal activity. When the accused persons claimed that the wiretaps had violated their Fourth Amendment right to be free of searches without warrants, the majority of the Court said that the taps had physically been outside of the building, and therefore no search had taken place.

Some members of the Court disagreed, and although Justice Louis D. Brandeis – the same man who 35 years earlier had co-authored that seminal article on privacy – wrote in dissent, eventually his views on privacy in general, and wire-tapping in particular, would prevail.

Justice Louis D. Brandeis, dissenting in Olmstead v. United States (1928)

Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them on any subject, and although proper, confidential, and privileged, may be overheard. . . .

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions

and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the one most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Brandeis considered it irrelevant that the Framers of the Fourth Amendment had not used the word "privacy" specifically, nor had they mentioned wire-tapping. How could they, since telephones had not been invented! What he and others have sought is not the *literal* meaning of the words, but what the Framers intended – namely, that government should leave people alone. The *manner* of intrusion did not matter; the *fact* of it did.

Eventually Brandeis's view prevailed, and, in the 1960s, the Court ruled that wire-tapping did violate a constitutionally protected right of privacy. As Justice Potter Stewart explained, the Fourth Amendment protects *people* not *places*. If people have legitimate expectations of privacy, such as in their home, then they may invoke the protection of the Constitution to ensure that privacy.

Changes in a different kind of technology triggered the leading case in privacy in the mid-1960s, a case that is at the base of all modern privacy discussion. In the 19th century moral crusaders had secured passage of laws in the state of Connecticut banning either the use of birth control devices or the dissemination of information about them. Although by 1960 most people ignored these laws, they remained on the books, and family-planning clinics worried that social conservatives might someday invoke their use. That is exactly what happened when one anti-contraception group induced the government of Connecticut to prosecute a clinic run by Planned Parenthood that dispensed information about birth control, as well as the devices themselves.

Because the use of substantive due process had been limited following the court crisis of the 1930s, in which the Roosevelt administration had attacked the Court for using due process as a means of striking down legislation it did not like, the Supreme Court as late as 1965 hesitated to use the Fourteenth Amendment's Due Process Clause. Moreover, the Fourth Amendment was not appropriate here, because the object of the government's prosecution was not a private home but a medical clinic. Nonetheless, in *Griswold v. Connecticut* (1965) the Court asked the question – Did the people want the state to be involved with intimate private decisions about family planning? The answer was clearly no, because this was a personal matter, a private decision, in which that the state had no business intruding. Justice Douglas, in striking down the state law and upholding the right of the clinic to dispense birth control information, declared that privacy, even though not mentioned directly, nonetheless enjoyed the constitutional protection that Justice Brandeis a generation earlier had proclaimed. "Specific guarantees in the Bill of Rights," he declared, "have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." While creative, Douglas's opinion did not directly address the important Constitutional concept of due process. However, within a few years and via several other cases, the Court in fact adopted the notion of liberty interests in the Due Process Clause as the constitutional basis for privacy.

Following the decision in *Griswold* that information about birth control, and the decision whether to use it, constituted a private matter, the Court in a case involving a woman's right to have an abortion, a few years later extended the right of privacy. *Roe v. Wade* (1973) has been the Court's most controversial decision in over a century and a half, and opponents of abortion believe that the Court totally misconstrued the Constitution; defenders of choice argue that the court's pro-

abortion stance in this case is a logical extension of the concept of privacy as well as the more specific liberty interest contained in the Fourteenth Amendment. In subsequent cases, the Court and its members have returned to this issue and the basic division still exists, but many people, even those who are unsure of whether abortions should be permitted, would agree with Justice O'Connor's views.

Justice Sandra Day O'Connor, in Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

* * * * *

The latest manifestation of changes in how privacy is perceived, and how technology is again the driving force, is the extension of personal autonomy to include a person's right to refuse medical treatment and, in effect, choose to die. In 1990, the Supreme Court confronted an issue it had never heard before, a claim for a right to die. In fact, it was a relatively new issue for the nation as a whole, arising from the amazing explosion of medical technology in the previous three decades. People who up until the 1960s would have been expected to die from severe accidents or illnesses could now be helped, although this technology had significant limits as well as some negative effects. Some people kept "alive" through this new technology may have very little quality of life, and may decide that they would rather be dead than lead a life tied to medical machinery.

Chief Justice William H. Rehnquist found that the Constitution protected a right to die, deriving from the guarantees of personal autonomy embedded in the Fourteenth Amendment's Due Process Clause. A long line of decisions, he held, support the principle "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." Within a few years, this new form of privacy, the right-to-die, had become statutorily and judicially embedded in the laws of all 50 states, and Congress had passed a patients' rights bill that required hospitals receiving federal funds to obey patient directives in regard to refusal of treatment.

Chief Justice William H. Rehnquist, in Washington v. Glucksberg (1997)

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

There is a major debate going on now as to the extent of this new version of privacy. While most people agree that terminally ill people ought to be allowed to decline treatment if they so choose, some groups argue that the notion of personal autonomy ought to be expanded to include physician-assisted suicide. One's life, they argue, is one's own, and what people choose to do with that life, whether they choose to live or die, ought to be a matter of their own decision, a private

matter. This view has not gained widespread acceptance, and it is a major policy issue at the moment; yet both sides still agree that personal autonomy as a form of protected privacy is a right.

* * * * *

Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy" (1890)

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closets shall be proclaimed from the house-tops."

In his opinion in the wire-tapping case, as well as in the earlier article he had written, Justice Brandeis sounded a dire warning that technology would give the government the power not only to eavesdrop on people's telephonic or even spoken conversations, but someday to examine their papers and documents without ever entering their home. While Brandeis worried about the government using this technology, in modern times people have begun to see such threats to privacy as coming not just from the government, but from other sources as well. This raises a very interesting question about the right of privacy.

In nearly all of the rights discussed in this book, the original and continuing aim has been to protect the individual against the government. Freedom of speech ensures that the government will not silence unpopular expressions or punish those who utter them. Freedom of religion guarantees that the government will not establish a church or somehow restrict the free exercise of those whose faith is different from that of others. The press is protected against government censorship, while the rights of the accused require the government to adhere to fair procedures in a criminal trial. Neither the Constitution nor the Bill of Rights addresses the question of what happens when non-governmental actors infringe upon individual liberties. Congress has acted in certain instances when private actors have threatened the civil liberties of people of color, but we now, and not only in the United States, face the issue of privacy in what many are calling the "Information Age."

Once again technology, this time in the form of computers and the Internet, threatens to overwhelm the ability of people to control information about themselves. To take but one example, in the United States most people who carry health insurance do so with a private company. In order for these companies to reimburse physician services, the doctors have to file forms detailing the nature of the illness, its progress, and the steps taken to counter it, such as medication or surgery. This information is then entered on computers, and as the years go by a very detailed record of a person's health accumulates.

There is no question that some people need to have access to this information. The insurance company must make certain there is no fraud, and that services billed have in fact been delivered. If a new doctor takes over the case, he may need to review the patient's past history. But who else, if anyone, should have access to a person's medical records? Should prospective employers? Should insurance companies seeking generalized information about prospective clients? Should medical researchers seeking to build a database in an effort to discover a cure for a disease? Once a computer database is created, it is almost impossible to maintain total security over it.

Moreover, many firms that gather information about their business clients and customers – such as credit-card companies – believe the information belongs to them and that they are free to sell it, or otherwise distribute it, without the permission of the individual. To whom does one's medical history or financial records belong – the individual, or companies with whom he or she does business?

We are now entering an era of even greater information becoming available about an individual thanks to such advances as the mapping of the human genome and DNA classification. There is no doubt that DNA detection has proven a major advance in criminal investigation, helping not only to prove the guilt of some perpetrators but also the innocence of people wrongly accused and perhaps even convicted of crimes they did not commit.

But some researchers believe that a person's DNA contains markers that show whether that person is prone to certain diseases and perhaps even to some kinds of social behavior. Who should have access to this information? Should decisions be based on the alleged proclivity of a certain gene sequence, a situation that is far from a statistical certainty? Who owns the information about one's body? Is this also not a form of privacy? The main invader of this zone of privacy, however, at present is not the government, but private companies specializing in biological research.

The personal computer and access to the Internet are rapidly becoming as common as the telephone or television. The Internet has been hailed as the greatest public forum ever devised, in which any person, no matter what his wealth, can be heard by others. But as anyone who owns a computer can testify, one is constantly bombarded by unwanted messages on one's e-mail, and by a barrage of advertisements on server home pages. Hackers can invade personal as well as industrial computers, and the unleashing of computer viruses can wreak havoc at both the individual and corporate level. But it is not just a question of monetary damages. Should not one be able to view one's computer as a personal instrument, one in which private messages may be composed and sent to specific recipients? Who has the right, besides the owner, of determining what information, what messages, what solicitations, will land on one's screen, wanted or not?

Today, when Americans and others in the industrialized world talk about a right to privacy, they are talking about a right that while it may be centuries old in concept, is evolving almost as rapidly as the technology that threatens it. People are worried that "Big Brother," to use Orwell's name for an omniscient government, will know too much about them, and use that information to their detriment. But as much as they are worried about government, they are also worried about threats to their privacy from business, from the medical establishment, and from criminals who may use information collected over the Internet to harm their interests.

Congress has attempted to protect informational privacy through a number of statutes, including the Electronics Communications Privacy Act, but the problem is that the amount of information available is growing at an exponential rate, far faster than the means to control and regulate access. There is so much information available today that a clever person, armed only with access to the Internet and a person's Social Security number, can secure all sorts of information about that person, including traffic violations, credit report, purchasing habits, and more and, with enough information, even "steal" that person's public identity. The right to be let alone is still valued highly by civilized people; how they will protect that right in the new Information Age remains to be seen.

For further reading:

Ellen Alderman and Carolyn Kennedy, *The Right to Privacy* (New York: Knopf, 1995).

David H. Flaherty, *Protecting Privacy in Surveillance Societies* (Chapel Hill: University of North Carolina Press, 1989).

Richard F. Hixson, *Privacy in a Public Society* (New York: Oxford University Press, 1987).

Philippa Strum, *Privacy: The Debate in the United States since 1945* (Fort Worth: Harcourt Brace, 1998).

Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968).

Trial by Jury



In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

– Sixth Amendment to the U.S. Constitution

It has been said that a society can be judged by how it treats its least favored citizens, and people accused of crimes, by definition, fall into this category. They have allegedly broken the social compact by depriving other people of life, limb, or property, and if in fact the charges are true, they have placed themselves outside the bonds of society; they are, literally "outlaws." But before we consign people to prison, purge them from the community, or even deprive them of life, we want to be exceptionally sure that in fact they are guilty of the crimes with which they are charged – guilty, that is, "beyond a reasonable doubt."

There are two reasons for this cautious approach. The first, and most obvious, is to avoid lasting harm to the individual. If the accused did not commit a crime, then that must be determined through the rule of law, so that the innocent shall not be punished. Another, and equally important reason, is to prevent both harm to society and the erosion of the people's liberties. A system of justice that is corrupt, that is used by authorities to punish political opponents, or that lets the guilty go free, erodes the trust in government and society that is essential in a democratic society. Just as one cannot have a free society without liberty of speech or press, neither can democracy exist without a justice system that treats people accused of crimes fairly and ensures them their rights.

This is not to say that the criminal justice system in the United States is perfect; there are often gaps between the real and the ideal, as there are in any society. But the constitutional

requirements found in the Fifth and Sixth Amendments serve as constant reminders of what the ideal is, and provide those who believe they have been unfairly treated the right to appeal adverse judgments to higher courts.

Because the workings of the criminal justice system are very important in a democracy, the right to a speedy and public trial refers not just to those accused of crimes; it is also a right of the public, one that suggests people may examine how the system is working and determine whether there are significant problems. Moreover, jury duty is an essential responsibility of citizenship, second only, perhaps, to voting itself. In no other governmental function is the average citizen asked to shoulder the task of determining whether someone is innocent or guilty of a crime, or bears the responsibility for civil damages. Jury duty is an education, in which people are asked to apply the law, and so they must learn to understand what the law is, and how it affects the case in front of them.

Alexis de Tocqueville, Democracy in America (1835)

The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.

There are many aspects of the right to a fair trial, and while in certain instances one aspect may be of more importance than another, they are all part of that "bundle of rights" to which we have referred over and over again. At a trial, for example, the type of evidence that may be introduced is governed by the rules of the Fourth Amendment, which requires the police to have probable cause for searching a person's home, and then to secure a warrant in order to actually do so. Should the police fail to obey these constitutional commands, the evidence they seize may not be used at trial. Should the police fail to warn a suspect of his or her constitutional rights, then confessions made are considered invalid in a courtroom. When charged with a crime, if a person is denied access to an attorney, then it is clear that justice cannot be done in a fair trial.

To some people, all of these safeguards appear to be too favorable to the criminal, and they argue that a smart lawyer can ensure that a client, even a guilty one, will not be punished. Although there are occasionally high-profile cases where apparently guilty defendants have been freed, in fact if we look at the system overall it works remarkably well. The safeguards involving pre-trial investigations and arrest guarantee better, more professional police work, so that when an arrest is made, the chances are that sufficient evidence has been legitimately collected, proof of guilt is high, and the criminal is punished. But all of this takes place within a constitutional framework carefully designed to limit the arbitrary power of the state.

* * * * *

A jury trial is essentially an effort to determine the truth. Did a person actually do what the state says he or she has done? In the past, efforts to determine truths took many different forms, and often included terrible physical ordeals. Hundreds of years ago, for example, the accused might suffer through a physical ordeal, in which he called upon God to prove his innocence. A person might be tossed into a pool to see if he would sink (innocent) or float (guilty); and if innocent, be retrieved, hopefully while still alive. In Europe, for the knightly classes, the ordeal often took the form of trial by combat, in which it was believed that God would strengthen the arm of the innocent who would then prevail over a false accuser or a true felon.

