
Introduction



On August 23, 1984, the New York Times carried a brief story on its inside pages about a disorderly march in Dallas, Texas, the host city for the Republican National Convention. The incident had begun as a protest against the renomination of President Ronald Reagan for a second term. About one hundred people were arrested for disorderly conduct; among them was Gregory Lee Johnson, who was charged under a Texas law outlawing the desecration of “venerated objects.” He had burned the American flag.

Tried and convicted in a Dallas court, Johnson received the maximum penalty of a year in jail and a \$2,000 fine. No doubt many people believed he deserved the sentence. Few things stir the emotions of Americans as strongly as an assault on our patriotic symbols. In this instance, the attack was especially troublesome because Johnson had appeared to be such an all-American male. He was born in the nation’s heartland, Indiana, and had grown up on military bases as the son of a soldier. But Johnson was not a sympathetic figure. He had joined the Revolutionary Communist Party, an anti-American group. While the flag burned, he and other members of the demonstration had shouted, “America, the red, white, and blue, we spit on you.”

Johnson appealed his conviction, and the case ended up in the U.S. Supreme Court. The justices ruled, 5 to 4, that the First Amendment’s guarantee of free speech protected Johnson’s act. He was expressing a political opinion, which clearly fell within the protections of the Bill of Rights. “If there is a bedrock principle underlying the First Amendment,” Justice William Brennan wrote for the majority, “it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” The minority, citing the value of the flag as a historical symbol of national unity, saw Johnson’s actions as an incitement to violence, not the protected expression of an idea. “Flag burning is the equivalent of an inarticulate grunt or roar that. . . is most likely to be indulged in not to express any particular idea, but to antagonize others,” Chief Justice William Rehnquist argued.

“I came here from Czechoslovakia, a country with a deep and humane tradition of democratic values, crushed first by the Nazis and then by the Soviets and their disgusting little puppets. . . . So America, its traditions and values and its flag are important to me. Foremost among those values is the principle that no one shall be punished for his political expressions—no matter how offensive or bizarre.”

—Professor Charles Fried, Harvard University,
testimony before the House Judiciary Committee (1989)

Texas v. Johnson revealed a deeply divided nation. The decision brought a storm of criticism, as well as voices in strong support of the decision. Congress immediately enacted the Flag Protection Act in response, and when a bare majority of the Court narrowly ruled that it, too, was unconstitutional, a movement began to amend the Constitution. The House of Representatives passed a flag-protection amendment on six occasions from 1995 to 2005, but each time it failed to obtain the required two-thirds majority vote in the Senate. In mid-2006, the controversy still was alive, with the amendment failing by one vote in the Senate from passing to the states for ratification. The American public remains split over what is most important—upholding a symbol of national unity and order or protecting free speech.

The flag-burning case featured a clash between two legitimate ends of democratic government—the protection of individual rights and the promotion of public order and security. This conflict is nothing new in our history. We have often fought over how far we can extend our rights without threatening our unity and our security. The controversy over the Iraq War at the beginning of the twenty-first century made this issue real for new generations of Americans, but in fact war only heightens the tension between these two goals.

What we may not recognize is how old this debate is. It was present during the American Revolution, the period that defined much of how we think about liberty and about the role of government. But even by 1776, the debate surrounding rights and order was already centuries in the making. It stretched to a time “when the memory of man runneth not,” as one English medieval law book put it. This contest between individual rights and public order has resulted in what we view today as our rich heritage of freedom, a hard-won prize of Anglo-American history.

In many popular versions of our national past, the framers of the Bill of Rights captured our essential liberties in the first ten amendments to the Constitution. Many people assume these rights had self-evident meanings, which judges today simply apply to new circumstances. The truth is far messier. Our rights have never been free of controversy, and they have never been the responsibility of courts alone. Throughout American history, rights have been invented and repudiated, fought over and striven for, expanded and violated. Scarcely was the ink dry on the Bill of Rights when debates began about what the words meant.

Still, it would be misleading to feature these conflicts too prominently in the story of American rights. As consistent as the debate has been, so too has been the expansion of our rights in number, scope, and practice. Freedom of speech, for example, is more extensive today than at any time in the nation’s past. Freedom of religion once meant the right to embrace Christianity; today, it protects citizens of any faith—or of none. What is meant by due process of law, our fundamental guarantee of fairness, differs widely from its definition a few decades ago.

It also would be inaccurate to attribute the expansion of rights to the judiciary alone. We have added new rights to the Constitution by amendment, for example, creating the right of eighteen-year-olds to vote. Statutes have also added new expressions of individual liberty, as when civil rights laws of the 1960s gave new force to the Fourteenth Amendment’s promise of equal protection. Some states have recognized rights for their residents beyond what is listed in the U.S. Constitution, such as the right to an education.

“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate [abolish] the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”

—House Speaker Tip O’Neill, *All Politics Is Local, and Other Rules of the Game* (1994) on becoming Speaker of the House in 1999

Many advances in our rights have resulted from the claims of political, ethnic, or religious minorities, as well as social misfits; often, they believe things or live in ways that are far outside the mainstream. In a democracy, we wonder, why should the rights of these few trump the will of a majority? Why should we extend constitutional protections to people accused of heinous crimes, for instance, or to anyone who has opinions or a lifestyle unacceptable to the vast majority of citizens? These are fair questions, but they ignore the role of rights in our society. We understand liberty to belong to individuals, not simply to society generally, so we have chosen to safeguard personal liberty as much as possible within the need for public order. The best ways to guarantee this liberty, we have decided, are to limit the power of government to act arbitrarily or without rules and to recognize that majorities can themselves be unfair or even tyrannical.

