

## CHAPTER 1

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# Our Rights in American History



Rights are expressions of individual liberty. The history of America is, on the whole, a story of individual liberty and rights. In 1776, the signers of the Declaration of Independence boldly proclaimed their belief in the right of equality—“all men are created equal”—and in the inalienable rights of life, liberty, and the pursuit of happiness. The founding generation considered individual rights so critical to freedom that only a promise to add them to the new Constitution ensured ratification of the nation’s fundamental law. Almost ninety years later, as the Civil War threatened the nation’s existence, President Abraham Lincoln used the same language of rights and liberty to remind his fellow citizens about the importance of their campaign to save the Union. So has every President in every war called upon Americans to defend what we all identify as our heritage of freedom and the rights that protect it. Even when we disagree most with each other about what course the nation should take, we often express our choices in the language of rights.

We usually associate our rights with the Bill of Rights, the first ten amendments to the Constitution. It is our touchstone to what the revolutionary generation defined as a “great experiment in liberty.” But its guarantees were, in many ways, a listing of rights the framers considered to be their own inheritance from countless generations that preceded them. Now, we judge the Bill of Rights to be our gift from the past. Only when we look carefully do we recognize how this legacy of rights has changed in response to new conditions. Our rights, like our understanding of liberty, are not static. They are dynamic expressions of freedom. What is most constant in the history of individual rights is how each successive generation has contributed to defining the liberties we claim today.

When English settlers migrated to the New World, they came with a royal guarantee that they would continue to have the “rights and privileges of Englishmen.” The pledge was important. It promised continued ownership of a long tra-

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*“There is something back of the [Constitution and the Union], entwining itself. . . closely about the human heart. That something, is the principle of ‘Liberty to all’—the principle that clears the path for all—gives hope to all—and, by consequence, enterprise, and industry to all.”*

—President Abraham Lincoln, “Fragment on  
the Constitution and the Union” (1861)

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dition of English liberty that was thought to stretch at least to the Magna Carta (or Great Charter) in 1215, when English noblemen forced King John to abide by the “law of the land,” or as it was known later, “due process of law.” Embodied in these phrases were two core contributions to the English understanding of rights: the idea of fairness and the concept that no one, not even the king, was above the law. Although the document applied only to the king and barons, the most powerful class in English society, over time its guarantee of rights became understood as a commitment to all English citizens.

Much of the early history of rights centered on protections for property and for individuals accused of crimes, because in these areas the state most often exercised arbitrary power. Rights of the accused offer the clearest example of what Englishmen understood to be their heritage. By the time the earliest North American colonies were established, numerous guarantees already existed to ensure a fair criminal trial for Englishmen. The Massachusetts Puritans included many of these protections in their first law code, the Body of Liberties, in 1641: the promise of speedy trial and equal justice, protection against being tried twice for the same crime (double jeopardy), and the prohibition of torture, among others. The long seventeenth-century struggle between king and Parliament for supremacy further limited the power of government and added to the rights of Englishmen, including the right of petition, a limited form of freedom of speech, a right to release the accused from detention upon a guarantee to appear at trial (bail), and prohibition against excessive fines. The Bill of Rights of 1689, which Parliament adopted after ousting King James II in the Glorious Revolution, put these rights in written form. Unlike the Magna Carta, it extended them to the English population as a whole, including the colonists.

Much of what the English settlers to the New World considered to be rights was found in the common law, the case law of English courts, not in statutes or state documents. Common law contained what had become customary practice in English society. As with the Magna Carta, it emphasized rights of the accused: the promise of a speedy and public trial by jury; prohibition of ex post facto laws, or laws that criminalized behavior after it had occurred; and the guarantee of habeas corpus, a procedure that required government to bring a person under detention before a court to determine if legal reason existed to hold him. Common law also offered some protection for the rights of widows and children, the right of compensation for the taking of private property, and the openness of courts to all citizens. Not only did colonial assemblies and courts adopt common law, but colonists looked as well to English law books for further instruction on their rights and privileges.

The colonists were not satisfied with reliance on their charters alone because they could be changed too easily. Early on, they put their liberties into writing as a way to prevent imperial encroachment. The Massachusetts Body of Liberties in 1641 summarized these rights and added a few additional safeguards; it was, in effect, the first bill of rights in American history. The Pennsylvania Charter of Liberties and Frame of Government, both written in 1682, also protected the rights of colonists from government interference, as did the New York Charter of Liberties and Privileges enacted the following year. Most colonies adopted this practice of converting customary rights and privileges into written protections, and they often extended these liberties beyond those claimed by their cousins in the mother country.

By the eve of the Revolution, these safeguards had become part of a shared

language about liberty that guided colonial resistance to British attempts to tighten control over the empire. But it would be a mistake to draw a direct line of descent from the colonial understanding of rights to our understanding today. The words are similar but not their substance. Due process of law, for example, held a sharply different meaning in the seventeenth and eighteenth centuries than it does in the twenty-first. Then, it referred to a fair process only; now it also means a fair result. Personal rights were important, but the good order of society took precedence over individual liberty. Still, the colonial contribution to modern ideas about rights was significant, not as much as a list of rights but as a set of attitudes about individual liberty. The colonists by necessity had adapted English laws and customs to a new world and, in the process, claimed full ownership in the great tradition of English liberty. But they went further than mere imitation. They had simplified the law and made it accessible in written form to all settlers. They had been willing to reform the law and had added rights not recognized in the British Isles. Their biggest contribution, however, was an acceptance of legal change and a willingness to mold law to social needs and circumstances. This flexibility became a trait that defined American society and allowed the ancient maxim of due process to become as expansive as the continent itself.