When the jury system that Americans have come to prize so highly first developed is not known. Before the Norman conquest of England, Saxon law required a definite and known accuser to publicly confront the accused; proceedings were open, and the presence of the community ensured fairness. The Norman Conquest introduced the grand jury, which derived from the Norman institution of "recognition by sworn inquest," whereby 12 knights, chosen to serve as "recognitors," inquired publicly into various matters of interest to the new rulers of England. These matters might include issues such as the rate of taxation or the feudal duties owed by a vassal to his lord.

As early as the 12th century, those bringing suit in certain cases relating to land ownership applied to the King's Court for the summoning of recognitors to ascertain the fact, either from their own knowledge or on inquiry of others; the verdict of the court, if unanimous, was accepted as conclusive. Eventually other questions of fact arising in the King's Court were handled in a similar manner, and a panel of knight recognitors became the jury. Originally, the jury members not only judged fact, but might also serve as witnesses because of their knowledge of the customs and the people of the locality. By the early 15th century, however, the judges of the common law courts restricted the jury to the single function of determining fact based on the evidence submitted in an action.

By the era of the American Revolution, trial by jury was an accepted right in every colony. The colonists saw it as a basic protection of individual freedoms, and Edmund Burke, the British statesman, warned Parliament that the American colonies would rebel if the mother country attempted to restrict trial by jury. But that is exactly what Parliament did in the Stamp Act of 1765, when it transferred the trial of persons accused of smuggling to admiralty courts, where naval officials sat in judgment without a civilian jury.

John Adams, on the Stamp Act (1765)

But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge.

Over time, two kinds of juries evolved, grand and petit, serving two different functions. The *grand jury* determines whether there is sufficient evidence to bring an indictment (official accusation) against a person for a particular crime, while the *petit jury* hears the actual case. The two juries are different in size, method of operation, and standards of evidence.

Currently, in the United States, a grand jury may have as many as 24 members. It may be called to investigate a complex issue or merely to determine whether to hand up an indictment to a court. If the former, the prosecuting attorneys will bring in witnesses, and the jury may return a report detailing its conclusions or it may indict persons whom they believe might be guilty of crimes. The procedures in a grand jury are quite flexible; it may hear evidence not permitted in regular trials, such as hearsay evidence, and its standard for returning an indictment is one of possibility rather than certainty. If there is sufficient evidence to make the members of a grand jury believe that a person may have committed the crime, they can return an indictment. A much higher standard prevails in the petit jury, when the case finally goes to trial.

Sir William Blackstone, Commentaries on the Laws of England (1765)

But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice had an ample field to range in; either by asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and varying others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individuals in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression may be examined and decided by twelve indifferent men, not appointed until the hour of the trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of general justice, and prevents the encroachment of the powerful and wealthy citizens.

The institution of the grand jury has often been seen as an important bulwark against tyranny. Despite the existence of the grand jury in England as far back as the 12th century, the Crown could also initiate criminal prosecutions on its own. The abuse of this prerogative led to popular uprisings against the Stuart monarchs Charles I and James II in England in the 17th century and by the American colonists against George III in the 18th century. In the Declaration of Independence, the colonists listed those rights that they claimed the King had transgressed, and prominent among them were rights of the accused. The leaders of the American revolution pointed out that judges served at the King's pleasure, trials were rigged, jury trials had been denied, and trials had been moved to faraway venues – all of which mocked the ideal of due process of law that had been handed down from the Magna Carta. The principle that only the people as a whole through their representatives should have the power to institute criminal prosecutions is embodied in the Fifth Amendment of the Constitution, which guarantees the institution of the grand jury. Most state constitutions have similar provisions. Although the use of the grand jury was abolished in England in 1933 and replaced with the court clerk's preparing the indictment, it continues as an active although not universal feature of the American criminal justice system.

The petit jury normally has 12 members, but some states have smaller jury panels. They are chosen, like the members of the grand jury, from a pool of registered voters. The procedural requirements of a jury trial are quite precise, and rest upon the assumption that the accused is innocent until proven guilty. It is not the defendant's task to prove that he or she is innocent of the crime; rather, the burden is on the state to prove the guilt of the accused, and for felonies, the most serious crimes, the standard is "beyond a reasonable doubt." In federal courts and in most state courts, unanimous agreement is required for a guilty verdict. Should a majority of the jury vote for innocence, the defendant is discharged. Should a majority vote for guilt, however, this may result in what is known as a "hung jury," and lead to a new trial with a different panel.

The phrase "innocent until proven guilty" is not empty rhetoric. Constitutional provisions and the procedural rules that have flowed from them are designed to redress the clear advantage that the state has when confronting a single citizen. At the grand jury stage, the prosecution must prove, by a preponderance of the evidence, that the accused might have committed the crime. This standard is similar to the "probable cause" standard that police must meet in securing a search warrant. The grand jury need not know absolutely that the accused is in fact guilty, only that there is a reasonable possibility; actual guilt is determined by the petit jury.

In that trial, the prosecution lays out its case first, and each witness for the prosecution may be cross-examined (subject to questioning) by the defendant's attorney. The state must present evidence that has been lawfully secured, and it cannot introduce certain types of evidence, such as hearsay, that is, assertions based entirely on things a witness has heard from other people. Moreover, it cannot refer to matters that are beyond the scope of the current trial, such as the defendant's problems with the law at other times. If there are witnesses with evidence against the defendant, they must be presented in court, since under the Constitution the accused is entitled to confront those giving testimony against him. At the end of the prosecution's presentation, if the defense believes that the state has failed to make its case, it may request that the court summarily dismiss the charges. This rarely happens, but occasionally it does, and serves to remind the state that bringing ill-founded charges does not sit well with the judiciary.

The defense then presents its case, and its witnesses may also be cross-examined by the prosecutor. The defense has the power, under the Constitution, to compel the appearance of witnesses who can testify to the defendant's innocence. The defense need not prove the innocence of the defendant, only that there is a *reasonable doubt* regarding guilt.

This outline is, by its nature, merely an overview, and the actual procedural rules governing a trial are quite complex. That is one reason why the Constitution guarantees that a person accused of a crime is entitled to counsel to aid in his or her defense.

* * * * *

Justice Byron White, in Duncan v. Louisiana (1967)

The question has been asked whether [trial by jury] is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . We believe that trial by jury is fundamental to the American scheme of justice. . . . The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Regrettably, the reality of the American criminal justice system often falls short of the ideal. Harried and overworked prosecutors, public defenders [lawyers provided for free to indigent defendants] and judges often engage in "plea bargaining," in which the defendant agrees to plead guilty in return for a reduced sentence, thus saving the state the time and expense of a trial. And, despite the rules, trials are rarely the neat affairs one sees on television or in the movies. There is confusion and delay, lawyers are not always eloquent, nor are judges always paragons of judicial wisdom. Yet even with all its problems, the American judicial system both in its ideal theory and its sometimes flawed practice offers persons accused of crimes more protection than any other system in the world. Like all liberties, the right of fair trial is a work in progress, changing and improving to match similar transformations in society.

Indeed, if we look at how the jury system has changed over the years, we see that change within the Constitutional framework has always been the rule rather than the exception. Thomas Jefferson in the late 18th century noted that "the common sense of twelve honest men" (jurors) enhanced the chances of a just decision. He might well have added, at that time, "twelve honest, white, property-owning men," since jury rolls in the United States have always been taken from

voter registration lists. Just as the right to vote has expanded over history (see Chapter 12), so have the rights and responsibilities of people heretofore excluded from full participation in the workings of government and law. As the Supreme Court noted in 1940, "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. It is part of the established tradition . . . that the jury be a body truly representative of the community."

Property requirements for civic participation fell into disrepute early on in American history, so that by the 1830s no state imposed the ownership of property as a precondition for either voting or for jury service. However, though the Civil War ended slavery, some southern states attempted to keep blacks off juries simply because of their race. In 1879, the Supreme Court struck down a West Virginia statute that excluded blacks from grand and petit jury service. But since voting qualifications were then considered a matter of state law, once southern states devised various stratagems to deprive blacks from voting, they also managed to keep them off juries. If the voting lists did not include blacks, then neither did the jury pools.

But as the civil rights movement began to take shape in the 1940s, challenges to keeping blacks off juries found a sympathetic ear in the federal courts. In part, the country's ideas and ideals regarding race were changing, and they would come to fruition in the great upheavals of the 1950s and 1960s which finally won black Americans full legal rights in the country. As the courts have emphasized time and again, barring particular groups from jury service not only discriminated against those groups and prevented them from partaking fully in their responsibilities as citizens, it also deprived persons accused of crimes from one of the basic attributes of a free trial – a jury of one's peers.

Over the years, court cases have arisen not only from those who have, for one reason or another, been kept off jury rolls, but also from defendants who have claimed that barring certain groups from jury service denied them due process of law.

Justice Thurgood Marshall, in Peters v. Kiff (1972)

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

The largest group of people to be kept off jury lists consisted of women. Even after they received the vote in 1920, women were still excluded from jury service on the grounds that their primary duty was to take care of their homes and families. Even if women could vote, strong male prejudices continued to dictate that the "raw" material women might hear in the course of a criminal trial would shock their "delicate sensibilities."

Justice William O. Douglas, in Ballard v. United States (1946)

If the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is

that the two sexes are not fungible: a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence of one on the other is among imponderables A flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community.

Eventually women won the right to full participation in the jury system, and there is no evidence that it has done anything to harm them. To the contrary, it has – as is the case with all groups whose rights have expanded – given them a better sense of the responsibilities that accompany citizenship.

* * * * *

The jury system, as we have seen, is designed to protect first and foremost the rights of persons accused of crimes. The theory is that a panel of one's fellow citizens – one's peers – are best qualified to judge guilt or innocence. Second, the jury system is essential to democracy in that it imposes a serious responsibility upon individuals who, as in perhaps no other setting, can learn how democracy works. But there is still a third aspect to the jury trial, the assurance to the community at large that the legal system is functioning properly.

Chief Justice Warren E. Burger, in Richmond Newspapers, Inc. v. Virginia (1980)

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. . . . What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe. . . . From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "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." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chose to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Although many people will never attend a trial in their entire life, they have a right to do so. Some would say that they even have an obligation to do so, because if eternal vigilance is the price of liberty, then there should be constant oversight of what many people consider a key element of democratic society.

* * * * *

Unlike nearly all the other liberties of the people, trial by jury has been the subject of serious criticism, and of the sort that requires extensive examination. Nowadays, people do not claim that the right of trial by jury should be replaced with ordeals by combat, or closed courtrooms where a single judge hands down unreviewable decisions. The ideal of a free and fair trial is that justice be done, and critics claim that the current system is so overloaded that truly free and fair trials cannot take place.

The current system, it is claimed, works poorly. There are too many trials, many of them for petty offenses that could and should be handled in a more efficient manner. Court calendars are overcrowded, so that oftentimes there may be delays of months or perhaps even years before an accused person is brought to trial, and, as the saying goes, justice delayed is justice denied. Public defenders are overworked, and cannot give truly effective assistance to the poor people whom they serve. Public prosecutors, faced with too many trials and insufficient staff, are willing to enter into plea bargains that often penalize those accused of relatively minor crimes while letting those accused of more serious felonies off with minimal penalties.

Even when a case goes to trial, are juries actually the best means of determining truth? In former times, part of the rationale for a jury was that the panel members would know the neighborhood, know both the victim and the defendant, know the facts, and thus be able to reach a fair and just decision. Today, juror panels are taken from voting lists of jurisdictions that cover hundreds of square miles and contain hundreds of thousands of people. Jurors rarely know the accused, and if they do may be excused because of it, under the assumption personal acquaintance might unduly influence their judgment. In antitrust cases and in charges of stock manipulation and fraud, can the average citizen really understand the economic and accounting issues involved?

Are there more efficient means of managing the criminal justice system? After all, in Great Britain, the birthplace of trial by jury, only one percent of civil trials and five percent of criminal trials are decided by juries. "Bench trials," in which a single judge or a panel of judges hears the case without a jury, take less time, cost less money, and since they are open to the public and may be reviewed by appellate courts, are considered by many to be fair and efficient. Moreover, in cases involving difficult questions of law, judges rather than laypersons are better equipped to make a determination.

Prompted by such considerations, in the United States, in the area of civil law, there has been a growing movement toward impartial arbitration, where both parties agree to be bound by the ruling of an impartial outsider. Arbitration, it is claimed, is faster since there is no delay caused by

overcrowded court calendars; it is fair; and when businesses are involved, it allows the parties to have the decision made based on the rules of the marketplace in which they operate.

Finally, it is charged, juries are notoriously fickle, and can ignore the law when they decide that a defendant had good reason to do whatever was done, or they can be manipulated by crafty attorneys.

All of these criticisms are partially true, and, in fact, the American systems of criminal and civil justice today rely on a variety of forms. There are bench trials, and there is arbitration. Moreover, good police work often yields such a convincing amount of evidence that accused criminals will plead guilty without a jury trial. As for so-called renegade juries that ignore the law to vote their emotions, this is an occasional weakness of a system that relies heavily on the decisions of ordinary citizens. In addition, there have also been times in American history when "jury nullification" has taken place because juries have believed the laws to be unjust. Prior to the American Revolution, local juries refused to convict their neighbors accused of smuggling, believing the English trade and navigation acts to be unjust.

But to eliminate trial by jury because of perceived defects in the system would be to strike a blow against democratic government itself. For those who believe they will do better by bench trial or (in civil matters) through arbitration, that option is there. But for many, their only hope of establishing their innocence is to go before a jury of their peers, where the state must establish the issue of guilt "beyond a reasonable doubt."

Critics who look at the jury system simply in terms of its efficiency or inefficiency also fail to recognize the importance the jury has beyond the question of determining guilt or innocence. As society grows more complex, many people worry that the average citizen is growing disconnected from the government, that he or she is losing a sense of participation in the daily processes of democracy. Jury service, almost alone of everything a person does as a citizen, continues to provide that sense of both responsibility and participation.

A free and fair trial by a jury of one's peers remains a critical right of the people, both of those who may be accused of a crime, as well as those called upon to establish that fact.

For further reading:

Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (New York: Basic Books, 1994).

Harry Kalven, Jr., and Hans Zeisel, eds., *The American Jury* (Boston: Little, Brown and Company, 1966).

Linda K. Kerber, *No Constitutional Right to be Ladies* (New York: Hill & Wang, 1998).

