Theories of Civil Liberties

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In the words of English jurist and professor of common law Sir William Blackstone (http://uscivilliberties.org/historical-overview/3207-blackstone-and-common-law-prohibition-on-prior-restraints.html), ‘‘Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views and interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.’’ Justice Louis D. Brandeis, in dissent in Olmstead v. U.S., 277 U.S. 438 (1928), while criticizing the majority’s narrow interpretation of the Fourth Amendment, similarly declared that ‘‘the makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone.’’

Civil liberties are defined as freedoms from improper government action; they create a personal sphere of liberty around the individual citizen in which the individual is free from governmental restrictions. These restraints on government’s power can be substantive (restraints on what the government shall and shall not have the power to do) or procedural (restraints on how the government is to act). In other words, substantive restrictions limit the ends of government, whereas procedural restrictions limit the means of government.

While there may be general agreement as to the importance of civil liberties in a free society, the questions of where to draw the line between individual rights and the needs of the community are often difficult to resolve in specific (and controversial) cases. In the words of philosopher John Stuart Mill, ‘‘... though the proposition is not likely to be contested in general terms, the practical question, where to place the limits—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done’’ (Mill, 16).

The Role of Civil Liberties in a Free Society

The framers established a government of limited and enumerated powers that provided for majority rule while protecting minority rights. The American constitutional tradition was influenced by British philosopher John Locke, who, in his Two Treatises of Government, argued that individuals leave the

state of nature and form a civil society in order to protect their life, liberty, and property, and that people have the right to dissolve government if it no longer meets their legitimate expectations. Justice William Brennan believed that the end of constitutional democracy is the promotion of human dignity and respect for the individual: ‘‘As augmented by the Bill of Rights and the Civil War Amendments, [the Constitution] is a sparkling vision of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual’’ (Brennan, ‘‘The Constitution of the United States: Contemporary Ratification’’).

An essential element of this constitutional democracy is the right to freedom of expression, especially political speech. Alexander Meiklejohn has argued persuasively that the First Amendment gives absolute protection to political speech (Meiklejohn, Political Freedom). Indeed, the freedom to speak, to publish, and to assemble with others for the purpose of expressing a point of view are at the core of what most Americans conceive as a democratic political system (Casper, 17).

Freedom of expression is necessary to promote individual liberty and human dignity. As Charles Fried explained:

Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others. Autonomy is the foundation of all basic liberties, including liberty of expression.... Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons’’ (Fried, in Stone et al., 233).

Moreover, freedom of expression is seen as the best way to expand human knowledge and to seek the truth in political debate. John Stuart Mill described a ‘‘marketplace of ideas,’’ in which the free exchange and competition among ideas would best ensure that the truth would emerge. According to Mill, ‘‘The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this.’’

The idea that democracy is a means to an end rather than an end in itself and that majority rule must recognize minority rights is, perhaps, most eloquently articulated in the compulsory flag salute cases. In these cases, involving Jehovah’s Witnesses and their religious objection to saluting the flag, the Court emphatically declared the importance of protecting individual liberty.

Justice Harlan Fiske Stone, dissenting in Minersville School District v. Gobitis (310 U.S. 586, 1940, at 602-3, 606-7), in which the majority of the Court upheld the Pennsylvania town’s 1914 ordinance compelling students to salute the flag, declared:

The very fact that we have constitutional guarantees of civil liberties and the specificity of their command where freedom of speech and religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that these liberties be protected against the action of the government itself.... The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It also is an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.

Justice Robert H. Jackson in West Virginia Board of Education v. Barnette (319 U.S. 624 at 638, 642, 1943), speaking for the majority in holding that West Virginia may not compel school children to salute the flag against their beliefs, explained:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.... The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, [for] they depend on the outcome of no elections.

Civil liberties play an essential role in protecting minority rights from the ''tyranny of the majority.''

Negative vs. Positive Rights

The distinction between negative and positive rights is often described as ''freedom from'' versus ''freedom to.'' In other words, negative rights imply freedom from government interference, whereas positive rights imply affirmative obligations on the part of government to fulfill the right (such as entitlement programs, welfare, housing, and nutrition). The differences between negative and positive rights have been classically expounded by Charles Fried (Fabre, 40):

A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation. (Fried, 110)

Cecile Fabre argues that individuals have social rights to adequate minimum income, housing, health care, and education, and that those rights must be included in the constitution of a democratic state. Moreover, Fabre argues that a democratic majority should not be able to repeal these rights and that

certain institutions, such as the judiciary, should be given the power to strike down laws passed by the legislature that are in breach of those rights (Fabre, Social Rights under the Constitution).