Colonists entered the struggle for independence with a view that individual rights restrained the exercise of arbitrary power, especially by the central government; by restraining power, rights protected liberty. Three rights were especially important to the colonial understanding of liberty: trial by jury, the right to property, and due process of law. Representative government also was significant. These rights and this form of government above all protected local communities from tyranny exercised by a government far removed from them. The colonial view of liberty, after all, centered on the community first. The belief that rights belonged to individuals was the product of a later age.

In seeking greater control over the colonies, Great Britain threatened the local autonomy that all English colonists had come to consider their birthright. The list of grievances that poured from colonial pens from 1763 to 1776—and captured in a long litany in the Declaration of Independence—reveals how valuable the colonists considered self-government and how closely it was tied to their notion of rights. Taxation without representation was an interference with their right to property. Trials of alleged smugglers, such as Boston merchant John Hancock, by a judge alone violated the right to a public jury trial by members of the local community. Suspension of local courts denied due process of law.

Grievances are rights in reverse—they identify rights under threat—and by this measure the Declaration of Independence is an important gauge of what the colonists believed was at stake. British actions, the document charged, robbed Englishmen of their heritage. Each action of the imperial government mocked an essential ingredient of English liberty; collectively, they proved an intention to deprive the colonists of their freedom. “We are obliged,” the people of Newburyport, Rhode Island, petitioned Parliament, “to submit to a Jurisdiction. . . where the Common Law, the collected wisdom of the British Nation for Ages, is not admitted.” Other revolutionaries were more blunt. In *A Summary View of the Rights of British America* (1774), Thomas Jefferson alleged that the British were pursuing nothing less, than a “deliberate, systematic plan of reducing us to slavery,” a condition that left individuals with no rights and no freedom. The

colonists declared independence to save their liberty and the rights that made it possible, but in the process they became revolutionaries intent on creating what they called “a new order for the ages.” The founding generation set out not only to build a new frame of government, but also to identify what rights were necessary to protect liberty. Their search led them to a different understanding of the nature of government itself. They focused on republicanism, a form of government that rested clearly on the consent of the governed and thus, by definition, exercised limited power. They discovered rights not in English history alone but in the laws of nature, or natural law. These rights went beyond the common law, and because they existed before societies were formed, they belonged to individuals, not communities.

New state constitutions and later, the federal Bill of Rights, contained more expansive safeguards of liberty than had been listed in colonial protests. The founding generation also put these rights in writing and gave them the force of fundamental law, protections that could not be changed easily. The most important model was the Virginia Declaration of Rights in 1776. Written by George Mason, the declaration contained sixteen articles, with seven enumerating the rights of citizens, including the right of religious belief. Other states followed suit, usually listing the rights as part of the state constitutions. At first, revolutionary legislatures did not seek popular ratification of their actions, which raised questions about whether or not the constitutions restrained the legislatures themselves. In 1780, however, Massachusetts submitted its new constitution for voter approval, thus placing rights beyond the reach of legislative majorities. All other states soon adopted this innovation, as did the new federal constitution in 1787. Rights now existed as fundamental law.

The importance of this development became clear during and after the Constitutional Convention, which met in Philadelphia in 1787 to replace the inadequate Articles of Confederation, the nation’s first constitution. The fifty-five delegates faced a critical problem: how to grant government enough power to do its job without also giving it the power to threaten liberty? Their answer revealed how far the revolutionaries had advanced in their understanding of the relationship between power and liberty. First, they based all power or sovereignty (the right to rule) in the people, not the government, an idea known as popular sovereignty. Government had only the authority granted to it in a written constitution ratified by the people. To restrain government even more, the framers divided power in two fundamental ways. They created three separate and coequal branches of government—legislative, executive, and judicial—and required the cooperation of each to exercise power fully. Then they divided power further between the states and the national government. This principle, federalism, entrusted the central government, the one they feared most, with only the power necessary to serve truly national functions, such as defense and regulation of commerce between the states. The powers not granted to the central government, including the critical authority to define and prosecute crimes, would remain with the states, which by definition were closer to the people.

The delegates believed that these restrictions on government—popular sovereignty, a written constitution, separation and balance of powers, and federalism—would be sufficient protection for the rights of individuals. The Constitution contained no bill of rights, but it did not need one, its advocates reasoned, because the new government could not exercise any power not granted to it explicitly. But when the Federalists, or supporters of the Constitution, submit-

ted it to state conventions for ratification, they learned that a large number of voters were not convinced by this argument. Thomas Jefferson, for example, believed the absence of a bill of rights was a serious defect. A listing of rights, he explained, “is what the people are entitled to against every government on earth.” The absence of a declaration of rights, Anti-Federalists protested, made the Constitution unacceptable because it was in the nature of government, especially central government, to infringe on the rights of the people. It soon became apparent that ratification would not occur without a promise to address his deficiency. Led by James Madison, the Federalists pledged to amend the Constitution to include clear safeguards for individual liberty.