Godfrey D. Lehman, *We the Jury: The Impact of Jurors on Our Basic Freedoms* (Amherst, NY: Prometheus Books, 1997).

Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999).

Rights of the Accused



Illustrated by Richard Anderson

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

– Fourth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law. . . .

– Fifth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

– Sixth Amendment

Nor shall any State deprive any person of life, liberty, or property, without due process of law...

– Fourteenth Amendment

We normally think of a trial by jury as one of the individual rights afforded to persons accused of a crime. It is also, as we have seen, a right that is institutional as well – one that belongs to the people as a whole as well as to the individual. But jury trials, as has been all too evident in dictatorships, can be meaningless unless that trial is governed by rules that ensure fairness to the individual. A trial in which the judge allows illegally seized evidence to be used, or in which the defendant has no access to an attorney, is forced to testify against himself, or is denied the ability to bring witnesses favorable to his cause, is not a trial that meets the standard of due process of law. The men who drafted the Bill of Rights knew this, not only from their experience during the Colonial era, but also from the history of Great Britain, which ever since the signing of the Magna Carta in 1215 had been committed to expanding the rule of law.

Today we tend to emphasize the relationship of rights to individual liberty, but even those rights which are most identified as individual – such as the rights of persons accused of crimes – still have a community basis. Rights in American history are not designed to free the individual from community norms; rather, they exist to promote a responsible liberty, to allow each and every one to be free from arbitrary power. In the areas of free expression, the Bill of Rights carves out a space where dissenting voices may be freely heard, both for the benefit of the individual as well as for the sake of the community. Rights of any kind are the community's protection against the unwarranted interference in daily life by an all-powerful central government. Rights liberate both the community and the individual.

Regarding the rights of the accused, the basic outlines of due process are spelled out in the Constitution, and their specifics have been refined in local, state, and federal courtrooms for more than two centuries. Many of these questions seem to deal with minute, some would even say mundane, details of procedure. But as Justice Felix Frankfurter once declared, "The history of American freedom is, in no small measure, the history of procedure." His colleague on the Supreme Court, Justice Robert H. Jackson, agreed, and once noted that whatever else "due process" might mean, procedural fairness "is what it most uncompromisingly requires."

What is due process of law? There is no absolute agreement on the meaning, and over the past two centuries courts have found that the phrase encompasses not only procedural but substantive rights as well. For our purposes, due process of law is what the Constitution, as interpreted by the courts and supplemented by legislation, has created to protect the integrity of the criminal justice system. It does not mean that in every case every defendant is treated identically. Rather, every defendant, no matter what the charge, is entitled to certain processes to ensure that at the end of the day, he or she will have had a fair trial, conducted under the rules of law, openly, and in such a manner that the public can rest assured that the system is working fairly. While this sounds simple to accomplish, the history of criminal procedure in the United States and elsewhere shows that it is not. Only in democratic societies confident of their rights can such a system develop. Military justice is different, out of necessity – this essay treats of the vast majority of cases referred to civil courts.

* * * * *

At the time of the American Revolution, the concept of the rights of the accused had progressed much further than in Great Britain. If we look at the first state laws passed after the American Revolution of 1776, we find a surprisingly modern list of rights, which included a right to reasonable bail, the exclusion of confessions made out of court, the right to know the charges, grand jury indictments in capital cases, trial by jury, and others, many of which would eventually be included in the Bill of Rights (1791). But the Bill of Rights applied only to the federal government until the 1920s, and criminal cases were for the most part tried in state courts under state law. The result was that in the early 20th century there were two separate systems of criminal procedure in the United States.

On the one hand, there were a small number of federal crimes (that is, crimes defined by Acts of Congress), which would be investigated by the small force of federal investigators, and tried in federal courts under the strict requirements of the Bill of Rights. Moreover, relatively early on, if the defendant was too poor to hire a lawyer, the court would appoint one from the local bar to represent him. At least on the federal level, the notion that due process required a lawyer was well established by the early 20th century.

On the other hand, were the state courts, in which state crimes (defined by acts of the state legislature) were investigated by local or state police, prosecuted by local or state district attorneys in state courts, and in which only state provisions, not federal rights, applied. And the sad fact of the matter is that in most states, there were few procedural rights, and even the ones that existed were not stringently enforced. Searches could often be carried out without a warrant; persons arrested could be subjected to intimidating police interrogation without the presence of a lawyer; if they did not have the money to hire an attorney, then they could be tried without a lawyer; in many states defendants did not have the right to refuse to testify at their trials, and if

they decided not to take the stand, their silence could be used as "proof" of their guilt; and if found guilty, they often did not have the right of an appeal.

Because the United States is a federal system, laws do vary not only between the federal government and the states, but from state to state. In those areas where the Constitution does not spell out a clear federal supremacy, the practice has been to allow the states great leeway in how they conduct their business, including investigation and prosecution for crime. Until the early 20th century, federal courts operated on the assumption that the Constitution did not give them any power to review either the procedures or the results of state trials. One should note that in many states, procedural guidelines were as protective of individual rights as that of the federal government. But a wide spectrum existed, ranging from trials that would, under any circumstances, be considered fair to those that could only be described as mockeries of justice. It was one of these latter that finally moved the federal courts to intervene, and which over the next half-century led to a redefinition of criminal procedure in the United States.

William Rawle, a Philadelphia lawyer (1825)

The most innocent man, pressed by the awful solemnities of public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the contradictions or defects of their testimony, and to counteract it by properly introducing it and applying his own.

The eight young black men (the "Scottsboro boys") who were charged with raping two white girls in Alabama in 1931 may have been innocent, but in the racially charged atmosphere of the Deep South during the Depression they certainly had no knowledge or ability to defend themselves. All eight were tried, found guilty, and sentenced to die in sham trials lasting less than a day. The lawyers assigned to defend them by the judge did little more than show their faces in the courtroom and leave. When news of this travesty of justice reached northern newspapers, civil liberties groups immediately volunteered to provide effective counsel on appeal, and succeeded in moving the case into the federal court system and up to the U.S. Supreme Court.

Justice Oliver Justice George Sutherland, in Powell v. Alabama (1932)

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be out on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The case of *Powell v. Alabama* is notable for two things. First, it launched the federal courts on a new mission, that of overseeing the criminal justice system in the states, and they did this under the Due Process Clause of the Fourteenth Amendment, which specifically applies to the states. It

was not then, and never has been, the mission of the federal courts to ensure that criminal procedure in every state is identical to that in every other state. Rather, the courts have attempted to define the minimum protection of rights that the Constitution demands to ensure due process. While some states, for example, have 12-person juries, other states have lesser numbers for certain types of trial. These variations are permissible, the courts have held, so long as the trial and the jury adhere to minimal standards of fairness.

Second, *Powell* established the rule that in capital cases, those in which the death penalty could be imposed, effective assistance of counsel is constitutionally required. The lawyers in the Alabama case did no more than show up; they did nothing to defend their clients, and for all practical purposes might as well have been absent altogether. Not only must a defendant have a lawyer, the Court ruled, but that lawyer must provide real assistance, or as the courts have put it, *effective counsel*.

But the Court that ruled in *Powell* still believed strongly in a federal system, and while it was willing to extend its oversight function, it did so slowly, and only when confronted with a case that so offended it that the justices could not ignore the breach of due process. In 1936, for example, the high court overturned the convictions of three black men who had confessed to committing murder only after they had been severely beaten and tortured. In *Brown v. Mississippi* (1936), Chief Justice Charles Evans Hughes denounced the state's use of coerced confessions as a violation of due process. Torture "revolted the sense of justice," and violated a principle "so rooted in the traditions and consciences of our people as to be ranked fundamental."

Here again the Court was not ready to extend the protection of explicit Bill of Rights guarantees, but relied on the Due Process Clause of the Fourteenth Amendment. It made clear that states had great leeway in how they structured their trials; they did not even have to have jury trials provided whatever procedure they did adopt conformed to the principles of fairness demanded by the ideal of due process.

Chief Justice Charles Evans Hughes, in Brown v. Mississippi (1936)

Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness chair.

Although *Powell* established the rule that states had to provide counsel in capital cases. It did not address the question of whether counsel had to be provided to indigent defendants in felony cases that did not carry the death penalty. That issue would not be decided in the United States until 1963, in one of the most famous cases in American history – *Gideon v. Wainwright*.

A drifter, Clarence Earl Gideon, had been convicted of robbing a pool hall. At his trial he maintained his innocence, and asked the judge to assign him a lawyer, since he believed the Constitution of the United States assured him of that right. The judge responded that under Florida law he was not entitled to a lawyer in this case. Gideon did the best job he could defending himself, but was found guilty primarily on the basis of circumstantial evidence. In prison he went to the library and looked up how to appeal his case, first to the Florida Supreme Court (which turned him down), and then to the U.S. Supreme Court.

As it turned out, Gideon's "pauper's appeal" (in *forma pauperis*) arrived at the Court in the midst of the "due process revolution" of the Warren Court. The Supreme Court, under the leadership of Chief Justice Earl Warren, was in the process of determining that the Due Process Clause of the Fourteenth Amendment also "incorporates" other elements of due process found in the Bill of Rights. The Court had not yet determined whether the Sixth Amendment right to counsel was to be incorporated, and Gideon's appeal gave it the opportunity to make that decision. And as it does whenever it accepts a pauper's appeal, the Court assigned counsel to represent Gideon, in this case one of Washington's most prominent attorneys, Abe Fortas, later to be a member of the Court itself. (Law firms consider it a high honor when asked by the Court to do this type of service, even though they are not reimbursed a cent for the thousands of dollars they expend in preparing the case.)

At oral argument, Fortas convinced the justices that there could never be a truly fair trial, and that the requirement of due process could never be met, unless a defendant, no matter what his or her financial resources, could have the services of an attorney. The Court agreed, and in its decision extended this basic right to all persons charged with a felony. A few years later, the Court under Chief Justice Warren Burger, extended this protection to misdemeanor charges that could lead to a jail sentence.

Attorney General Robert F. Kennedy on the Gideon case (1963)

If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the Court had not taken the trouble to look for merit in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed.

But Gideon did write that letter, the Court did look into his case; he was retried with the help of a competent defense counsel, found not guilty, and released from prison after two years of punishment for a crime he did not commit – and the whole course of American legal history has been changed.

* * * * *

The role of the lawyer is considered central to protecting the rights of a person accused of a crime, but the lawyer standing alone would be of little use were it not for the bundle of codified rights that are there for the accused person's protection. What evidence may be used in a criminal case, for example, is governed by the protections against unlawful search and seizure established in the Fourth Amendment. Here again the colonists' experience under British rule in the 18th century shaped the concerns of the Founding generation.

Although British law required that warrants be issued for the police to search a person's residence, the British Colonial government relied on general warrants, called writs of assistance, which gave officials a license to search almost everywhere for almost everything. The notion of a general warrant dated back to the Tudor reign under Henry VIII, and resistance to its broad reach began to grow in the early 18th century. Critics attacked the general warrants as "a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him." But the government still used them, and they became a major source of friction between His Majesty's Government and the American colonists. The problem with the general

warrant was that it lacked specificity. In England in 1763, for example, a typical warrant issued by the Secretary of State commanded "diligent search" for the unidentified author, printer, and publisher of a satirical journal, *The North Briton*, and the seizure of their papers. At least five houses were subsequently searched, 49 (mostly innocent) people were arrested, and thousands of books and papers confiscated. Opposition to the warrants was widespread in England, and the opposition gradually forced the government to restrict their usage.

Chief Justice Sir Charles Pratt, on general warrants (1762)

To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; [it is] a law under which no Englishman would wish to live for an hour.

Despite its restriction in the mother country, the use of general warrants remained widespread in the colonies, and constituted one of the colonists' major complaints against Great Britain. In a famous speech against the writs of assistance, James Otis, a member of the colonial Massachusetts assembly, charged that they went "against the fundamental principles of law, the privilege of house. . . . [It is] the worst instrument of arbitrary power, the most destructive of English liberty, that was ever found in an English law-book." Following the Revolution, the states enacted a variety of laws limiting the use of such warrants, and when James Madison drafted the Bill of Rights, the Fourth Amendment spelled out further restrictions on the use of warrants.

In order to get a warrant under the U.S. Constitution, police must present evidence in their possession pointing to a specific person they wish to arrest or a place they wish to search. And they must be specific. The person must be identified by name, not just "the man who lives in that house." Police must specify what it is they are searching for – contraband, drugs, weapons – and not just indicate that they wish to search a suspected person's house. In order to get that warrant, they must have what the Fourth Amendment identifies as "probable cause." This does not mean overwhelming proof that there is contraband in a certain house or that a particular person did in fact commit a crime. Rather, they must show that it is more likely than not that the person did commit a specific illegal act, and that it is more likely than not that a search of the premises will yield particular evidence of a crime.

The Fourth Amendment is silent about any enforcement of these provisions, and for many years police in the states often did, in fact, search houses and arrest people either without having any warrant at all or having secured one without really showing probable cause. Courts held that federal law enforcement officials had to abide by the high standards of the Constitution, and created what came to be known as the "exclusionary rule." Under this standard, evidence seized without a proper warrant could not be introduced at a trial. When the federal courts expanded the reach of the Bill of Rights to apply to the states as well, they also applied the exclusionary rule to state police and trial courts.

Justice Tom Clark, in Mapp v. Ohio (1961)

[Without the exclusionary rule] the assurance against unreasonable searches would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties. So too, without that rule the freedom from state invasion of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing

evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Although there have been some critics of the exclusionary rule – Justice Cardozo once famously said that because of the rule "the criminal is to go free because the constable has blundered" – there is also general agreement that it is the only means to enforce the requirements of the Fourth Amendment. It makes sure that the state, with all the power behind it, plays by the rules. And if it doesn't, then it cannot use evidence illegally gained in prosecuting a person, even if that person is in fact guilty. While this may seem extreme to some, it serves a higher good – ensuring the proper behavior of the police.

