

The Future of Our Rights



“Any citizen in this country is entitled to equality before the law; to equality of education; to equality at earning a living, as far as his abilities have made it possible for him to do; to equality of participation in government so that he or she may register their opinion in just the way that any other citizens do.

—Eleanor Roosevelt, “Civil Liberties—The Individual and the Community,” address to Chicago Civil Liberties Committee, March 4, 1940

At a summit of world leaders in 2006, the chancellor of Austria noted that the United States historically had led the world in advancing “democracy, liberty, and individual rights.” The remark was so widely accepted that it was a commonplace and quickly forgotten. In fact, the ordinary acceptance of the comment is what should draw our attention. It is remarkable because it identifies three key concepts of free societies—democracy, liberty, and individual rights—and takes their connections for granted. American history has convinced us that these three ideas are essential to freedom itself and that each depends upon the other for its fullest expression. The mention of individual rights especially testifies to their importance as both symbol and substance of our status as free people.

We often speak of the expansion of individual rights over time, and with good reason. History generally supports the view that we have greater individual freedom now than at any time in our past. This conclusion, however, obscures more than it reveals. Not only does it hide the long struggle to secure these individual liberties, but it also suggests more modern agreement on the meaning of these rights than exists in fact. The history of our rights is not a simple story, and the future of our rights no doubt will be equally complex.

Today, we tend to associate the development of rights with judicial decisions, especially rulings of the U.S. Supreme Court. We also view individual liberty primarily through the lens of the federal Bill of Rights. This perspective is more accurate now than it was earlier in our history, but it is incomplete. The rights revolution of the 1960s, especially decisions of the Supreme Court under Chief Justice Earl Warren, focused attention on the courts as guardians of our freedom. It identified much of the Bill of Rights, applied to states through the Fourteenth Amendment, as the primary source of our rights. Largely forgotten were two older traditions. The first looked to multiple sources—natural law, federalism, state constitutions, and legislative acts, among others—as equally important to the Bill of Rights in the growth of individual liberty. The other vested responsibility for individual liberty in all our political institutions, not courts alone.

The twenty-first century may witness a return to patterns established earlier in American history. Judges follow the election returns, an old saying goes, and over the past two decades, the American electorate generally has become more conservative politically and less willing to support judicial expansion of rights. In a democracy, unpopular laws usually cannot exist for long; the same is true for court decisions. Consider the right to abortion, which the Supreme Court concluded was part of the constitutionally protected right of privacy in *Roe v. Wade* (1973). Most opinion polls reveal support for a woman’s right to choose an abortion, especially in cases of rape or incest or when necessary to protect a woman’s life or health, but the polls also find support for some restrictions of this right. One result has been legislative regulation of the practice of abortion, such as laws that require parental notification for women under a certain age. Al-

though the Supreme Court has accepted many of these restrictions, it has repeatedly reaffirmed the right itself. More recently, some states have challenged *Roe* by passing laws to prohibit abortions completely. It remains unclear whether a different set of justices will reconsider the Supreme Court's earlier decision in the face of such repeated challenges. Or take the various anti-flag-burning laws passed after *Texas v. Johnson*, the 1989 case in which the justices ruled that burning the American flag was a protected form of free speech. Opponents are seeking to overturn the Court's decision by a constitutional amendment giving Congress the power to punish flag desecration. In 2006, Congress came within one vote in the Senate of sending the measure to the states for ratification.

These cases and countless others reveal that we are in a period of unusually intense public debate about what our rights are and who decides what they should be. The focus of the debate is shifting to some degree from the courts to the legislature. A reversal of *Roe v. Wade* would redefine the meaning of a federally protected right to privacy, but it would not end a woman's right to choose an abortion in states where the right is protected by state law or by the state constitution. Some observers believe a reversal would increase pressure on state lawmakers to wrestle with this issue, as they did in the days before *Roe*. Should a flag amendment be adopted, any law to protect the flag still must pass Congress and be signed by the President. In both examples, the question of rights would become a matter for majority decision. Defining liberty in these areas would be a political issue, not a judicial one.