As a newly elected member of the House of Representatives, Madison submitted nine amendments to the first Congress in 1788. The proposals borrowed heavily from the Virginia Declaration of Rights and the various state bills of rights. Madison listed two types of guarantees: rights necessary for representative government, such as freedom of speech, press, and peaceable assembly, and rights of the accused, including protections against double jeopardy and self-incrimination as well as the right to trial by jury. In all, his proposals covered twenty-six paragraphs. Over the next month, these safeguards were molded into twelve amendments; by 1791, the states had ratified ten of them. These ten became known as the Bill of Rights.

During the debates over the ratification of the Constitution, Madison at first had resisted a declaration of rights because he feared it would be only a “parchment barrier,” a mere paper incapable of protecting liberty. He came to believe instead that written constitutional guarantees were necessary because they would remind people of “the fundamental maxims of free government,” especially the close link between individual rights and personal liberty. They would serve as “good ground for an appeal to the sense of community,” he concluded, if states or oppressive majorities threatened liberty. He worried much about majorities running roughshod over the rights of minorities, especially in matters of conscience, and he feared states would not be able to resist this kind of tyranny. In fact, Madison initially had proposed that the Bill of Rights apply to the states as well as the central government, a result not achieved, even in part, until the twentieth century. Who would enforce the Bill of Rights on behalf of individuals whose rights were threatened? Here, Madison believed the answer was more certain. An independent judiciary, operating through courts open to all citizens, would come to consider themselves “the guardian of these rights,” he argued. They would “resist every encroachment on rights expressly stipulated for in the constitution,” forming an “impenetrable bulwark against every assumption of power in the legislative or executive.”

Madison’s views are instructive for understanding our rights under the Constitution. Although most of his contemporaries viewed the Bill of Rights as a standard that enabled people to judge their government, Madison believed it promoted self-government by enabling citizens to resist any impulse—fear, selfishness, and prejudice, among others—that threatened America’s great experiment in liberty. Enforcement of rights by an independent judiciary, he argued, provided a means to correct injustices that were sure to occur in any human society but which could not be allowed to exist in a society dedicated to liberty. The federal Bill of Rights resulted from a rich mix of English history, colonial experience, and revolutionary ideas. It was the product of a society far different from our own, and no one at the time seriously believed that its protections

benefited American Indians, African Americans, or even white women. But for all the flaws of its creators, the list of rights was far advanced for its time. The legacy of liberty the Bill of Rights gave to the new nation became the envy of the rest of the world. Since 1791 we have been debating exactly what this legacy means.

Almost from the moment of their passage, the rights promised in the new constitutional amendments came under dispute. The desire to safeguard individual liberty did not disappear—if anything, it became stronger—but when faced with practical problems, people disagreed about what government could and could not do. The 1790s, for example, witnessed a ferocious debate between Secretary of the Treasury Alexander Hamilton and Secretary of State Thomas Jefferson about the power of the central government. The debate became intensely partisan, and when it appeared to threaten national security, Congress passed a law, the Sedition Act of 1798, forbidding anyone to criticize the government or government officials. Although the law expired three years later, it was clear that the founding generation had sharp differences of opinion about what freedom of speech or freedom of the press meant in practice.

On the whole, however, the concern for rights became more intense in the decades following the Revolution, although the focus shifted from the federal to the state governments. The United States was becoming more democratic, with most states removing property qualifications for voting and officeholding by the 1820s to allow all adult white males to participate in government. The nation had also embraced capitalism, which emphasized individual risk and reward. Both developments reinforced the notion of individual rights, especially property rights, and they strengthened as well a demand for fair procedure, or due process, to ensure equal opportunity in the political arena and the marketplace.

Ensuring these protections of liberty was primarily the responsibility of the states. In 1833, the U.S. Supreme Court ruled, in *Barron v. Baltimore*, that the Bill of Rights restrained the federal government alone. Most individual rights, then, were protected by state constitutions and state judiciaries. In some ways, this decision had a limited effect because almost every state constitution included the set of rights contained in the federal amendments, and some exceeded the federal safeguards. But the decision also meant that the interpretation and enforcement of rights could vary widely from state to state.

Rights of the accused occupied much of the nineteenth-century attention to individual liberty. No other part of the law had a more intimate relationship to everyday life than did criminal justice. Judges at first interpreted their state constitutions to offer significant protections to anyone accused of crimes. They insisted on following procedure strictly, such as requiring that indictments, or formal accusations of crime, use precisely the words required by law. The goal of such precision was twofold: the defendant needed to have exact knowledge to prepare his defense, and the indictment's precise language ensured that the state could not use the alleged facts to support a second trial for the same offense. Judges resisted any pressure to loosen these safeguards. "The harmless decision of today becomes the dangerous precedent for tomorrow," an Indiana court warned. The regard for proper procedure was no "idle technicality"; "the people have no better security than in holding officers of the state to a reasonable degree of care, precision, and certainty in prosecuting the citizen for a violation of the law."