* * * * *

The Sixth Amendment right to counsel is also often tied to what some scholars have called "the Great Right" in the Fifth Amendment that no person shall be compelled in any criminal case to be a "witness against himself." The origins of the right go back to objections against the inquisitorial proceedings of medieval ecclesiastical tribunals as well as the British Courts of Star Chamber. By the late 17th century, the maxim of *nemo tenetur prodere seipsum* – no man is bound to accuse himself – had been adopted by British common law courts and had been expanded to mean that a person did not have to answer any questions about his or her actions. The state could prosecute a person, but could not require that he or she assist in that process. The colonies carried this doctrine over as part of the received common law, and many states wrote it into their early bills of rights. Madison included it as a matter of course when he drafted the federal Bill of Rights.

The privilege came under heavy criticism during the early 1950s, as witnesses refused to answer Senator McCarthy's questions at hearings of the congressional "Un-American Activities" committee, a quasi-judicial inquiry into Communist activity in the United States, on grounds of possible self-incrimination. "Taking the Fifth" became associated with Communists in the public mind, and commentators asserted that a truly innocent person would not hesitate to take the stand and tell the truth in criminal trials or before investigating committees. The popular press carried articles on whether this constitutional right, which allegedly sheltered only guilty persons, ought to be amended.

The Court, however, continued to take an expansive view of this right, as it had since the late 19th century, when it had defined the privilege against self-incrimination to apply to any criminal case, as well as to civil cases where testimony might later be used in criminal hearings. The privilege is not absolute; persons may not refuse to be fingerprinted, to have blood samples, voice recordings or other physical evidence taken, or to submit to intoxication tests – even though all these may prove incriminating. But at a trial, the accused has the right to remain silent, and any adverse comment on a defendant's silence, by either judge or prosecutor, violates the constitutional privilege.

* * * * *

Although an accused person may not be forced to testify, he or she may voluntarily confess, and the confession may be used in evidence. In fact, in many criminal cases resulting from acts of passion or drugs where the perpetrator is not a career criminal, the suspect is eager to confess. The old common law rule against confessions obtained by torture, threats, inducements, or

promises had been reaffirmed as part of constitutional law by the Court in 1884. In modern times, in spite of the "Red Scare" of the 1950s, the Supreme Court continued to refine the test to give police greater guidance in how to carry out their responsibilities while still respecting the strictures of the Bill of Rights.

The court emphasized that confession must be voluntary, and not be the result of physical abuse or psychological brutality. Then the Court tied the Fifth Amendment privilege to the Sixth Amendment's right to counsel, on the grounds that only if the accused is first informed of his rights, including the right to remain silent, can an ensuing confession be admissible.

Justice Arthur Goldberg in Escobedo v. Illinois (1964)

Our Constitution strikes the balance in favor of the rights of the accused to be advised by his lawyer of his privilege against self-incrimination. . . . No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Then in 1966, the Supreme Court handed down the landmark ruling of *Miranda v. Arizona*. Police and lower courts had wanted a clear rule to help them determine when all the constitutional requirements had been met, and in *Miranda* the Court gave them that rule. According to Chief Justice Warren, a person under arrest had to be informed in clear and unequivocal terms of the constitutional right to remain silent, and that anything said at that point could be used against him later in court. In addition, the officers had to tell the suspect of the right to counsel and that if he or she had no money to hire a lawyer, the state would provide one. If the police interrogation continued without a lawyer present, the chief justice warned, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and the right to counsel."

The *Miranda* decision unleashed a storm of criticism of the Court for its alleged coddling of criminals, but within a short time the basic soundness of *Miranda* became clear.

The more progressive police departments in the country lost little time in announcing that they had been following similar practices for years, and that doing so had not undermined their effectiveness in investigating or solving crimes. Felons who wanted to confess did so anyway; in other cases, the lack of a confession merely required more efficient police work to find and convict the guilty party. As to charges that the decision encouraged crime, Attorney General Ramsey Clark explained that "court rules do not cause crime." Many prosecutors agreed, and one commented that "changes in court decisions and procedural practice have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."

The Court – and the Constitution – can do very little should a person commit a crime. Their concern, and the concern of the society, is that when the police apprehend a suspect, that man or woman is not sent to jail or condemned to die without due process of law. The prevention of crime is the responsibility of the legislative and executive branches, who make the laws and retain the ultimate responsibility for enforcement. But in the United States they must do so within the parameters drawn by the Constitution. Because the Framers knew too well how the courts could

be perverted by an overbearing monarch, they did their best to give the courts complete independence in interpreting and applying the law.

And because they had seen how the criminal law could be used to persecute political opponents of the regime, they made a fateful decision. Not only would they provide persons accused of a crime that bundle of rights that constitute due process, including a fair and speedy trial by one's peers, but they insisted that the entire system rest on the assumption that a person accused of a crime is considered innocent until proven guilty beyond the shadow of a doubt. In a democratic society, no person should have to prove that he or she is innocent when accused of a crime. Rather, the burden is on the state to prove guilt, and to do so convincingly.

Will some criminals escape justice because they have hidden their tracks well and the police cannot make a case? Yes, and that is one of the prices we pay for a system that insists on due process. An occasional criminal may go free, but our goal is to ensure that no innocent person is wrongfully punished. The system is not perfect, but its ideals do in fact govern. Due process in a democracy must be more than a mere phrase if the rights of the people are to be protected.

For further reading:

David J. Bodenhamer, *Fair Trial: Rights of the Accused in American History* (New York: Oxford University Press, 1992).

Jacob W. Landynski, *Search and Seizure and the Supreme Court* (Baltimore: Johns Hopkins University Press, 1966).

Leonard W. Levy, *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968).

Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964).

Melvin I. Urofsky, *The Continuity of Change: The Supreme Court and Individual Liberties, 1953-1986* (Belmont, CA: Wadsworth Press, 1989).

Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980)

Property Rights



No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

– Fifth Amendment to the U.S. Constitution

Property rights seem to many people an archaic notion, a relic of a time long gone when the status of an individual would be

determined by the property he owned. In such an era, most property belonged to a small portion of the population, and that ownership gave them not only wealth and social standing, but political as well as economic power. It recalls a time when a majority of the people owned little or nothing – women, for example, lost all control over what property they might have when they married – and, thus, government and society were under the control of a small elite. Most of us would prefer the present situation, when property is more widely distributed, when people may enjoy status on the grounds of their accomplishments as well as wealth, when women are no longer hobbled by outmoded notions, and when the right to vote is now universally enjoyed free of any requirement to be a landowner.

But the right to own and enjoy property has always been an important part of the rights of the people. At the Philadelphia convention that drafted the Constitution, John Rutledge of South Carolina reminded the delegates that "property was certainly the principal object of Society." They did not really need much reminding, because the Framers all believed that respect for an individual's property rights lay at the heart of the social contract. Not only did they build institutional safeguards into the Constitution to protect those rights, but the nation soon added important provisions through the Bill of Rights to buttress that protection. Moreover, the Founders did not intend that these protections extend only to land or discernible assets, but to all the rights inherent in property – real or personal, tangible or intangible. They believed that property was "the guardian of every other right," for without the right to own and use and enjoy one's property free from arbitrary governmental interference, there could be no liberty of any sort.

Today property rights are still important to the American people. The right to own what you have created, built, purchased or even been given as a gift – knowing that the government cannot take it from you except under stringent legal procedures – provides the material security that goes hand in hand with less tangible freedoms, such as speech and privacy. People whose economic rights are threatened are just as much at the mercy of a despotic government as are those who find their freedom of expression or their right to vote curtailed. When talking of rights, legal scholars often speak of a "bundle of rights," and by this they mean that all are closely connected. If we no longer believe that property rights underlie all other freedoms, we do believe that freedom is a seamless tapestry, in which every one of the rights in that bundle is important to the preservation of others. This is certainly true of freedom of speech, and it is no less true of property rights.

* * * * *

Ownership in land – the most tangible, and in the early days of the Republic, the most important form of property – had never meant absolute control over that property or an unfettered right to use it in any way the owner wanted. Traditions going back to English common law have always placed restrictions on property. The common law doctrine of nuisance, for example, prevented owners from using their land in a way that interfered unreasonably with the rights of their neighbors. Custom often allowed hunting on private, unenclosed land, or required that an owner allow access to rivers and lakes. Property in the form of businesses also had regulations on them; taverns, ferries and coach lines, for example, were often heavily regulated in both England and the North American colonies. Governments could and did tax individual wealth, and while most people recognize the importance of taxes in providing governmental services, taxation is a taking of property from individuals. Perhaps the most drastic form of interference with private property rights is the concept of eminent domain, by which authorities can compel the transfer of property

from a private owner to the government for a public purpose, such as the building of a road or canal.

Given this dichotomy between full protection of property rights and public purpose limits on those rights, the limits on governmental interference with those rights have never been totally clear or without debate. Over time, the meaning of property itself has been transformed. (A parcel of land is still a parcel of land, but how does one look at items like stock options or brand name protection or computer software enhancements?) Thus, the courts are called upon as they always have been throughout American history to interpret the meaning of the different constitutional concepts regarding property. At times, the judiciary has been a champion of property rights, and its decisions have been hailed as necessary to safeguard economic liberty, foster competition, and protect the private enterprise system. Critics of the courts have attacked these same decisions as a barrier to much-needed reforms aimed at protecting the weak, and have criticized them for undermining the emerging welfare state.

While it is true that at times there have been battles between a conservative judiciary intent on fully protecting what the judges saw as untouchable property rights and reformers who believed limits had to be imposed in the form of restrictions or even transfer, to look at those battles would be to miss the true meaning of property rights in American history. Most of those battles involved business property and labor contracts, admittedly important issues, but ones that in many ways are limited to the period of America's industrial transformation, roughly from the 1870s to the 1930s. Those battles have been fought, and the basic issues decided. Rights in business property are important but may be limited when necessary to protect the general welfare; the rights of an individual property owner often must give way to the need of the state to protect those who are weak or disadvantaged.

But the interest in and love of property as a measure of one's connection to society remains strong in the United States. It is not, as so many critics have charged, a simple case of money grubbing and lust after wealth. Owning a home, for example, is seen by many not as a matter of property, but of achieving a dream, a place in society. This attachment to property goes back to the founding of the country, when a large number of settlers came to the New World seeking not gold but land they could work and call their own.

J. Hector de St. Jean Crèvecoeur, Letters from an American Farmer (1782)

The instant I enter on my own land, the bright ideas of prosperity, of exclusive right, of independence exalt my mind. Precious soil, I say to myself, by what singular custom of law is it that thou wast made to constitute the riches of the freeholder? What should we American farmers be without the distinct possession of that soil? It feeds, it clothes us, from it we draw even a great exuberancy, our best meat, our richest drink, the very honey of our bees comes from this privileged spot. No wonder we should thus cherish its possession, no wonder that so many Europeans who have never been able to say that such portion of land was theirs, cross the Atlantic to realize that happiness. Thus formerly rude soil has been converted by my father into a pleasant farm, and in return it has established all our rights; on it is founded our rank, our freedom, our power as citizens.

Property drove many people to migrate to the New World. By the 16th century, there was no "free" land in the British Isles or in Western Europe. Every acre was owned by someone, either a

private individual or by government in the form of the Crown. The laws of primogeniture and entail meant that an estate of land had to be passed on intact to the oldest son, and those without land were in large measure powerless. Of particular importance at this time were the writings of the great English political theorist John Locke (1632-1704), whose ideas strongly influenced the generation of Americans that declared independence from Great Britain and wrote the Constitution. The Declaration of Independence reflects many of Locke's ideas about government and individual rights, while the Constitution includes his theory of property rights.

To Locke, private property arose out of natural law and existed prior to the creation of government. The right to own property, therefore, did not depend upon the whims of a king or parliament; to the contrary, the primary purpose of government was to protect rights in property, since these rights were at the base of all liberties. As the English political writer John Trenchard explained in 1721, "All Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men." Without rights to property, no other liberties could exist, and people created government to protect "their Lives, Liberties and Estates," that is, their property. Since the right to own and enjoy property derived from natural law, government existed to safeguard property and the liberties that flowed from it.

From writings of German settlers in Maryland (1763)

The law of the land is so constituted, that every man is secure in the enjoyment of his property, the meanest person is out of reach of oppression from the most powerful, nor can anything be taken from him without his receiving satisfaction for it.

This tradition was even more powerful in the New World than in the Old. The colonists avidly read Locke and other 17th and 18th century English writers who proclaimed the importance of property rights and the limits that existed on government's ability to limit those rights. American lawyers believed that the common law had been built around the protection of property, and they found support for this view in the highly influential Commentaries on the Laws of England by William Blackstone. So great, Blackstone intoned, "is the regard for the law of private property, that it will not authorize the least violation of it." John Adams perfectly reflected this tradition when he declared in 1790 that "property must be secured or liberty cannot exist."

New Hampshire Constitution of 1784

All men have certain natural, essential, and inherent rights; among which are – the enjoying and defending of life and property – and in a word, of seeking and obtaining happiness.

Thus, like other provisions of the Constitution, the various clauses relating to property were not written on an empty slate, but reflected the intellectual heritage of the Enlightenment and the specific experiences of the colonies. The Founders believed property to be important. They built in limitations on government to enforce that view, and to prevent depredations such as those they had allegedly suffered under the Crown. But while the Constitution may appear to be a more conservative document than the Declaration of Independence, with the latter's clarion call for "life, liberty and the pursuit of happiness," it is just as protective of those rights. The same generation that declared independence from Great Britain and fought the American Revolution also ratified the Constitution; indeed, many of the men who put their signatures to the Declaration in 1776 also signed the Constitution 11 years later. The two documents are not antithetical but complementary;

one proclaimed that the country was rebelling because King George III had trampled upon the rights of Englishmen, while the other set up a framework of government to protect those rights, including the fundamental right to own property.

It should be noted that although the Framers of the Constitution wrote in safeguards for property, they did not make office holding conditional upon the ownership of property. The only qualifications that the Constitution makes regarding membership in the Congress or for the President are age, residence, and citizenship. While many states at the time did have some property qualifications for voting, scholars have found that they kept few from the franchise. In many areas men either owned the small amount of property needed for the vote, or local authorities ignored the rule. Within only a few decades, moreover, property qualifications for voters were swept away in the great tide of democratic reform known as the Jacksonian Era.