Some commentators believe this result would be a good thing because it would place the question of rights at the center of our political life as a nation. We would have to debate and decide openly what rights we are willing to live by, thus lending popular support to whatever decision we reach about our catalog of individual liberties. Although this result certainly seems democratic, it also raises a question about which is most important, majority rule or minority rights. In our constitutional system, we believe some rights are fundamental; they are not subject to majority rule because they protect the ability of all people to participate in the political process, a basic requirement in a democracy in which the people at large are the ultimate authority. The rights of speech, religion, press, and assembly are central to the democratic process itself. Defining them according to the will of a majority limits the ability of a minority to seek a change in law or practice. In similar fashion, our experience has taught us the danger of making the rights of the accused or the rights of those with limited political power, such as youth or the poor, subject to majority rule. Here, the concern is not to protect citizen participation in decision making but to ensure fair and equal treatment.

Even with the recognition that certain rights are fundamental, how far these safeguards extend may be subject to legitimate debate and legislative action. Consider the right of a criminal defendant to have the advice of counsel. We now deem it vitally important to the guarantee of a fair trial, and as a matter of right we assign counsel at public expense to poor defendants who face a loss of liberty. But is the right to counsel unlimited? Should it apply to all appeals, no matter how many or how frivolous? Should a defendant have a right, at state expense, to as many lawyers as the prosecution has on its team? To whatever lawyer the defendant wants to represent him? What about the issue of effectiveness of the counsel? Few people would suggest that poor defendants be assigned incompetent attorneys, but does the right to counsel mean that the defendant's

“Some might find it a bit disconcerting to consider that the responsibility for protecting our Constitution rests not just on judges but on a host of others as well. The responsibility is shared by state and federal legislators considering the constitutionality of proposed laws; by litigants who must marshal the time, money, and hope to take cases to court; by political officeholders (including the President himself) who must see that the Court’s rulings are put into practice; and by citizens, who ultimately must determine the Nation’s response to each major issue.”

—Justice Sandra Day O’Connor, speech at the dedication of the National Constitution Center, Philadelphia (2003)

lawyer must be as well qualified as the state’s attorney? The answers to these questions may impose additional expense on taxpayers, so it is not unreasonable to put them up to legislative debate—unless, of course, they are central to the meaning of the right to counsel itself.

The debate about majority rule and minority rights is perennial in American history. Democratic principles suggest that rights are best advanced and protected by majorities, but a constitution represents the permanent or fundamental will of all the people. The Bill of Rights especially represents the decision of the founding generation to protect the rights of the minority from a majority, which, in their experience, could be oppressive or tyrannical. Our history has proven their concerns to be well-founded. At one time in our past, women and ethnic and racial minorities did not have equal protection of the laws, often because a democratic majority did not consider them worthy of this constitutional promise.

We accept in theory the need to protect individuals from oppressive majorities because we all understand that each of us may be in the minority on some issue or in some circumstance. The harder questions we face are about what our rights mean in practice, especially what the limits are on our individual liberty. We have confronted this issue most directly in debates over laws passed in response to the terrorist attacks of September 11, 2001. The USA PATRIOT Act of 2001, for example, brought needed change to our national intelligence agencies, especially improving coordination among intelligence agencies, but it also raised concerns about the future of constitutional safeguards, such as habeas corpus or the warrant requirements for search and seizure. Another response to 9/11 was a system of military courts operating solely within the executive branch, not subject to judicial review, to handle suspected terrorists. Many Americans saw nothing wrong with establishing commissions to try foreign suspects, but they were uncomfortable with abandoning all protections for the accused or denying judicial oversight. They were also wary of lessening legislative oversight of the executive branch. The problem is an old one: how do we balance our need for security with protection of our rights? The United States has faced the question in each national crisis, and Americans have, in retrospect, regretted some of the decisions, as in the case of internment for Japanese Americans during World

War II. The larger issue is, in fact, the same one faced by the founding generation: how can we give government sufficient power to meet its responsibilities, including its obligation to keep us safe, and yet not give it power to threaten our liberty?