An insistence on strict adherence to procedure diminished by the mid-nine-

teenth century, as fear of crime increased in tandem with the growth of cities. Public demands for order and security had profound implications for rights of the accused. By the end of the century, states were, in effect, running as many as three different criminal systems, each with its own standard of due process, as illustrated by Alameda County, California, home to Oakland. At the bottom was assembly-line justice. It was a highly bureaucratic process that used plea bargains—negotiated sentences in exchange for a plea of guilty—to move people accused of minor crimes swiftly from arrest to imprisonment. The handling of ordinary but serious property crimes was only marginally less routine, with fewer than half the cases going to trial and the vast majority of defendants being found guilty. Only for the most serious crimes—murder and robbery chief among them—did rights of the accused play any part in the criminal process. These cases grabbed public attention, and the duel of lawyers acted to educate citizens on an idealized version of American justice and the rights of defendants. Of course, for immigrants and blacks even the most routine administration of due process was often a mirage, a constitutional pledge they could not redeem.

Still, the promise of individual rights maintained a powerful hold on Americans. The nineteenth century witnessed numerous reform movements designed to extend the Bill of Rights and other democratic safeguards of liberty, some of them newly invented, to excluded groups. Women made one of the strongest demands, and at the Seneca Falls Convention in New York State in 1848, they put their case for voting rights and property rights in a Declaration of Sentiments, Grievances, and Resolutions that borrowed language from the Declaration of Independence. Workingmen used Jefferson's term, "inalienable rights," to lobby for fair wages and the ability to use their free time as they saw fit, which they wanted to include in the list of individual rights. Both of these movements succeeded after decades of struggle, but it was another nineteenth-century campaign that had the most profound effect on our rights as we know them today. This movement sought the abolition of slavery.

Union victory in the Civil War effectively ended slavery and led to three new amendments, each adding new rights, and one, the Fourteenth Amendment, containing within it the seeds of a veritable revolution in our conception of rights. The fruit of the Thirteenth Amendment was the right to freedom through the abolition of slavery; the Fifteenth Amendment guaranteed the right to vote to the freedmen. But it was the Fourteenth Amendment that changed the traditional relationship of national and state governments. Previously, Americans were citizens of their states; they looked primarily to their state constitutions for protection of their rights. The Fourteenth Amendment established national standards for citizenship and made every person born in the United States both a citizen of his state and a citizen of the nation. Equally important, it declared that "equal protection of the laws" and "due process of law" were guarantees for all citizens.

For the first time, the federal government had the responsibility to protect the rights of citizens—at least in theory. On the whole, however, federal courts did not interpret the amendment in this fashion during the last half of the nineteenth century, in part because the framers of the amendments did not define what they meant by such general phrases as "due process of law." Contrary to the expectations of the framers, the Supreme Court held that the amendment did not require states and local governments to respect the guarantees of the Bill of Rights. The justices instead followed traditional practice and allowed

states wide discretion to protect individual liberty as they saw fit. For example, in *Plessy v. Ferguson* (1896), the Court held that state-mandated racial segregation of railroad cars did not violate the equal protection clause of the Fourteenth Amendment. The doctrine, known as “separate but equal,” justified the widespread racial segregation and discrimination that finally ended as a matter of law in the 1960s. The *Plessy* decision, although repugnant to us today, reflected a much different view of rights and the role of states than we hold in modern America. It implied that the right to associate was a social right, subject to regulation by democratic majorities through legislative acts. Separating the races by law did not deny individuals their political rights, or so many people believed. Now we understand that racial discrimination prevents the enjoyment of other rights, such as equal protection of the laws. This view, however, became accepted only in the twentieth century.

The Fourteenth Amendment initially became a bulwark not for the civil rights of individuals but for the property rights of monopolistic corporations. From the late nineteenth century through the first three decades of the twentieth, big business dominated the American economy as never before. The U.S. Supreme Court proved to be its strong ally, first by declaring in 1886 that a corporation was a person for purposes of the Fourteenth Amendment and then by reading the amendment as protecting freedom of contract, but not other individual rights, such as freedom of speech, from government interference. In effect, this stance prevented most state and federal regulation of economic activity in the name of protecting individual liberty.

The late nineteenth and early twentieth centuries witnessed reform movements to reconcile the promise of American life with its harsher realities. The rapid growth of industry, emergence of a national market, the closing of the frontier, and rise of big cities following the Civil War had changed forever the earlier vision of a republic of small farmers and independent shopkeepers. These developments created great national wealth and moved the United States from a third-class nation to a world power, but they also brought many social ills, from child labor to massive urban poverty. In response, reformers lobbied against the prevailing notion that property rights limited the government’s power to regulate the marketplace; they argued instead for an expanded view of governmental power sufficient to ensure fair competition and equal justice.

They were aided in these efforts by a new way of thinking about law and the role of judges. In a series of lectures in 1881, Justice Oliver Wendell Holmes, Jr., suggested that “the life of the law is not logic but experience.” By this, he meant that social and economic change influenced the way we interpret the law; reaching the right decision in a case was not simply a matter of reasoning from abstract principles but also recognizing how to apply the law to changing circumstances. Advocates of “legal realism” argued that judges had to look beyond legal rules, including precedent (how previous judges had interpreted the law), to understand how the law would work in the world outside the courtroom. Legal realism also assumed that courts had a responsibility to keep law abreast of the times. This new understanding of law and courts was instrumental in the move to strengthen protection for individual rights in the twentieth century.