* * * * *

The provisions in the Constitution regarding property fall into four general categories. First are restrictions on the new national government's abilities to restrict property rights as they pertain to both individuals and states. Congress could not enact "bills of attainder," in which the property of persons convicted of treason or certain other crimes could not pass to their natural heirs but were forfeit to the government. These provisions aimed at preventing the type of abuse that had been all too common in England, where kings had declared rich lords traitors in order to confiscate their entire estates and those of near relatives, or Parliament had deprived particular groups or individuals of their property through attainder.

In addition, Congress could not give preferential treatment to a port in one state over that in another. While it could impose tariffs on goods coming into the country, it could not tax exports, again ensuring that no one section of the country would gain or lose business because of discriminatory federal policies. These latter provisions grew directly out of the colonial experience, when various colonies had suffered because Parliament in the trade acts had given preference to one colonial port over others, or had taxed the exports particular to some colonies, putting those goods at a disadvantage in the imperial market.

The second group of provisions in the Constitution strengthened the power of the federal government over interstate and foreign commerce, and included a broad taxing authority. While these powers might seem antithetical to property rights, they were actually supportive of them, since the Framers designed them to be a check on the states. During the Articles of Confederation period (1781-1788), the states had often engaged in economic warfare with one another, setting up tariff barriers against the goods of neighboring states, or bribing foreign ship owners to use one port over another. Such practices had wreaked havoc with local businesses, and the provisions of the new Constitution guaranteed that all growers and manufacturers would have equal access to national and foreign markets, and would be free of discriminatory tariffs.

Another important aspect of property protection is the clause granting Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This protection of what today we call "intellectual property" had actually begun a few years earlier. Once the break with England had occurred, American writers and inventors could no longer rely on the patents and copyrights issued earlier by the Crown. Despite the widespread animus against monopoly (a

reaction to British imperial policies on tea and other staples), Americans recognized that writers and inventors needed special protection. The Continental Congress lacked the power to grant these shields, and had urged the states to issue them. North Carolina promptly responded with a copyright law, declaring that "the Security of literary Property must greatly tend to encourage Genius." In 1784, South Carolina passed an Act for the Encouragement of Arts and Sciences, the first general patent law in the nation. But under the Confederation, one state could ignore the laws (including patents and copyrights) of another state; the national approach set out in the Constitution provided the protection that owners of intellectual property needed.

A third area placed restrictions on the states. During the 1780s, several state legislatures, responding to popular demand, had passed debtor relief bills or had issued worthless paper money that quickly lost all its value. In addition, as noted above, various state laws taxing imports or exports – either from foreign countries or from other states – had seriously retarded economic recovery after the Revolution. States were expressly forbidden from issuing money and from taxing imports or exports, nor could they enact bills of attainder. Perhaps the strongest protection of private property can be found in the clause prohibiting states from passing any law "impairing the obligation of contract." These contracts could be arrangements between creditor and debtor, landlord and tenant, buyer and seller, or even between the government and private individuals. (One of the most famous of all Supreme Court decisions, the Dartmouth College Case, held that a charter to a private college constituted a contract, and once issued, could not be abridged by the state.) In the early decades of the new republic, the Contract Clause would be one of the most litigated parts of the Constitution, with the Supreme Court strictly enforcing its terms against the states. Yet it generated little discussion at the Philadelphia Convention; the delegates had seen what problems the states had caused, and were determined to ensure they would not have power to do so again.

James Madison, Federalist No. 44 (1788)

Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. . . . They very rightly infer...that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

The fourth area of protection involved a form of property that no longer exists in the United States, chattel slavery. By 1787, slavery was firmly established in all of the southern colonies, and representatives from those states made it clear that they would not join the Union unless the new Constitution explicitly protected slavery. In the interest of forging a Union, the delegates to the convention gave in to most of the southern demands. Thus, the Constitution, as originally drafted, gave Congress the power to enact legislation to apprehend runaway slaves, but gave Congress no power to interfere with the domestic slave trade. None of the delegates at Philadelphia, from either the North or the South, could have anticipated how bitter and divisive the issue of slavery would become, or that it would take a civil war that nearly destroyed the Union in order to eradicate what southerners called their "peculiar institution."

What one will not find in the original Constitution is a specific clause overtly affirming all property rights. This was not because the Framers did not value property – recall John Rutledge's comment that "property was certainly the principal object of Society" – but rather because they believed that it would be protected by the institutional arrangements they had created, the selective grants of power to the federal government as well as selective restrictions placed on both the state and federal power. They believed that all individual liberties, including property, could best be preserved by limiting government to some extent, and as a result, the original Constitution did not include a bill of rights.

* * * * *

In the debate over ratification of the Constitution, however, powerful voices called for the addition of just such a bill of rights. Indeed, several states conditioned their approval of the Constitution upon the immediate adoption of specific protections of the rights of the people from interference by Congress. James Madison proposed an expansive statement that "government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." His colleagues in Congress, however, wanted more specific provisions, and in the Bill of Rights there are two sections of the Fifth Amendment directly relating to property – no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Due Process Clause of the Fifth Amendment is a direct descendent of the "law of the land" provision of the Magna Carta, and is perhaps the most important protection not only of property rights but of individual liberties to be found in the Constitution. But there is more to the protection than meets the eye. If all government had to do was follow legal rules – which Congress could enact – then it would be relatively easy for the government to impinge on individual liberties. But the courts have interpreted the Due Process Clause to contain not only procedural rights (the means that government must follow) but also substantive rights (limits that exist on government itself that derive from both "natural law" and the English legal tradition). History is unfortunately replete with examples of corrupt or dictatorial governments using legislation to steal the people's wealth and to restrict their liberty, all the while claiming they were doing nothing more than following the law. The Due Process Clause essentially says that the Congress cannot pass such laws, because they violate the spirit that animates the entire constitutional arrangement – the protection of individual liberties, including property rights.

The Fifth Amendment's Takings Clause is an additional and powerful protector of property. Everyone recognized that at times the government would need to take over portions of private property for essential public needs, such as streets, roads and canals, or federal military installations. The amendment, however, rejected the then-European practice of outright confiscation without reimbursement. In feudal society, all land theoretically belonged to the Crown, and was held in fief by the king's vassals. Since the government owned all the land under this system, there seemed to be no need to reimburse "vassals" for taking what in effect did not belong to them anyway. Even after the feudal system passed into history, the notion that government could take land without reimbursement remained the norm. In the United States, by the time of the Constitution, people believed strongly that individuals completely owned the land they lived on and worked. Government, it is true, owned vast areas of land on the western frontier, but under legislation first passed by the Confederation Congress and then repassed under the

constitutional Congress, when government sold off that land it lost all rights to it. If for any reason it needed to acquire private property, it would have to pay for it.

Justice Antonin Scalia, in Nollan v. California Coastal Commission (1987)

To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather "a mere restriction on its use" is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Although the Fifth Amendment clauses applied at the time only to the national government, many states adopted their wording into state bills of rights. One needs to recall that the United States is governed under a federal system, in which both the national and state governments have powers. Many states had bills of rights even before 1791, but nearly all of them either added or modified their own constitutions to adopt the intent and even the wording of the Due Process and Takings clauses. The adoption by the states reinforced the high standing of property and its related rights within the constitutional and legal structure of the country. Until the 20th century it was the states, not the federal government that took the lead in promoting economic enterprises such as roads and canals. The safeguards in the state constitutions ensured that these activities progressed with some regard for the rights of individual property owners.

* * * * *

During the 19th and early parts of the 20th century, a great debate took place in the United States over the nature of property rights and the balance that should be struck between the rights of private owners and businessmen on the one hand and the police powers of the state that were enlisted to ameliorate the harsher aspects of industrialization. Especially within the judicial branch, many judges seemed to hold an unalloyed Lockean view that nothing should be done to disturb individual rights in property.

Justice Joseph Story, in Wilkinson v. Leland (1829)

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.

As a result, conservative courts consistently restricted both state legislatures and the Congress in their efforts to put through reform measures such as wages and work-hours laws, factory safety measures, rate regulation of public utilities, and progressive taxation of income – measures that are common in all modern states. Not until the Great Depression of the 1930s did the forces of reform finally triumph. This did not mean that the American people abandoned property rights, but rather that property rights took on a more proportional value within a larger revolution in individual liberties. Starting in 1937, both the country and its courts began to concentrate on personal liberties, and especially the meaning of the Equal Protection Clause of the Fourteenth

Amendment. This was the beginning of the great civil rights revolution, as well as the dramatic expansion of the meaning of such rights as speech, press, religion, and rights of the accused – all covered in other chapters of this book. Contrary to the views of some that property rights have been eroded into insignificance, the protection of property remains a vital interest in American life. If Americans no longer view property as "the guardian of every other right," it still plays a very important role in how they view the rights of the people.

There has been a long-standing debate among historians as to why a strong socialist movement never developed in the United States. After all, the industrial revolution was just as wrenching in the United States as in Western Europe and Great Britain. Workers in American mines and factories labored under conditions just as harsh as their counterparts faced in the Old World, and they labored for low wages that barely allowed many of them to eke out a meager existence. But where workers in England, France, Germany and Italy, came together in powerful trade unions that soon grew into strong political movements on the Left, that never happened in the United States. Although there were numerous socialist groups in the 19th and early 20th centuries, no dominant organization that tied together worker demands and political power ever developed. At their height in the early 20th century, the Socialists only garnered one million votes in the presidential election of 1912, a number never reached again, even during the terrible years of the Great Depression.

The commonly accepted explanation is that in many parts of the world, both workers and property owners saw the economic world as a "zero-sum game," meaning that if one group were to improve its lot in life, it would have to be at the expense of others. For the proletariat to become owners of property themselves, the property would have to be taken away from those who controlled it and given to those who did not. While classical economic thinkers always referred to a person's labor as a form of property, in fact a common laborer had very little control of his work, his laboring conditions, or his pay.

In the United States, however, there had been and, in fact, still is sufficient open land to allow anyone who works hard to become an owner of property. From the beginning, not only farmers, but artisans and even unskilled workers wanted to become property owners. During the first three centuries of the country's existence, both as English colonies and then as an independent nation, a great body of open and free land existed in the West, ready to be settled and worked. Government policy favored this individual ownership, both through the sale of public lands at extremely cheap rates and also by subsidies of land deeded to railroads in the building of the transcontinental railroads. The railroads turned around and sold those lands at a moderate cost, bringing in more settlers to own and work the new territories.

The class and caste systems that seemed to hobble many European societies did not exist in the United States. There was no hereditary aristocracy controlling great estates, nor was there a laboring class limited by custom to their "place" on the bottom rungs of society. Many settlers came to the New World in the 17th and 18th centuries as indentured servants, agreeing to work as farmhands or housemaids for a period of years, after which they would be free. In many instances the "freedom dues" given to a servant upon the completion of an indenture consisted of a parcel of land, farming tools, and seed with which to begin a new life. While not all former indentured servants became great landowners, some did, and many did acquire their own farm and enjoy the privileges that Hector de St. Jean Crèvecoeur sang about in 1782. While the nation has changed dramatically from the 1780s until the present, the dream of land ownership has been a constant

for all groups in America. Most workers did not want to become a more powerful proletariat supporting a socialist political party; they wanted to become small business owners, independent artisans, employers of others in their own right, members of a burgeoning middle class and, above all, homeowners and landowners, like the rich.

Alexis de Tocqueville, Democracy in America (1832)

In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned.

The unique conditions in the United States made the beliefs Tocqueville described possible. Even after the frontier disappeared at the end of the 19th century, great tracts of land still remained upon which individual family houses could be built. Visitors to the United States in the 1950s marveled at the extensive communities of single-family homes that dotted the American landscape, and which were inhabited by blue- and white-collar workers. Property in the form of owning one's own house has been a constant dream in the United States from its founding. Both Democrats and Republicans have fostered and supported that dream through governmental programs designed to make it easier for people to purchase homes. Property in America has been the foundation on which a prosperous middle-class democratic society has been built.

* * * * *

At the beginning of the 21st century we confront a bewildering array of "properties," ranging from the tangible and familiar to the virtual and exotic. But the basic premises remain, and part of the job of society, government, and especially the courts is to determine how property, both in its traditional and its revolutionary new forms, is to be treated. The rights explosion beginning in the 1950s transformed not only how we view speech and religious liberty, but property as well. To take but one example, the modern state provides a number of tangible benefits to its citizens including social welfare programs, old age pensions, unemployment benefits, and health insurance. These are now seen by many as a form of property rights, to which the citizens are fully entitled.

In the second half of the 20th century, the civil rights and environmental movements led to laws that have placed significant burdens on traditional concepts of property rights. Restaurant owners can no longer discriminate about whom they will serve, while both businesses and private property owners often must bear the cost of environmental protection programs. Government regulations affecting all sectors of the economy and the society further eroded the old notion that owners can do completely what they will with their businesses and property. These inroads have led some commentators to charge that property rights had been consigned to "a legal dust-bin."

There would be some justification for this view, but only if one considered property rights inviolate, a condition that has never existed in either American or English law. Even John Locke, while extolling the primacy of property as the guarantor of other rights, nonetheless recognized significant limits on its use. If in one period of American history the notion of laissez-faire (a French expression meaning to "let people do what they want") put too great an emphasis on property rights, in other periods there perhaps has been too little. In the last two decades, the federal courts have been leading the way in trying to strike a new balance between the legitimate concerns of the modern state and how those concerns impinge on the rights of property.

Justice John Paul Stevens, dissenting in Dolan v. City of Tigard (1994)

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of [property owners]. If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial, and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the [property] belongs squarely on the shoulders of the party challenging the state action.

Some of these issues grow out of a newly heightened sense of environmental awareness, and that growth, while healthy for the economy, may have deleterious effects on the quality of air and water. The common law placed the blame for fouling a stream on the owner who dumped refuse into it. Today the damage to air or water cannot often be placed on one individual or one corporation, but is the sum result of the actions of many parties over several years or even decades. How do we affix – not so much blame – but the costs of cleanup? How much do we penalize private property interests, especially of owners who may have at best a marginal impact on the larger environmental problem, by limiting their traditional rights in the property? As Justice Hugo Black noted many years ago, the Takings Clause "was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." This is part of the debate at the beginning of the 21st century, but only part.