Most often, we have answered this question not by an appeal to the majority or to the legislature but rather by a reliance on courts to maintain our constitutional promises. Even when most concerned with our security, Americans have kept the courts open so that individual citizens can assert their claims that a right has been denied. Some people protest that such openness leads us to seek protection only in the courts rather than through the political process. An over-reliance on courts to guard our liberties indeed may be one result, but as often an alert and independent judiciary has served as the best protector of our rights, much as James Madison predicted. It was in open courts with judges committed to the Constitution, he believed, that we could best balance our fundamental liberties, our need for security, and our commitment to the rule of democratic majorities.

These issues of liberty, security, and democracy will not fade in the next decade, but neither will they be our sole concern as we consider the future of our rights. New conditions and new expectations undoubtedly will lead to a demand for more or less individual liberty. We live in a world quite different from that of our parents, and we are far removed from the one inhabited by the founding generation. The Internet, still relatively new, already has transformed our society, as have other innovative technologies. We now participate in a global economy to an extent unknown in our past; never has the movement of people, goods, and ideas been so easy. We have embraced much of what has resulted, but already we are seeing how these changes challenge our traditional understanding of individual rights. For example, we have long resisted government interference with the freedom of press and speech, but now many people worry about the ready access children have to adult publications or to materials that promote violence or hatred. In an earlier day, we could easily remove these materials from the reach of minors—for example, we could keep them off library shelves—but it is all too easy to get past the parental controls offered by Internet providers. Other people are concerned about the threat new technologies pose to our privacy. Law enforcement officers can go on the Web and conduct searches previously imaginable only in futurist novels. Do their actions violate our constitutional protections under the Fourth Amendment? What about the harvesting of our private data for commercial purposes, to create, say, a targeted marketing campaign based on our online viewing habits? Does it undercut our expectations of privacy? In an increasingly wired world, how do we balance our commitment to an open exchange of information with protection of our privacy and other important values?

Advances in technology do not pose the only challenges to our understanding of individual rights; some people believe modern social and economic conditions require the creation of new rights or the recognition of rights implied by the Constitution. The world economy demands highly educated workforces—and without adequate education, the gap between rich and poor only grows wider—but we have never recognized education as a fundamental right of American citizenship. Education traditionally has been a state responsibility, and a number of states, but not all, have recognized this right as part of their constitutions. One result has been vastly unequal support of education among and even within

states, with children in poorer districts receiving inferior educations because of lack of funding. Is it time to create a national right to education to guarantee equality, or is access to a quality education more an issue for state and national policies than a fundamental right? The same questions arise with health care. Do all citizens have a right to quality health care, or is this issue one that should be addressed instead through the political process or the marketplace? We can list countless other potential rights: rights to a clean environment or to a living wage or job security are only a few other rights claims that people have made over the past few decades. Today, there is no national consensus to support the creation of new rights to education, health care, environmental cleanliness, or jobs, but the same conclusion was true in the 1830s about citizenship and equality for African Americans.

Even without the creation of new rights, courts and legislatures will continue to grapple with unanswered questions about constitutionally protected liberties. Governments at all levels often provide services through private agencies, including faith-based or religious organizations. Does government funding of faith-based social services, say a food bank or health clinic, violate the traditional understanding of a separation between church and state? If not, may faith-based organizations that receive government funding refuse to hire someone who does not share the organization's beliefs? May they offer favored treatment or more services to people who believe as they do? Or consider these questions: Do federal and state laws regulating how much political candidates can spend violate their freedom of speech? Does freedom of the press protect confidential sources of journalists? Congress can restrict indecent and obscene speech that is available to everyone in radio and television broadcasts, but should the same restrictions apply to paid services, such as cable channels, satellite radio, and broadband Internet? Can we outlaw hate crimes—can we ban the “n” word, for example without violating our commitment to free speech? These questions are not hypothetical. Even now, state and federal lawmakers are debating these issues, and cases are winding their way through courts across the nation.

If history is any guide, we always will confront questions and controversy about our individual rights. The language used by the Constitution and Bill of Rights is clear enough, but its meaning is often elusive. We know the words in the phrase “due process of law” but what the phrase means is not immediately apparent. It is not an empty vessel to be filled with whatever meaning we wish to assign—due process has a long history, after all, that helps us define it—but it is flexible and capable of change. Many observers have identified this characteristic as the genius of our fundamental law. We have repeatedly invested constitutional

“The Constitution is not a document designed to solve the problems of a community at any level—local, state, or national. Rather it is a document that trusts people to solve those problems themselves. And it creates a framework for a government that will help them to do so. That framework foresees democratically determined solutions, protective of the individual’s basic liberties.”