The first step was to challenge the traditional view that individual property rights were sacred. The Supreme Court had adopted an exalted view of the marketplace, seeing it as the ideal arrangement for securing the utmost economic liberty. The prevailing notion was that, without any interference or aid from

government, individuals freely bargained with each other in an unregulated, open market. They sold their labor to the highest bidder, accumulated and exchanged their property as they wished, and used their talents and energies to create wealth for themselves and their families. The result of this unrestrained competition benefited the nation, as when railroad builders risked bankruptcy to develop a transportation network that was the envy of the world. This view, of course, was fantasy. Ordinary shop owners in no way competed equally with millionaire industrialists; common laborers had no ability to set their own wages; poor people had no money to invest in a business. It was an idealized picture of an economy that, in fact, valued monopoly over competition and in which government routinely devoted public assets to private gain, as when it gave land to railroad magnates. But the Court based its ideas of economic liberty on theory more than reality, so its decisions were hostile to any attempt to regulate the outcome of private economic arrangements. One decision, since discredited, even discovered in the due process clause a “liberty of contract” that protected corporations from state laws, even though the Constitution never mentions such a right.

What had happened was a change in the meaning of due process. Initially, the term meant only that government had to follow its own laws or procedures when making decisions or taking actions. If it did, then the result was thought to be fair. The new interpretation of due process looked instead to the result of the decision-making process: was it fair, and if not, who decided the right result—legislatures or judges? The answer under the new view was that government could follow all its established procedures and still deprive citizens (or corporations) of their rights because the result of the decision-making process was unfair. Judges would decide when this occurred. The idea that due process meant an acceptable result and not simply a fair process was called substantive due process. It represented a shift in interpretation that came to a head when states sought to regulate the monopolistic practices of corporations, for example, by establishing the rates railroads could charge. The Supreme Court usually struck down these laws because, even if the state followed its procedures to the letter, the result of the regulation was an infringement on the corporation’s property rights. Regulation had resulted in a loss of freedom by the corporation to set its rates at whatever price the market would bear. Significantly, the Court did not apply this same logic to individual rights, which remained under state protection—or, too often, as in the case of racial minorities, were not protected at all.

Ultimately, this stance disappeared when monopolistic practices and market excesses resulted in the economic collapse known as the Great Depression of the 1930s. After initial resistance to economic reforms, the Court retreated from its belief in the supremacy of economic rights and accepted government regulation of property as a reasonable exercise of congressional power to regulate interstate commerce. But the justices’ attempt to shield property rights from state regulation under the due process clause of the Fourteenth Amendment suggested that individual rights might be protected in similar fashion. Were the guarantees of free speech, fair trial, rights to counsel, and other safeguards of the Bill of Rights included in the meaning of the Fourteenth Amendment’s due process and equal protection clauses?

The aftermath of World War I presented an opportunity to test this idea. Free speech was at issue. After the United States entered the war, the federal government sought to suppress dissent as harmful to the war effort. Much of the

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*“Of the freedom of thought and speech. . . one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”*

—Justice Benjamin Cardozo,  
Palko v. Connecticut (1937)

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concern focused on attempts by union organizers, many of them self-proclaimed communists, to use wartime labor shortages to force concessions from business, even if it harmed military production. State courts had long refused to protect radical or offensive speech, and they also suppressed speech if it was accompanied by action that threatened public order, such as might occur at a union rally. At first, the Supreme Court followed this line of reasoning: it upheld convictions under state laws of antiwar protestors, including a candidate for U.S. President (*Debs v. United States*, 1919), because their speech presented “a clear and present danger” to the war effort. The First Amendment right of free speech did not protect individuals from state laws designed to ensure public order. By 1925, however, the Court had changed its mind, not about the meaning of free speech but about the role of the First Amendment. It ruled for the first time, in *Gitlow v. New York* (1925), that the freedoms of speech and press “are among the fundamental personal rights protected by the due process clause of the Fourteenth Amendment from impairment by the states.” It would be several years before the full impact of this decision became apparent, but it marked the beginning of a new era for individual rights.

By the late 1930s, the Court was marching under the banner of incorporation for First Amendment freedoms. In 1937, the justices rejected an argument that the Fourteenth Amendment’s due process clause incorporated, or included, the Fifth Amendment’s ban on double jeopardy, but Justice Benjamin Cardozo, writing for the majority, ruled that it did incorporate all the provisions of the First Amendment. These rights—speech, press, religion, and assembly—were freedoms of expression, which Cardozo called “the matrix, the indispensable condition” for nearly all other freedoms. Other rights, however, were subject to selective incorporation, or inclusion one by one in the meaning of due process: the Court would apply only those rights that are, in Cardozo’s words, “of the very essence of a scheme of ordered liberty” and could be considered fundamental because they were so deeply rooted in American traditions.

This standard meant the Court would consider individual rights on a case-by-case basis. It was a position that divided the justices; some argued that all of the Bill of Rights applied to the states under the Fourteenth Amendment, a view known as total incorporation.

The debate over selective versus total incorporation had barely begun when successive international crises, World War II and the Cold War, plunged the Court once more into a debate about how to reconcile liberty and security. It was a problem as old as the Constitution itself, and it centered on how far individual rights extended in times of threat. The first cases to test the limits came from an unlikely source, Jehovah’s Witnesses, a religious group that claimed First Amendment protection for their children’s refusal to salute the flag in school, as required by state laws. The law infringed upon their right to the free exercise of their religious beliefs, they argued, since they owed allegiance only to God. Initially, the justices deferred to legislative judgments: the need to encourage patriotism, they concluded, was sufficiently important to justify a minor infringement of religious belief. But when accounts of public attacks on the Witnesses reached Court chambers, several justices reversed course and held in 1943 that the First Amendment protected freedom of religion from state interference.