In a free enterprise system, property takes many forms, and each form has a particular value to different interests. Polls show that more than 70 percent of the American people place great value on property rights. The traditional view of substantial rights in property has served the American people well for more than 200 years, and the challenge is to take the values underlying that commitment and apply it to new situations, to new forms of property, in a manner that will protect both the owner of the property as well as the public.

For further reading:

Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977).

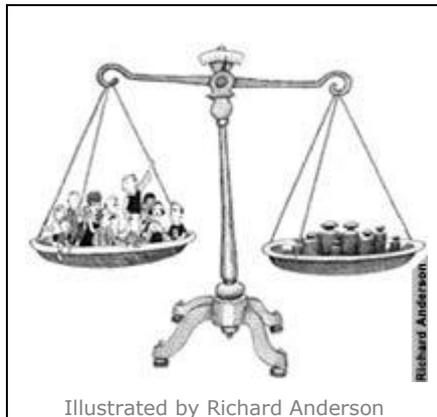
James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2nd ed., New York: Oxford University Press, 1998).

Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985).

Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and the Foundations of the American Constitution* (Albany: State University of New York Press, 1989).

William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington: Indiana University Press, 1977).

Equal Protection of the Law



Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

– Fourteenth Amendment to the U.S. Constitution

In the last half-century the constitutional command requiring equal protection of the laws for all people has been critical in the great social movements that have secured equal legal rights for people of color, women, and other groups, in the United States. In concept it is one of the noblest statements in the American Constitution, and in practice one of the more powerful. Without its authority it is unlikely that the United States would have achieved as much social progress as it has

in the past 50 years, and many Americans might still be subjected to an institutionalized prejudice that made them second-class citizens, unable to vote or enjoy all rights. Yet although the Fourteenth Amendment became part of the Constitution in 1868, almost 90 years passed before this broad interpretation of the meaning of "equal protection" flowered.

* * * * *

When Thomas Jefferson wrote in the Declaration of Independence that "all men are created equal," he did not mean social or economic egalitarianism. Rather he and others of the Founding generation believed that society by its nature could never be socially or economically homogeneous because men differ in their abilities and virtues. They did not want to level society, but rather give to each individual the opportunity to make the most of his abilities. In order for this opportunity to exist, all men (and at the time they were only concerned with men) had to stand before the law on an equal footing. There could not be one law for the rich and another for the poor, although the Founders ignored the fact that there was clearly one law for white people and another for slaves. A generation later, when Andrew Jackson's Democrats talked about equality, they meant the same thing – equality of opportunity based on equal treatment by the law.

Interestingly, no mention of equal opportunity can be found in either the original body of the Constitution or the Bill of Rights, nor was it deemed necessary until after the Civil War. When it became apparent that the defeated Confederate states had no intention of treating the newly freed slaves fairly, Congress responded by drafting and passing the Fourteenth Amendment to the Constitution, which forbade all states from denying any citizens not only due process of law but equal protection of those laws.

Justice Stanley Matthews, in Yick Wo v. Hopkins (1886)

The guaranty of equal protection of the laws is a pledge of the protection of equal laws.

Yet, from the very beginning the meaning of "equal protection" has at times been confusing, perhaps because the framers of the Fourteenth Amendment left us no explanation of exactly what they meant. On the other hand, the phrase could be read to mean that any law, no matter what common sense suggests, will be applied rigidly to all people. Such an extreme notion that laws cannot in any way, shape or manner discriminate among individuals or groups, can become silly.

Passing a vision test as a requirement for securing a driver's license clearly discriminates against people who are blind or have sight impediments, yet this is an appropriate form of distinction.

Justice Anthony Kennedy, in Romer v. Evans (1996)

The Fourteenth Amendment's premise that no person shall be denied the equal protection of the law must coexist with the practical necessity that most legislation classifies [people] for one purpose or another, with resulting disadvantages to various groups or persons. . . . [The Court] has attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class [vulnerable group of citizens], we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

All laws rely on some form of classification, and in many instances the laws only apply to certain people and not to others, and people may be treated differently under terms of the same law. A pension plan for government workers, for example, could certainly differentiate the amount of the pension depending upon rank, years of service, and salary. Both criminal and civil law impose punishments that are clearly differentiated depending upon a number of circumstances. Two women, for example, who are both convicted of the same crime, say murder, could receive vastly different sentences depending upon the circumstances surrounding each case. Just as we would not want the law blatantly to discriminate against people on the basis of such characteristics as age, height, gender, race, or religion, at the same time, we would not want a law that forced all people, regardless of conditions, to be treated exactly alike.

The origins of the Fourteenth Amendment, as a blueprint for the reconstruction of the Confederate states after the Civil War, informed its interpretation in the courts for many years. Despite its plain language that does not in fact refer to race, everyone understood that the Congress that proposed the amendment meant to protect the former slaves from discrimination, and nothing else. Justice Harlan's famous comment that the Constitution was color-blind captured perfectly what had been intended.

Justice John Marshall Harlan, dissenting in Plessy v. Ferguson (1896)

In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Justice Harlan's words expressed the ideal, if not always the reality of life for the former slaves and their children. The victorious northern Union, after wiping out slavery and writing noble sentiments into the Constitution, entered a period of economic expansion and industrial growth, and left the intractable problem of race to the South to resolve as it pleased. The result was more than six decades of the institutionalized discrimination against African-Americans known as "Jim Crow." The phrase "Jim Crow" was drawn from a stock character in "minstrel" (vaudeville) shows of the time, in which a white singer and actor would put on black makeup to look like a black man. Eventually, the phrase became widespread throughout the South to denote the segregation of the races.

Eventually segregation – legal separation of whites and blacks under state and local statute – would fall before the Equal Protection Clause, but in the meantime the clause practically disappeared from the constitutional lexicon. The courts, except in certain extreme cases of

discrimination, refused to apply it broadly to race relations; and believing that limited purpose to be the sole justification for the Amendment as a whole, refused to utilize it in other instances either. By 1927, Justice Oliver Wendell Holmes could characterize the Equal Protection Clause as the "usual last resort of constitutional arguments," one that had little effect on the legal system as a whole.

All that began to change during World War II, and in one of those ironic aspects of history, new life crept back into the clause not in a case involving overt discrimination against people of color, but in one where chicken thieves were punished far more severely – by sterilization – than were criminals convicted of more genteel forms of thievery such as embezzling funds. Justice William O. Douglas asked the basic question: Was it fair that a strict law applied to all felons with the exception of wealthy embezzlers? The answer was clearly no. This gross disparity in penalties based on social class, he argued, violated the entire premise of equal protection. Douglas then went on to suggest that any law which impinged upon fundamental rights in a way to violate the Equal Protection Clause should be given strict judicial scrutiny by the courts. With this analysis in place, the stage was set for the great civil rights revolution in the decades immediately following the war.

* * * * *

The Great Depression in America had created a new sense of what government should and should not do. The old notion, that the federal government should not interfere much in the economy, had been erased by the need of the government to act in the 1930s to mitigate the effects of a broken economy, and then in the 1940s to protect the country during the war. At the same time, a new generation of lawyers and civil rights activists began pondering what role the government – and especially the courts – might play in ending segregation. They took heart not only from some cases in which the Court struck down the exclusion of blacks from primary elections, but also from statements such as "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect," a formulation used in more than one case.

When President Dwight Eisenhower named Earl Warren as chief justice of the United States in 1953, the stage was set for what has been termed the "egalitarian revolution." Warren and other members of the Court had no more interest than Jefferson and the Founders in eradicating differences that resulted from talent and hard work. They had no constitutional patience, however, for artificial barriers created by inequalities in the law or unequal treatment of certain groups.

The greatest statement of this principle came in what is without doubt the most important case the Supreme Court handed down in the 20th century, *Brown v. Board of Education* (1954). For more than a decade, the Court had slowly been chipping away at the edges of Jim Crow – which had resulted in many areas in the legal segregation of blacks from whites – recognizing that it had made a mistake in approving it at the end of the 19th century in a case known as *Plessy v. Ferguson* (1896). In *Brown*, it confronted segregation head on, and announced that this practice violated the constitutional mandate for equal protection.

Chief Justice Earl Warren, in Brown v. Board of Education (1954)

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of

equal educational opportunities? We believe that it does. . . . We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. . . . Such segregation is a denial of the equal protection of the laws.

When Warren announced that "separate educational facilities are inherently unequal," he seemed to be saying that racial segregation violated the constitutional mandate of "equal protection" at all times and in all places. In effect, the Court said that racial discrimination had been unconstitutional since 1868, and that cases to the contrary, such as *Plessy*, had been wrongly decided.

But Warren actually meant more, and it was this latter meaning that would inform so much of the interpretation of equal protection. Constitutional meaning changes with changing times and circumstances. At the beginning of the 19th century, Chief Justice John Marshall had lectured the American people to always remember that the Constitution is intended "to be adopted to the various crises of human affairs." This notion of a "living constitution" is not accepted by all scholars or judges, but the history of the Equal Protection Clause in the last half-century would indicate that its applications, and possibly its meaning as well, have changed over time.

Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989)

If Brown v. Board of Education reflected a change in the American civic culture, it also generated further changes. Brown was the Supreme Court's most important decision of the twentieth century. Today it stands as much more than a decision about schools, or even a decision about segregation. Brown is our leading authoritative symbol for the principle that the Constitution forbids a system of caste.

Race relations in the United States would never be the same after *Brown*. What had been a nascent drive to regain lost rights acquired new life, and grew into the civil rights movement of the 1950s and 1960s. When 200,000 people gathered at the Lincoln Memorial in August 1963 to rally for civil rights, they heard Martin Luther King, Jr.'s poetic statement that with equal protection afforded by law "one day on the red hills of Georgia, the sons of former slaves and the sons of former slave-owners will be able to sit together at the table of brotherhood."

Neither King nor President John F. Kennedy differed greatly in their interpretation of equal protection from that of Jefferson and Jackson before them – they simply wanted to expand it to other categories of people. They wanted all Americans to be treated according to individual merits, talents and virtues, and not according to accidents of skin coloring, gender, or religious belief. The Civil Rights Act of 1964, which Kennedy had proposed and which President Lyndon Baines Johnson signed into law, carried out the same theme. People are different, but all must be treated equally by the law.

What *Brown* and other cases, as well as the Civil Rights Act of 1964 and indeed the entire civil rights movement, said, in essence, was that without the equal protection of the laws, there can be no full citizenship for the minority, and without this, there can be only limited democracy. Perhaps, as some would argue, democracy makes rights possible; an equally valid argument can be made that individual rights make democracy work. At the core of the modern interpretation of the Equal Protection Clause is the belief that individuals, no matter what their race, gender, or religion, must be treated, certainly not as interchangeable cogs, but as individuals, each of whom is entitled to

be treated without discrimination in accordance with his or her deserts with all other individuals before the law.

President John F. Kennedy, Address to Nation on Civil Rights (11 June 1963)

It ought to be possible for American students of any color to attend any public institution without having to be backed up by troops. It ought to be possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street, and it ought to be possible for American citizens of any color to register and to vote in a free election without interference or fear of reprisal. . . . In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. But this is not the case.

An important by-product of *Brown* and the civil rights movement is that other groups also began calling for equality, of which the largest has been women. Despite the fact that women make up over one-half the population, in the early 1960s they still occupied a second-class status, especially in the workplace, barred by custom from certain jobs, excluded from certain professional schools, and getting paid far less than men for the same work. Efforts by women to gain equality by going to court had failed, and most men probably shared the view expressed by Justice Bradley in 1873; "The paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

The women's movement had won its first major victory in 1964, when Title VII of the Civil Rights Acts prohibited employment discrimination on the basis of race, religion, national origin, and sex. Throughout the 1960s the media carried one story after another on the women's movement and its efforts to achieve sexual equality. In early 1972, Congress overwhelmingly approved a gender-based Equal Rights Amendment to the Constitution and sent it to the states (where, however, it failed of ratification), and the following year it passed the Equal Pay Act of 1973 mandating equal pay for equal work.

Justice William Brennan, Jr., in Frontiero v. Richardson (1973)

Our Nation has a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes. . . . It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in particular because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.

Taking its cue from the civil rights movement, women's groups went into court to attack one discriminatory law after another, and won in nearly all their cases. Like other sections of society, the courts grappled with the problem of trying to achieve equality before the law for both men and women, while recognizing that differences did exist that might justify the retention of some paternalistic measures even if they violated a strict equal protection standard. Where no valid reason justified discrimination, however, the Supreme Court moved to end it quickly.

In 1979, the Burger Court took decisive steps to make the Constitution as gender-neutral as it is supposed to be race-blind. The Court struck down a state law under which husbands but never wives might be required to pay alimony. Such classifications must fall, according to Justice Brennan, whenever they reflect the "baggage of sexual stereotypes," in this instance that men always have a duty to work and support their wives, whose responsibility is centered on the home. In another case, the Court struck down provisions of a federal program that allowed benefits to a family when an employed father lost his job, but not when a working mother became unemployed.

Yet for all the advances women made in the courtroom, they still have not achieved the complete statutory equality sought through the Equal Rights Amendment (ERA), which provided that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," and authorized Congress to enact enforcing legislation. Congress had originally sent the amendment to the states in early 1972; within a few months about half the states had ratified it. Then opposition groups began to lobby intensively, and the amendment stalled. Proponents managed to get an extension of the ratification deadline from 1978 to the end of June 1982, but even then only 35 states approved, three short of the necessary margin.

Opposition to the amendment ranged from overt male chauvinism to claims that it would hurt women by vacating protective legislation; some opponents claimed that the ERA would require unisex bathrooms, while states' rights advocates feared that it would give the federal government still another club with which to bludgeon the states. Yet in constitutional terms, since the Fourteenth Amendment already guarantees "equal protection of the laws," it is unclear just how an equal rights amendment would affect existing law. It would, of course, raise gender to a classification equivalent to race and thus require the highest level of judicial scrutiny in cases where the law differentiated between men and women.