Rights are essential both to our conception of liberty and to what we have defined as the proper role of government. They have alternately expanded and contracted throughout our history and have been the subject of some of the most divisive fights we have experienced as a nation. But this statement begs several important questions: What are rights? Where did they come from? How have they changed? How do we understand our rights today? We can discover answers to these questions from the history of our constitutional development and from the specific history of some of our most significant rights. But first we must understand what we mean by rights.

In their simplest form, individual rights are legally enforceable claims to personal freedom or liberty. A right allows a person to do something—or to avoid doing it—and that action can be enforced by an order from a court of law. The claim of a right may be made either against government—for example, forbidding government to interfere with freedom of press—or may be enforced through government, as when courts forbid a hotel from racially discriminating against guests. An assertion of individual freedom, if it is truly a right, cannot be denied; it has to be granted; it is based on a duty to respect the right.

Consider this example: John Doe is deeply opposed to the reelection of his mayor, whom he mistakenly considers corrupt and inept; he refers to her in public as “lower than pond scum.” He decides to voice his opinion every afternoon from the gazebo in a park near city hall. The place he chooses is one traditionally open to political candidates, but his fellow townspeople are so appalled by his extreme statements—he once said he would vote for a Nazi rather than the current mayor—that they seek to prevent him from disgracing the community.

But John Doe has a legal claim, one guaranteed by the First Amendment, to free speech. He can go to court, if required, and get an order that prevents any interference with his ability to exercise (or enjoy) this freedom. Even if the judge is the mayor's closet political ally and best friend, the law requires her to support John Doe's claim to free speech.

The language of rights can be confusing. We use the word itself—right or rights—in many different ways: a right to life, a right to vote, a right to choose, a right to counsel, a right to believe one's own eyes, a right to declare a couple married, a right to do what we please. Of course, not all of these uses of the word mean the same thing. The founding generation believed certain rights—life, liberty, and the pursuit of happiness—were inalienable; they were natural, or universal, rights and could never be surrendered. At other times, the word refers to fundamental rights found in the U.S. Constitution; they cannot be changed unless two-thirds of both houses of Congress and three-fourths of the states agree to the change. The right to vote for citizens aged eighteen and older is a fundamental right; so is the right to assemble peacefully and to enjoy freedom of press or religion. Other rights are entitlements granted by the legislature and may be changed by a simple majority vote: the right to drive a car, for example, is available to anyone who meets the minimum age and performance criteria set by the state, which can change the eligibility requirements at any time. Other common uses of the word right do not address a legal claim at all. “Children have the right to have a doctor close to home,” as a recent ad announced, expresses a personal opinion and a moral judgment, not a legal claim; you cannot ask the legal system to act on it or make other people accept it.

When we talk about individual rights, we usually mean guarantees of liberty contained in federal and state constitutions or in laws made to enforce these guarantees. We sometimes divide these rights into the two categories of civil rights and civil liberties. The term civil rights refers to the legal protection we have against injury, discrimination, and denial of rights by private individuals, groups, or government because of a categorical bias, such as a denial of service based on race or gender. Civil rights may be contained in the Constitution or they may be defined by laws made under constitutional authority. Civil liberties are the legal guarantees, especially under the First Amendment, that protect us from government interference with our political actions, such as freedom of speech, press, assembly, and the like. These categories, civil rights and civil liberties, reflect contemporary usage. Earlier generations used the terms privileges, franchises, and immunities, as well as rights, and these terms still have special meaning for lawyers.

Regardless of the language we use, rights are not self-interpreting, self-enforcing, or absolute. The definition of a right not only has changed over time, but its modern meaning may differ from one situation to another. The First Amendment protects freedom of the press, but what does this phrase mean? At one point in the late 1790s, a person could be punished for printing criticisms of the government. Today, you have a right to publish your political views, no matter how extreme or how critical, although you still do not have the right to publish obscenity. Clearly, this claim of individual freedom has had different meanings throughout our history. Also, rights do not enforce themselves. They must be demanded, usually through a court order. Finally, rights are not absolute. People have a right to speak freely without fear of punishment, but they do not have a right to yell “fire!” falsely in a crowded theater. Under this circumstance, the

public has a stronger claim to safety than an individual has to freedom of speech. We recognize the limits on our rights in common language when we say that our right to swing our arms ends where another person's nose begins. Individual rights are creations of our history. In almost every instance, they have arisen out of a struggle against the abuse of power by government and oppressive majorities. In our democracy, written constitutions and access to open courts make it possible for claims of rights to come from any citizen, and throughout American history cases have arisen from every quarter by all sorts of individuals. At times, courts have chosen to follow precedent, or previous interpretations, even in the face of apparent injustice; at other times, these challenges have led to an expansion of rights, often by fitting old meanings to new conditions. No single answer exists to the question of where our rights come from, but in a democracy, there ultimately is one answer to how we maintain rights—through our own understanding of and attention to them. For this reason, we must first know the history that gave birth to our individual liberties.