Generally, the fascist assault on liberty during World War II, as seen in Nazi Germany, renewed American belief in the necessity of individual rights. President Franklin Roosevelt used his fireside radio chats to remind the nation

of the need to protect “essential human freedoms.” He called for a “second Bill of Rights” to include new guarantees, such as the right to a home, adequate medical care, and old age insurance, among others. But this expansive talk was not always consistent with rights in action. With the Japanese attack on Pearl Harbor, the federal government ordered the relocation of Japanese Americans into internment camps. Scholars today agree that the executive order violated the equal protection clause of the Fourteenth Amendment; it treated one group of citizens differently based solely on their ethnicity. But in 1943, the U.S. Supreme Court decided otherwise. It was not willing to challenge the President’s order that internment was necessary in time of war, even when the government could produce no evidence of a real threat. In times of crisis, concerns about national security trumped individual rights, at least for certain groups of Americans.

The Cold War, the struggle between democracy and communism, as embodied by the United States and the Soviet Union, also raised challenges to individual rights, especially First Amendment freedoms of speech and association. The exposure of domestic spy rings and the communist takeover of Eastern Europe and China persuaded national and state governments to launch massive loyalty programs to purge communist sympathizers. At first, the Supreme Court supported convictions under laws designed to punish anyone who belonged to an organization that merely advocated the overthrow of the government. These decisions represented a setback in protection for individual rights because they punished beliefs, not actions, which departed from the Court’s movement toward a broader view of First Amendment freedoms. Once public hysteria subsided in the mid-1950s, however, the justices reverted once again to a more liberal interpretation of these safeguards. They operated under the increasingly accepted view that the due process and equal protection clauses of the Fourteenth Amendment applied to the states as well as the federal government. What remained to be decided were what liberties these clauses included under their protection.

In the 1950s, the Court began a dramatic expansion of individual rights that lasted through the 1960s, and its decisions created a rights consciousness that remains strong today. In some ways, the new attention to rights was simply a continuation of a prominent theme in American history. Each decade since the nation’s founding had brought some new assertion of rights—a right to freedom, woman’s right to vote, a right to organize. Some of the claims resulted in fundamental law: both the right to freedom and woman suffrage were products of constitutional amendments. Other rights, such as the right to organize, were recognized by statute. What was different in mid-century was the leadership of the Supreme Court in applying the Bill of Rights creatively to new situations.

One explanation for the Court’s newfound aggressiveness was the appointment of Earl Warren as chief justice. Warren was a former California district prosecutor, attorney general, and governor who became chief justice in 1953. His tenure signaled a shift in judicial style from restraint to activism. He rejected the belief that judges should make decisions based on narrow case facts rather than broad constitutional principles. He specifically dismissed as “fantasy” the notion that justices should be impartial. “As a defender of the Constitution,” he wrote in his memoirs, “the Court cannot be neutral.” He sought a broad and active role for the high bench: the “Court sits to decide cases, not to avoid decision.” More important, Warren believed the Constitution contained moral truths that were essential to enlightened government. It was the Court’s duty to apply

these principles, even if it overturned laws favored by a large majority of citizens. The Court's role, he believed, was to champion individual liberty, especially for people without a meaningful political voice.

Nowhere was this judicial philosophy more evident than in his attitude toward the Bill of Rights. It codified the "sense of justice" humans were born with and provided the basis for bringing American law "more and more into harmony with moral principles." These views required the "constant and creative application" of the Bill of Rights to new situations. "The pursuit of justice," Warren said in a *Fortune* magazine article in 1955, "is not the vain pursuit of remote abstraction." It was an active search for a fundamental moral guide to the problems of daily life, led by an independent judiciary. This process suggested continual revision of the catalog of rights, leaving "a document that will not have exactly the same meaning it had when we received it from our fathers" but one that would be better because it was "burnished by growing use."

Other justices were ready to embrace Warren's judicial philosophy, and the emerging civil rights movement provided a ripe test bed for their new activist stance. African Americans protested the nation's continuing segregation and its failure to live up to the promise of equality contained in the Thirteenth, Fourteenth, and Fifteenth Amendments. The Court had taken hesitant steps toward enforcing equal protection of the laws against actions of state governments in the 1930s and 1940s, especially in cases of extreme and overt use of government power in support of racial discrimination, but it was the Warren Court's willingness to address segregation in public schools that advanced the cause of equal rights most dramatically. In *Brown v. Board of Education* (1954), the Court rejected the Plessy doctrine of "separate but equal" and mandated an end to educational segregation "with all deliberate speed." The *Brown* decision marked a victory for legal realism—the Court considered sociological evidence of the harmful effects of segregation on black children—and it effectively ended the Court's tendency to accept legislative judgments on such issues. Over the next decade, the justices gave new life to the equal protection clause as a means of protecting the rights of African Americans and, later, the rights of women. Despite strong resistance from southern states, the nation was ready to follow the Court's lead, as evidenced by congressional passage of new civil rights acts in 1964, 1965, and 1968, all designed to erase racial discrimination from American life.