Justice Ruth Bader Ginsburg, in United States v. Virginia (1996)

Does Virginia's exclusion of women from the educational opportunities provided by Virginia Military Institute – extraordinary opportunities for military training and civilian leadership development – deny to women "capable of all the individual activities required of VMI cadets" . . . the equal protection of the law guaranteed by the Fourteenth Amendment? . . . However liberally [VMI's] plan serves the State's sons, it makes no provision whatever for her daughters. That is not equal protection.

But in practical terms the courts have already achieved much of what women sought in the ERA. The Equal Protection Clause of the Fourteenth Amendment does not use the word "man" but "person," and a strict reading of that phrase by the courts has already struck down the most blatant forms of legally sanctioned sex discrimination in the United States. The situation for women is in many ways like that of people of color – state-sponsored discrimination cannot stand. The law, however, is powerless to change societal attitudes, and while the old attitudes that existed prior to the civil rights and women's movements have been greatly reduced, powerful vestiges remain.

Although women and people of color have been the most significant beneficiaries of the new interpretation of the Equal Protection Clause, other groups have also demanded that they, too, be given constitutional equality. Disabled persons, homosexuals, and others have sought, with varying degrees of success, to secure laws that would protect them from discrimination. The

Americans with Disabilities Act (1992) opened up vast possibilities for people with physical or mental impairments to be full members of the polity. While homosexual groups have fallen far short of the goals they seek, such as validation of same-sex marriage, the courts and many state legislatures have consistently held that there can be no legal discrimination aimed at gays and lesbians as a group, and slowly they too are beginning to be more accepted into the social mainstream.

* * * * *

If the sole implication of the Equal Protection Clause was merely to ensure that the government enforced all laws fairly, and passed no discriminatory measures, then while it would still be important, the clause would not have had the impact that it did in the last half-century. What the courts and legislatures have understood is that equal protection is a root concept of citizenship, much like the First Amendment's protection of free speech. Just as a person cannot fulfill the duties of a citizen without the ability to speak freely and hear different viewpoints, so one cannot be a full member of the community if subject to discriminatory classification.

An essential component of "equal citizenship" is respect, the recognition by one person of another's parity in the social contract and in public affairs. Any irrational form of stigmatization, be it based on race, gender, or religion, automatically assigns individuals who have that trait to an inferior category. Tied in with this is the value to the polity of participation. How can the majority take seriously efforts by the minority to participate in civic life if that minority has been branded as invariably inferior? Finally, how can the minority be expected to behave responsibly if its members are consigned to a category that implies they cannot do so?

These three values of equal citizenship – respect, participation, and responsibility – are the characteristics one expects of all citizens in a democratic society. It is, of course, impossible to legislate social or economic equality; few people would, in any case, want that. But the courts and the legislatures have attempted to ensure that at least in three areas deemed "fundamental" no person or group of persons will face discrimination.

First, there is voting rights, one of the great privileges as well as responsibilities of a democratic society. A free and fair election is the hallmark of democracy, and the ability to cast one's vote has both symbolic as well as substantive importance. It is how we choose our leaders and make important public policy decisions, and as the presidential election of 2000 demonstrated, even a small number of votes can affect the results. To deny anyone or any group the ballot lessens its importance, for the individual and for the community. Thus even before *Brown* the courts began attacking devices that kept minorities from voting.

A second area, access to the courts, is similar to voting in that it gives a person the chance to be heard. We have already discussed in the chapters on fair trial and rights of the accused why a democratic society goes to such lengths to ensure the fairness of the criminal justice system. That integrity is undermined if certain groups are prevented from that access, if blacks or women are kept off jury rolls, if people are punished simply because of the color of their skin. Many but not all of the cases that have helped establish the rights of accused persons have involved defendants of color, and the message that the courts have sent is clear: Equal protection means fair treatment in both the criminal and the civil court system.

A third area deemed fundamental has involved marriage and family, which in a free society are also tied closely to issues of respect, responsibility, and participation. Marriage and having children are integral to one's status, social self-concept, and legal responsibilities. These are also viewed as the most intimate of personal decisions, ones in which the state should have little or no involvement. Courts have struck down not only laws that involved race as a classification, but also wealth. A person cannot be denied access to marriage or divorce because he or she is poor. As early as the 1920s, the Supreme Court had begun to define areas of family responsibility and choice immune from state interference; in the 1960s these areas received further protection through the new interpretation of the Equal Protection Clause.

Chief Justice Earl Warren, in Loving v. Virginia (1967)

There is patently no legitimate over-riding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Does this mean that the state can never interfere in these fundamental areas? The answer is clearly that it can, but only when there are overriding state interests involved, and even then, the government must take steps to ensure that its regulations do not weigh unfairly on any particular group. So, for example, the state can set minimal age requirements for voting or getting a marriage license, but these must apply to all groups, not just minorities. Jury rolls may be regulated, but they are normally drawn from voting lists; if the voting lists are tainted by the purposeful exclusion of any group, then so is the jury panel. Equal protection of the laws means that one has both the right and the responsibility to vote and to serve on juries; due process of the law means that a defendant is entitled to a jury of peers, so that if he is a person of color, then the jury rolls must accurately reflect the community composition.

Equal protection has also come to mean that all persons must be free to participate in the community's public life, depending on their inclination and financial means, even those aspects that might normally be seen as belonging to private persons. The Civil Rights Act of 1964 made it illegal to discriminate on the basis of race, gender, or ethnicity in "public accommodations," such as restaurants, hotels, and theaters, even though these businesses might be owned privately. Prior to 1964, prevailing law held that the owner of a business had the right to serve whom he chose, and could therefore exclude blacks, women, Catholics, or other groups. The Fourteenth Amendment directs that "no state" can discriminate, and for many years it was thought that private discrimination could not be reached by public law. In the 1960s, both the courts and Congress recognized that to be denied access to such public accommodations may not have violated the letter of the Fourteenth Amendment, but the notion that somehow all people could partake of equal citizenship without convenient access to travel, lodging, dining, and culture certainly flouted the spirit of it.

* * * * *

In the late 19th century, the English philosopher Jeremy Bentham, in discussing the abstraction of equality, believed it to be insatiable, and asked where it would all end. Would proponents of equality not rest until all persons stood at the same social, economic, and political level?

That has never been the intent of the Fourteenth Amendment's Equal Protection Clause. To many people the United States seems to be the most egalitarian of all societies. French writer Simone de Beauvoir declared that "the rich American has no grandeur; the poor man no servility; human relations in daily life are on a footing of equality." Yet the United States has never been a leveler society; neither the well-to-do nor the poor have ever sought a one-size-fits-all status. Rather, the emphasis has been on opportunity – the ability of those with talent and industry to succeed-and on equality before the law. All men and women, rich and poor, white or colored, Anglo-Saxon or Latino, are to have the equal protection of equal laws. These are rights they enjoy as American citizens, but underlying the notion of equal rights is that of equal citizenship, a notion that embodies not only rights but responsibilities as well.

For further reading:

Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970).

Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989).

Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* (New York: St. Martin's Press, 1992).

Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present* (New York: Oxford University Press, 1991).

Paul M. Sniderman et al., *The Clash of Rights: Liberty, Equality, and Legitimacy in a Pluralist Democracy* (New Haven: Yale University Press, 1996).

The Right to Vote



– Nineteenth Amendment (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
– Fifteenth Amendment to the U.S. Constitution (1870)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.

– Twenty-fourth Amendment (1964)

The right of citizens of the United States, who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or by any state on account of age.

– Twenty-sixth Amendment (1971)

Abraham Lincoln best described democracy as "government of the people, by the people, and for the people." For that government to be "by the people," however, requires that the people decide who shall be their leaders. Without free and fair elections, there can be no democratic society, and without that constant accountability of government officials to the electorate, there can, in fact, be no assurance of any other rights. The right to vote, therefore, is not only an important individual liberty; it is also a foundation stone of free government.

Who shall have that right has been a persistent question in American history. A theme that runs throughout the American past is the gradual expansion of the franchise, from a ballot limited to white, male property-owners to a universal franchise for nearly everyone over the age of 18. A related theme is ensuring the full equivalency of each vote, insofar as that is possible within a federal system. But because Americans often take this right for granted, it has not always been exercised as fully as it should be. With nearly 200 million citizens eligible to vote, too many people think their individual ballot will not count. The closeness of the presidential election of 2000 has served as a reminder that every vote does count, however.

It would be a mistake, however, to view the expansion of the suffrage as either inevitable or peaceful. Although colonial Americans certainly believed in a free ballot, they also believed that the ballot ought to be restricted to men of property, whose wealth gave them a greater understanding of the needs of the society. The history of this franchise, although essential to the workings of democracy and the protection of individual rights, is a story of constant conflict.

Alexis de Tocqueville, Democracy in America (1835)

Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether. That is one of the most invariable rules of social behavior. The further the limit of voting rights is extended, the stronger is the need felt to spread them still wider, for after each new concession the forces of democracy are strengthened, and its demands increase with the augmented power. The ambition of those left below the qualifying limit increases in proportion to the number of those above it. Finally the exception becomes the rule; concessions follow one another without interruption, and there is no halting place until universal suffrage has been attained.

Despite de Tocqueville's "rule," the progress of universal voting has been neither straightforward nor easy. Bitter political fights during the Jacksonian Era (1820s-1840s) were waged in order to eliminate the property requirement. A bloody civil war that practically tore the country in twain led to the enfranchisement of black former slaves. In World War I, proponents of the ballot for women seized upon Woodrow Wilson's call to make the world safe for democracy to press their case. Similarly, the sacrifice of men of color in World War II led the courts to begin tearing down the obstacles that had been erected to frustrate black voting. The deaths of so many young men in

Vietnam in the 1960s in turn led to lowering the voting age to 18. More recently, it took prolonged suits in the federal courts to undo the malapportionment of state legislatures, a product of population shifts over nearly a century, in order to better equalize the vote in many states. Each step in expanding the franchise has been hard fought, and the road to universal suffrage has been neither short nor easy.

* * * * *

John Adams to James Sullivan on the suffrage (1776)

The same reasoning which will induce you to admit all men who have no property, to vote, with those who have . . . will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as those men who are wholly destitute of property. . . . Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand the vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.

Adams's view was the common one at the time of the American Revolution and at the framing of the Constitution, a document that did not even address the right to vote. Both the mother country and its colonies placed property restrictions on voting, and rested this practice on two assumptions. First, men who owned property, especially land, had a "stake" in preserving society and the government in order to protect their wealth. Second, only men of property had the "independence" to decide important political matters and to choose the members of the assembly who would debate and decide these matters. The 17th-century English soldier and political theorist Henry Ireton wrote the foundation of liberty is "that those who shall choose the law-makers shall be men freed from dependence upon others." To people of the upper and middle classes, such independence came only with the ownership of property.

This notion of "independence" led to the exclusion of women (who were dependent upon their husbands), young people (who were dependent upon their parents), slaves and servants (dependent upon their masters), and wage-earners (who relied upon temporary employment for their keep). In addition, a number of colonies barred Catholics and Jews, as well as Indians. Beyond that, the criteria for how much property a person needed to own in order to vote varied not only from colony to colony, but within each colony from countryside to township. People living in urban areas might own less real estate than their country cousins, but have far more personal property. All in all, historians estimate that at the time of the American Revolution, the proportion of adult white males who could vote was probably three in five, a figure higher than in Great Britain but still relatively narrow.

The Revolution, however, had a far greater democratic effect than many of its advocates had expected. If one took seriously the battle-cry of "no taxation without representation," a phrase that became widespread after the Stamp Tax riots of 1765, many people who paid taxes were deprived of this right. They either had no property, yet still paid taxes on goods they bought, or their property did not meet the minimum required for the vote. A writer in the *Maryland Gazette* in

1776 declared that "the ultimate end of all freedom is the enjoyment of a right to free suffrage." If that were true, then eight out of 10 colonists were effectively denied their freedom.

This logic was not lost on the rebelling colonists. Much as Adams and other conservatives wanted to retain a limited franchise, rebellion against the King's autocracy led to similar rebellion against property limits on voting. "No taxation without representation" applied just as well to the state assembly or the local town council as it did to the King and Parliament. Men would not fight for independence if they would merely secure one undemocratic regime in place of another. In the midst of the Revolution, citizens in western Massachusetts declared, "No man can be bound by a law that he has not given his consent to, either by his person, or legal representative."

As a result, the notion of property qualifications, at least in some areas, gave way to tax qualifications. If people paid taxes, then they should be able to vote, since only through the ballot could they prevent the government from abusing its powers and depriving them of their liberty. The result was that while the suffrage certainly expanded after the Revolution, it was still far from universal, and property qualifications, either in the form of actual ownership of real or personal property or minimal levels of taxation, continued to restrict the ballot for the next 50 years.

But did the ownership of property give men greater wisdom? Did the love of liberty, or good judgment on public affairs, depend upon one's wealth? Benjamin Franklin, perhaps the most thorough-going democrat at the conventions that drafted the Declaration of Independence in 1776 and the Constitution in 1787, certainly did not believe that to be the case.

Benjamin Franklin on the suffrage

Today a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next election the jackass dies. The man in the meantime has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers – but the jackass is dead and the man cannot vote. Now gentlemen, pray inform me, in whom is the right of suffrage? In the man or in the jackass?

Franklin's comment would be repeated time and again in the next half-century, as battles to increase the suffrage were fought out in every state. (From the nation's founding until the Civil War, voting requirements were controlled by the state. Even today, although there are several constitutional provisions as well as federal voting rights laws, the primary responsibility for administering the franchise remains with the states.) Property requirements were gradually dismantled in state after state, so that all had been eliminated by 1850. By 1855, the tax-paying requirements had also been abandoned, so that few if any economic barriers remained to prevent white adult males from voting.

Scholars give several reasons for this development. They point to the democratic reforms of the Jacksonian Era, which struck down many economic prerogatives. The expansion of the Union westward also created states in which there was little wealth, and in which the egalitarian spirit of the frontier dominated. In the older states, the growth of industry and cities created a large working class that demanded participation in the political process even if its members had neither land nor significant personal property. Even in southern states, where the landed gentry still held sway, the growth of urban middle and working classes led to the demand for the vote free of

property qualifications. Citizens of Richmond, Virginia, petitioned the 1829 state constitutional convention, and pointed out that should the Commonwealth ever need to be defended against foreign troops, as had happened in the past, no distinction would be drawn between those who owned and did not own land.