—Justice Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005)

words with new substance. For example, due process at one time simply required government to follow its own laws in administering justice. People believed this practice would ensure fairness. What if government followed the law, but the result was unfair? This circumstance occurred in the 1930s in the Scottsboro case, when white officials in Alabama observed the forms required by law but denied any meaningful due process to the poor black defendants accused of rape. Today, we give due process a different and more powerful meaning. Procedure remains important, but now we have safeguards to ensure that procedures are actually fair in practice. The right to trial by jury, for instance, no longer means we can select jurors from only one racial or ethnic category, as was once the case.

We could list any number of unresolved rights and new claims of individual liberties—but so, too, could every preceding generation. When Americans celebrated the bicentennial of the Constitution in 1987, some commentators seized on the words in the preamble, “in order to form a more perfect union,” and proclaimed, as Chief Justice Warren Burger did, that “the Declaration of Independence was the promise [of liberty]: the Constitution was the fulfillment.” Others were uncomfortable with too much veneration of the nation’s founding document. Burger’s colleague on the bench, Justice Thurgood Marshall, the first African American to sit on the nation’s highest bench, responded that “the government [the founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and respect for individual freedoms and human rights, that we hold as fundamental today.”

Change has been a constant theme of our constitutional experience. We have sought to fulfill the founding generation’s promise to form a more perfect union, but who is responsible for these changes? Here, the preamble again is our guide. It begins, “We the people.” We, not they. Rights are claims of liberty made by any of us, regardless of age or circumstance. When twelve-year-old Lillian Gobitas refused to salute the American flag because of her religion, she was claiming a right essential to her freedom—and ours. When an Iowa eighth grader, Mary Beth Tinker, wore an armband to protest the Vietnam War, she was claiming her right to speak—and ours. When the Chinese immigrant Yick Wo refused to accept the consequences of a discriminatory law, he was demanding his right to equal treatment—and ours. When Gerald Gault insisted on confronting his accuser in juvenile court, he was claiming his constitutional protections—and ours. In a democracy, we all are responsible for advancing and defending liberty and the individual rights that safeguard it.

It is inevitable that our rights will acquire new interpretation in future years and that we will identify new rights essential to our liberty. Rights gain meaning from experience, and undoubtedly they will continue to do so. We can expect disagreement on the proper balance between order and liberty, on the role of courts and legislatures in defining rights, on questions of majority rule versus minority rights, and on the interpretation of constitutional phrases such as “due process” and “equal protection.” What should be reassuring, however, is the debate itself, which makes real the idea of popular democracy and revitalizes the American commitment to a society governed by law. We cannot seek to restore the original expression of our rights, even if it were possible to do so. The founders did not leave us a dead legacy, one incapable of growth, but rather with a living framework that we can make our own. Each time we claim our rights, we act on this inheritance and in the process reaffirm the success of America’s great experiment in liberty.

The Four Freedoms

In 1941, the nation was emerging from the Great Depression and World War II was already underway in Europe, a war the United States would join less than a year later. In his address to Congress, Roosevelt spoke about the threat to democracy posed by Nazi Germany, and he proposed that the nation commit itself to securing four essential freedoms throughout the world. The first two freedoms—speech and religion—were well known to Americans. But the other two freedoms—the freedom from want (economic security) and the freedom from fear—were to be new rights. In this speech, Roosevelt reminded Americans that the work of freedom—and the rights that sustain it—is never done. The Four Freedoms are engraved on the Franklin Delano Roosevelt Memorial in Washington, D.C.

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny

which the dictators seek to create with the crash of a bomb.

To that new order we oppose the greater conception—the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear.

Since the beginning of our American history, we have been engaged in change—in a perpetual peaceful revolution—a revolution which goes on steadily, quietly adjusting itself to changing conditions—without the concentration camp or the quick-lime in the ditch. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society.

This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.