Acting with unprecedented boldness, the majority of justices on the Warren Court promoted a new understanding of individual rights, one that restrained the abuse of governmental power and, in their view, promoted a just society. The reforms came so swiftly that many commentators labeled them as revolutionary—and in a sense, they were. What had changed was the willingness to broaden individual rights aggressively in areas where traditionally legislatures had set standards. There were sweeping reforms of the electoral process, political representation, school desegregation, government support of religion, obscenity, and free speech, among others, all based on new interpretations of constitutional rights. New rights were inferred—invented, critics complained—from the Constitution's language, and chief among these implied rights was the right to privacy.

Rights of the accused were also fertile ground for the expansion of individual liberties, and they were by far the most controversial actions of the Warren Court. Between 1961 and 1969, the Court accomplished what previous courts

had stoutly resisted: it applied virtually all the procedural guarantees of the Bill of Rights to the states' administration of criminal justice. Adopting the strategy of selective incorporation, the justices explicitly defined the Fourteenth Amendment phrase "due process of law" to include most of the rights outlined in the Fourth, Fifth, and Sixth Amendments. The result was a national standard that governed all criminal proceedings at both federal and state levels. The justices even extended these rights beyond the courtroom to the nation's police stations and jailhouses, places previously thought to be subject to local control only. The Court claimed not to diminish states' rights but instead to elevate inadequate state practices to a higher national standard. In the process, however, it ignited a firestorm of criticism that the expansion of these rights favored criminals at the expense of public safety.

By the late 1960s, the remarkable expansion of individual rights was nearing an end. Americans were increasingly uneasy about the course of reform charted by the Warren Court. Critics complained that the rights of individuals had taken precedence over the order and security of society. The decade's turbulent history appeared to support this conclusion: urban riots, political violence, and increased crime were cited as evidence. Conservatives also charged that judges had upset the constitutional balance by making law, which was a legislative function, and that, in turn, subverted democracy. The Warren Court record became a major issue in the 1968 Presidential election. The winning candidate, Richard Nixon, promised to appoint law-and-order judges who would interpret the Constitution strictly, as he believed the founders intended, and halt, if not reverse, the trend toward greater liberalization of individual rights. Subsequent elections also featured this theme, with Ronald Reagan making a similar pledge to stop the creation of "judge-made rights."

Two successive chief justices, Warren Burger and William Rehnquist, both appointees of conservative Republican Presidents, held similar views, but the Courts they led during the last three decades of the twentieth century left much of the Warren Court's legacy in place. The justices did not abandon the newfound catalog of individual rights but focused instead on what these rights meant in practice. On occasion, their decisions brought the same public opposition that had greeted the more controversial cases from the 1960s, as in *Texas v. Johnson* (1989), when the justices upheld flag burning as protected speech under the First Amendment. In some instances, the Court reaffirmed explicitly what had once been viewed as a radical decision. In 2000, for example, the justices upheld the Miranda warning—"you have the right to remain silent"—in an opinion written by Chief Justice Rehnquist, once a vocal critic of the Warren Court case that mandated this rule. In other areas, the justices went beyond the 1960s decisions to expand or affirm individual liberties, especially the rights of women and affirmative action programs designed to remedy past racial discrimination.

Concern about whether the Supreme Court had overstepped its proper role by its aggressive expansion of Bill of Rights protections was not new in American history. It was the same criticism levied by progressive reformers early in the twentieth century against judges who cited a right to economic liberty as a shield against regulatory laws passed by democratic majorities. What made this challenge especially contentious in the late twentieth century, however, was a resurgence of what came to be known as "rights consciousness," or a widespread willingness on the part of individuals and groups to push for the recognition of new rights. The awareness of rights to be asserted against government and oth-

ers has long been a hallmark of our national culture. It is in fact a legacy of our revolutionary beginnings, but rights consciousness has rarely been stronger in our past than it has been since the 1960s. Not only has it led to claims of new rights to fit the needs of a modern age, but it has raised again questions about the role of rights in American democracy.

It is difficult to know whether decisions of the Warren Court led to the growth of rights consciousness or whether the justices simply were responding to a renewed awareness of rights. The demand for individual freedom came from many quarters. The American Civil Liberties Union, founded in 1920 to protect constitutional rights, led many of the fights for greater individual liberty. So, too, did the National Association for the Advancement of Colored People (NAACP), a significant number of national labor unions, the National Rifle Association, and a host of other interest groups. Courts can act only when someone presents a claim for a legal decision, so in some sense, the growing culture of rights arose from the demands of countless litigants. But it is also true that Supreme Court decisions during the 1960s spurred the growth of rights consciousness, if for no other reason than they influenced lower courts, which settle most cases, to be more receptive to rights claims.

When a citizen asks the courts to enforce a right, the lawsuit often results in an application that goes far beyond what he or she sought. In the early 1960s, for instance, a poor defendant, Clarence Earl Gideon, believed he had been denied his right to an attorney in his criminal trial, so he appealed his conviction. The Supreme Court agreed with him in 1963, but its decision went further and announced a right for all indigent defendants to be represented at state expense in felony trials. Later this right was extended to all criminal cases where the potential loss of liberty was at stake, even for minor crimes. The same result was true of the right to privacy, a right not found by name in the Constitution but legitimately inferred from other rights. In 1965, the Warren Court supported the argument that this right prevented a state from prohibiting the use of birth control by a married couple, but later decisions led to its application in new areas, including the right of a woman to have an abortion and protection of consenting gay adults from arrest under state laws.