Memorial of the Non-Freeholders of the City of Richmond (1829)

[The property requirement] creates an odious distinction between members of the same community; robs of all share, in the enactment of the laws, a large portion of the citizens, bound by them, and whose blood and treasure are pledged to maintain them, and vests in a favoured class, not in consideration of their public services, but of their private possessions, the highest of all privileges. . . .

In the hour of danger, they have drawn no invidious distinctions between the sons of Virginia. The muster rolls have undergone no scrutiny, no comparison with the land books, with a view to expunge those who have been struck from the ranks of freemen. If the landless citizens have been ignominiously driven from the polls, in time of peace, they have at least been generously summoned, in war, to the battle-field.

Perhaps the greatest force behind the expansion of the suffrage was the rise of organized political parties that fielded slates of candidates who ran for office advocating a specific political viewpoint. During the first half of the 19th century, the Democratic Party, led by the followers of Andrew Jackson, mobilized urban voters, and led the fight to expand the franchise and do away with property requirements. Their opposition, the Whigs, would have preferred to have kept the suffrage limited, but recognizing that they fought a losing battle, also joined in, hoping to get some of the credit, as well as the votes, of those who could now freely cast their ballot.

But if by the 1850s most white males over the age of 21 could vote, two very large groups remained excluded from the political process – African-Americans and women.

* * * * *

Delegate to the Indiana Constitutional Convention (1850)

According to our general understanding of the right of universal suffrage, I have no objection . . . but if it be the intention of the mover of the resolution to extend the right of suffrage to females and Negroes, I am against it. "All free white males over the age of twenty-one years," – I understand this language to be the measure of universal suffrage.

The legal status of black slaves in the South was completely circumscribed by the law, and they had no rights to speak of, much less that of the ballot. Even free African-Americans, whether they lived in the North or the South, could not vote, while women, despite the passage of some reform legislation allowing them to own property and sustain lawsuits, still were seen by the law as dependencies of their husbands or fathers, and unfit as such to cast a vote.

It took a civil war to abolish slavery in the southern states, and as part of the effort to give the former bondsmen legal status and equality, the nation passed three amendments to the Constitution. The Thirteenth did away with slavery as an institution; the Fourteenth for the first

time made citizenship a national trait, and conferred it upon all persons born or naturalized in the United States; and the Fifteenth barred any state from denying the vote on the basis of race.

Regrettably, the promise of emancipation soon faded, as one southern state after another not only put up legal or procedural roadblocks to keep blacks away from the polls, but through segregation laws relegated them to a permanent state of inferiority. Not until World War II, as American troops, both black and white, battled to defeat the fascists, did it become apparent that one could not fight for the rights of people overseas while denying those same rights to Americans simply because of the color of their skins.

In the middle of the war, the Supreme Court heard a challenge to the all-white primary system that was the norm throughout the South. In primary elections, members of a particular party choose which of the candidates will be the party's choice in the November general election. From the 1880s until the 1960s, whoever won the Democratic Party primary in most southern states was guaranteed victory in the general election, because the Republican Party was so weak in the South. Although the primary was thus an important, perhaps the most important, part of the election process, southern states maintained the fiction that political parties were private organizations, and thus could exclude blacks from membership and from voting in the primaries. In 1944, the Supreme Court struck down this fiction, and began the process by which African-Americans could claim their legitimate right to vote.

Justice Stanley Reed, in Smith v. Allwright (1944)

When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. . . . The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

The battle for black equality was far from over, and during the 1950s and 1960s the great civil rights movement led by Martin Luther King, Jr., Thurgood Marshall, and others attacked racial discrimination in the courts and in the halls of Congress. The results, regarding voting, included the Twenty-fourth Amendment in 1964 that abolished the poll tax (which required people to pay a tax for the right to vote and therefore kept many poor people, especially blacks, from voting) and the landmark Voting Rights Act of 1965. For the first time in 100 years, the post-Civil War Reconstruction Amendments would now be enforced, and the law not only targeted practices that excluded blacks from voting, but gave the federal government the power to enforce the law at all levels.

The importance of the Voting Rights Act cannot be underestimated, not only for its success in getting African-Americans the ballot, but also because it effectively nationalized much of the right to vote. In a federal system, many functions of government are carried out by the states, functions that in other countries are managed by the national government. As noted above, voting was, and for the most part still is, controlled by state law. Until 1870, all requirements for voting were established by the states; in that year the Fifteenth Amendment supposedly precluded the

states from denying the vote because of race. In subsequent amendments, the ballot was extended to women and to 18-year-olds, and the poll tax abolished. The Voting Rights Act went further, and in states with a clear pattern of discrimination, federal registrars took over the apparatus of registration and voting, ensuring that minorities would not be stopped from casting their votes. Some states still remain limited by the terms of this 1965 law, although day-to-day operation of the election machinery has for the most part been restored to state control. But while states still run the elections, they must now do so in the light of national standards and procedures.

* * * * *

Declaration of the Seneca Falls Convention (1848)

We hold these truths to be self-evident: that all men and women are created equal. . . .

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

When women began seeking the ballot is unclear, and there is evidence that women did vote occasionally in some of the states following the Revolution. The initiation of serious agitation for universal suffrage including women is usually attributed to the Seneca Falls Convention of 1848, which explicitly copied much of the Declaration of Independence and then substituted the sins of men against women in place of the actions of George III toward his American colonies. But the reform movement of the 1850s could only support one major effort, and that proved to be the abolition of slavery, a movement in which women played a key role. When Congress gave the former slaves the right to vote, however, women felt betrayed. Because states still controlled voting, women began by lobbying state legislatures for the ballot. The Wyoming territory gave women the vote in 1869, but by 1900 only four states had granted women full political equality. The movement picked up steam during the Progressive era, the two decades of reform ferment between 1897 and 1917, and advocates of the ballot called for a constitutional amendment.

When the United States entered World War I as a declared effort to save democracy, political wisdom dictated that one could not send Americans to fight and die for an ideal overseas while denying it to half the population at home. President Woodrow Wilson, who had originally opposed such an amendment, now endorsed it; and Congress approved a constitutional amendment in June 1919. The necessary 36 states ratified the proposed amendment in less than a year, in time for women to vote in the 1920 presidential election.

* * * * *

Once U.S. law ensured that each adult had the right to vote, the next great achievement in the mid-20th century was assuring that every person's vote counted, not just in terms of the raw tally,

but proportionally to how other people in the state voted. The Constitution is clear that each state is to have two senators, and that members of the House of Representatives are to be apportioned according to the state's share of the national population as determined by a required decennial census. But there is no guidance as to how these representatives are to be assigned within each state. James Madison, at the time the U.S. Constitution was written, had implied that the arrangement should be equitable, so that a man's vote would have approximately the same weight as his neighbor's in both state and federal elections.

Some states periodically redrew the lines of their (federal) congressional districts as well as their state assembly districts to ensure at least a rough equity among voters, and three-fifths of all states regularly reapportioned one or both of their legislative chambers. But despite major population shifts by the 1950s, 12 states had not redrawn their districts for more than three decades, leading to severe discrepancies in the value of an individual vote. In the small state of Vermont, for example, the most populous assembly district had 33,000 persons, the least populous 238, yet each elected one representative to the State Assembly. In California, the Los Angeles state senatorial district included six million people; in a more sparsely populated rural section of the state, the senate district had only 14,000 persons. Distortions such as these grossly undervalued urban and suburban votes and overvalued the ballot in older rural districts. Naturally, the rural representatives who controlled state government had little incentive to reapportion, because to do so would mean giving up their power.

Unable to secure change from the legislatures themselves, reform groups turned to the courts, invoking the constitutional guarantee of a "Republican Form of Government" (Article IV, Section 4), but the Supreme Court initially refused to get involved, since it had traditionally avoided questions involving apportionment, considering them to be "political" matters outside the ken of the courts. Then in March, 1962, the Court accepted a suit brought by urban voters in Tennessee, where there had been no redistricting since 1901, even though the state constitution required reapportionment every 10 years. The very fact that the Court had agreed to hear such cases led many legislatures to redistrict voluntarily; elsewhere reformers launched dozens of suits in state and federal courts to force reapportionment.

But the United States is a federal system, and to this date the votes in one state do not carry the same weight as do votes in other states during a presidential election. Under the American system, each state is entitled to a certain number of votes in the Electoral College, a body that meets once in four years to cast its ballot, as dictated by the popular election, for the president. Tiny Rhode Island has three votes in the Electoral College, equal to its one representative and two senators, and a vote there is proportionally greater on a per-person basis than that of large states like California or New York. Other issues have arisen in the federal system. Could states have an arrangement where one house of a bicameral legislature represents geographical units – such as counties – the way the U.S. Senate represents states? Could a state recognize certain historic divisions as a factor in drawing lines of voting districts? What standards would the High Court apply?

In fact, the criterion adopted by the Court in a case entitled *Gray v. Sanders* (1963) proved so remarkably clear and relatively easy to apply – one person, one vote – that it not only provided judicial guidance, but caught the popular imagination as well. All other formulations of the issue appeared to pit one group against another—rural versus urban, old settler against newcomers – but "one person, one vote" had a democratic ring to it. Who could object to assuring every person that

his or her vote counted equally with those of others? To support this formula meant upholding democracy and the Constitution; to oppose it seemed mean and petty. Within a relatively short time all the states in the Union had reapportioned their state as well as congressional districts in an equitable manner.

Chief Justice Earl Warren, in Reynolds v. Sims (1964)

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The weight of a citizen's vote cannot be made to depend on where he lives. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. . . .

Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. . . . Citizens, not history or economic interests, cast votes. People, not land or trees or pastures, vote. As long as ours is a representative form of government, and our legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

* * * * *

One would think that with the abolition of property requirements and poll taxes, the enfranchisement of people of color, women, and 18-year-olds, the battle for the right to vote had been won. But as we have noted so often, democracy is a constantly evolving process, and how we define individual rights within a democracy also changes over time. There is a big difference in how an American citizen voted in the 1820s and how that ballot is cast at the beginning of the 21st century. Moreover, it is not a simple case of pro-democratic heroes wanting to expand the franchise while anti-democratic demons want to narrow it.

Throughout American history people of the so-called better sort have feared mob rule; it is a theme that runs throughout the writings of the Founding generation. In different form today we find a version of it among those who would "purify" the electoral process. Efforts to making voting registration easier, for example, are often attacked as inviting corruption into the process. The relaxation of literacy standards and the expansion of voting rights to citizens who do not speak or read English is hailed by some as a victory of democracy and attacked by others who fear that people with little knowledge of the issues can be manipulated by demagogues.

Yet the curious fact remains that for all that we have expanded the franchise, the percentage of Americans who vote in presidential and other elections is one of the lowest among industrialized nations. In the 2000 presidential campaign, for example, less than 50 percent of the eligible voters cast their ballots. Scholars differ on why this decline in voting has occurred from the high point of the late 19th century, when voting rates regularly ran at 85 percent or better of qualified voters. Some historians attribute the decline to the corresponding decline in the importance of political parties in the daily lives of the people. Others think that the growth of well-moneyed interest groups has led people to lose interest in elections fought primarily through television and newspaper advertisements. When non-voters are queried as to why they did not vote the answers range widely. There are those who did not think that their single vote would make a difference, and those who did not believe that the issues affected them, as well as those who just did not care

– a sad commentary in light of the long historical movement toward universal suffrage in the United States.

Technical and procedural questions remain. In the 2000 presidential election, election officials in the state of Florida discarded up to 50,000 ballots, primarily because the ballot cards had been improperly punched so that it was unclear for whom the voter had cast his or her ballot. At that point, because of the archaic system known as the Electoral College, the entire election hinged on less than a few hundred votes cast in that state. Both Democrats and Republicans immediately went into court to challenge the procedures, and in the end the Supreme Court of the United States in essence awarded Florida – and the election – to George W. Bush.

In this case – and not for the first time – the Electoral College produced a president who had a minority of the popular vote. Americans are well aware of the Electoral College structure. It is not one of the most effective or rational aspects of American democracy, and is a relic of a time when the people were not trusted to elect a president directly. But the Electoral College system is also valuable today in terms of ensuring the status of the smaller states within the federal system, and in reality there is little chance of it being reformed.

The ballot-tallying problems associated with the 2000 election obscured some very important issues. Both sides wanted a fair counting of the vote; they wanted each ballot that had been legitimately cast and properly marked to count, but differed on the technical criteria by which to determine these matters. Despite cries in the media that the state discriminated against minorities in how it handled the matter, the fact is that a majority of the votes that were eventually disallowed had been cast by middle-class elderly white voters, most of whom had been confused as to how they were supposed to mark the ballots. No one, then or now, has suggested that this was a ruse to invalidate tens of thousands of votes; no one up until the counting actually began realized that the system was far less than perfect, and in the next session of its legislature, Florida instituted reforms to ensure that such a debacle would not happen again.

Such an election, with the person getting the most popular vote not winning, is rare in the United States, and it is one sign of the faith people have in the normal workings of the U.S. election process that they easily accepted George Bush as the winner. There were no riots in the streets, no barricades established. The Democratic candidate, Al Gore, accepted the Supreme Court's decision on how the ballots should be counted.

But many people were reminded by the closeness of the 2000 presidential election that the individual's vote does count. A shift of fractions of a percentage point in half-a-dozen states could easily have swung the election the other way. Perhaps as a result, Americans in the future will not take this important right, a right that lies at the very heart of the notion of "consent of the governed," quite as much for granted.

For further reading:

Marchette Gaylord Chute, *The First Liberty: A History of the Right to Vote in America, 1619-1850* (New York: Dutton, 1969).

Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill & Wang, 1998).

Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

Donald W. Rogers, ed., *Voting and the Spirit of American Democracy* (Urbana: University of Illinois Press, 1992).

Charles L. Zelden, *Voting Rights on Trial* (Santa Barbara: ABC-CLIO, 2002).