As a society, we have often debated how far to extend individual rights, but some of the decisions of the 1960s and later, especially those involving civil rights, introduced a new concept, group rights, into American constitutional law. After the Supreme Court's landmark rulings mandating equal treatment regardless of race in schools and public facilities, questions arose about how to remedy or correct racially discriminatory practices. One answer was affirmative action, which focused attention on an individual's membership in a racial or ethnic group and allowed race to be used as a positive factor in decisions about employment and admission to higher education. These programs, which the Court has accepted as constitutional under the equal protection clause, reflected a shift from rights as a protection against government to rights as a way to change social relations. What began as an effort to correct long-standing discrimination against blacks soon moved into new rights claims for other groups that have suffered discrimination—women, gays and lesbians, ethnic minorities, and the disabled, among others.

Significantly, some of these claims are pursued in the political arena and through the legislative process, both at state and federal levels, and not through the courts alone. The Americans with Disabilities Act of 1990, for example,

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*“[The Constitution] is an enabling (and a constraining) document. It sets forth a mechanism for making and applying law, and it creates a framework for representative government. It protects our basic freedoms, such as our rights to speak and to worship freely. It protects the basic fairness of our system, so that majorities cannot unfairly and systematically oppress minorities. It gives us the freedom to choose. But it does not tell us what to choose. It forces us, as a community, to choose democratically how we will solve our Nation’s problems.”*

—Justice Stephen Breyer, commencement address,  
New School University, New York City, May 20, 2005

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established legal rights for physically and mentally handicapped citizens. Not all claims are accepted by courts, legislatures, or voters, however. In the 1970s, women’s rights advocates pushed hard for an Equal Rights Amendment—which says that equality under the law shall not be denied on the basis of one’s sex—but fell heartbreakingly short in the ratification process.

We may be more rights conscious today than at other time in our history, but we remain divided over how far our rights extend. The eruption of new claims to rights and organizations dedicated to promoting them historically has been met with resistance and angry backlash. In many ways, this conflict has made rights talk even more contagious. Rights claims, after all, are made by someone who alleges a denial of liberty against the government or someone else. It is hard to think in terms of common values or community when engaged in rights talk; too much focus on individual liberties can skew our sense of the interests we hold in common. Still, what is most striking about the conflict over rights has been its democratic character. Rights are now a matter of public debate. When we confront each other over our individual rights, we are doing the work of democracy. Like the founding generation, we are trying to figure out what rights and liberties are required for a just and free society.

It is up to each of us to claim our rights and to engage in the work of a free people. Fortunately, our history is full of individuals who have demanded their constitutional protections and, in the process, advanced liberty for us all. In the twenty-three cases discussed in this book, it is ordinary citizens, for the most part, who have sought rights they believed were lawfully theirs. The claimants represent a cross section of Americans—young, old, well known, obscure, middle class, poor, respectable, and disreputable. One of the best ways we can protect our rights and our liberty is to understand what they demanded as their right—and why. They made history when they received an answer to their claim of individual liberty, but in these instances, as the novelist William Faulkner reminded us, the past is not dead, it is not even past. The rights these individuals sought remain vital, changing expressions of freedom. As members of a democratic society, we must always decide whether they moved the nation closer to the ideals established by the founding generation and whether they still represent the values the Constitution should protect today.

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## “All Men Are by Nature Equally Free”

*The Virginia Declaration of Rights was the first written listing of the rights of citizens in the newly independent United States. Drafted by George Mason, a wealthy planter and political leader, the declaration set forth principles of government and individual rights of citizens. Adopted unanimously by the Virginia Convention of Delegates on June 12, 1776, it served as the model for other state declarations of rights as well as the federal Bill of Rights.*

**I** That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

**II** That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

**III** That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

**IV** That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.

**V** That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed

periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

**VI** That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

**VII** That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

**VIII** That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.

**IX** That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

**X** That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

**XI** That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

**XII** That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

**XIII** That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the mili-

tary should be under strict subordination to, and be governed by, the civil power.

**XIV** That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

**XV** That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

**XVI** That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

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## Private Property and Public Use

*In 1822, a wharf owner in Baltimore sued the city for economic loss caused when the city diverted several streams and lowered the water level around his dock. He claimed a taking of his property without just compensation, in violation of the Fifth Amendment. Chief Justice John Marshall, writing for a unanimous Supreme Court in Barron v. Baltimore (1833), concluded that the Bill of Rights restrained only the federal government, not the states. This view no longer prevails. Today, almost all of the guarantees of the Bill of Rights have been incorporated by the Fourteenth Amendment as restraints on the states.*

The plaintiff in error contends that it comes within that clause of the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation, He insists that this amendment, being in favour of the liberty of the citizen, ought to be so construed as to restrain legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause. . . .

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its

particular government as its judgment dictated...

In their several constitutions they have imposed such restrictions on their representative governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest. . . .

We are of opinion that the provision of the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.