President Franklin Roosevelt's ''Second Bill of Rights,'' set forth in his 1944 State of the Union message, includes the following examples of what could be deemed ''positive rights'':

the right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; the right to earn enough to provide adequate food and clothing and recreation; the right of every family to a decent home; the right to adequate medical care and the opportunity to achieve and enjoy good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education. (Glendon, in Stone et al., 528)

The U.S. Supreme Court, however, has consistently declined to recognize constitutional welfare rights (Glendon, in Stone et al., 525). For example, in Lindsey v. Normet, 405 U.S. 56, 74 (1972), the Court ruled that there is no constitutional right to housing, and in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 30-31 (1973), the Court ruled that there is no constitutional right to education. Indeed, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit noted that the U.S. Constitution

is a charter of negative rather than positive liberties.... The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868, at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. (Jackson v. City of Joliet, 715 F.2d 1200, 1203, 7th Cir.1983)

However, David P. Currie points out that the U.S. Supreme Court has found ''duties that can in some sense be described as positive'' in negatively phrased provisions of the Bill of Rights (Currie, 872–880). For example, the Sixth Amendment guarantees the right to counsel, and, despite the fact that this appears to be a negative right (namely, that the government may not prevent a criminal defendant from having a lawyer), the Supreme Court has held that the Sixth Amendment imposes an affirmative duty on the part of government to provide legal assistance if the defendant cannot afford it (Currie, 874; Gideon v. Wainwright, 372 U.S. 335, 1963).

The Constitutional Basis for Civil Liberties in the United States

American revolutionary Thomas Paine declared that a constitution is ''to liberty what a grammar is to language'' (Pritchett, 1). The framers believed that a written constitution was necessary to guarantee a limited government and, therefore, to protect civil liberties. Indeed, the source of civil liberties is the Constitution, especially the first ten amendments, the Bill of Rights.

The lack of a Bill of Rights was seen by the Anti-Federalists to be a major defect of the original Constitution. In Antifederalist Paper No. 84, ''Brutus'' argued that a Bill of Rights was as necessary for the federal constitution as it was for the states. Thomas Jefferson, writing to James Madison on the subject of the proposed Constitution, criticized the omission of a Bill of Rights. After listing the rights

he thought should be included, Jefferson challenged the Federalists' rationale for their omission and concluded that ''a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or resist on inference'' (Levy, 26).

The Federalists countered that the Constitution was a Bill of Rights unto itself. It provided for the protection of specific liberties and the federal government that was created was one of limited and enumerated powers. Alexander Hamilton, in Federalist No. 84, explained that ''the Constitution is itself, in every rational sense and to every useful purpose, a Bill of Rights.'' Hamilton argued that the addition of a Bill of Rights would be ''dangerous'' as well as unnecessary because it ''would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?''

Despite the Federalists' claim that there was no need for a Bill of Rights to be added to the Constitution, the original document did include provisions to protect selected civil liberties. For example, Article I, }9, provides that the writ of habeas corpus shall not be suspended and that Congress shall not pass any bills of attainder or ex post facto laws. Article III guarantees a jury trial in the state in which the crime was committed and limits treason to the life of the person convicted and not to the person's heirs. Article VI, }3, bans religious tests as qualification for public office, and Article IV, }2, guarantees to citizens of each state of all privileges and immunities of citizens in the several states.

The Bill of Rights was adopted by the First Congress as a concession to the strong objections that the Anti-Federalists raised during the ratifying conventions. James Madison's speech to the House of Representatives admonished Congress to ''conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution'' (speech before the U.S. House of Representatives, 8 June 1789).

The Bill of Rights was originally interpreted to apply only to the federal government. State governments were believed to be closer to the people, and the state constitutions included their own bills of rights (see Schwartz, 87–90, for a table listing the civil liberties expressly protected in the revolutionary declarations and constitutions of each state). In Barron v. Mayor and Council of Baltimore, 7 Pet. (32 U.S.) 243 (1833), Chief Justice John Marshall held that the Bill of Rights was applicable only to the federal government and that its provisions did not serve to limit the power of the state governments.

However, the passage of the Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) radically changed the protection of fundamental liberties. The Fourteenth Amendment declares: ''No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.''

There is a long-standing debate regarding whether the framers of the Fourteenth Amendment intended that it would apply the Bill of Rights' provisions to the states. In the Slaughterhouse Cases, 16 Wall. (83 U.S.) 36 (1873), the Supreme Court rejected the argument that the privileges or immunities clause was designed to apply the Bill of Rights to the states. However, through a gradual process of ''selective incorporation,'' the Supreme Court has held various provisions of the Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment (Palko v. Connecticut, 302 U.S. 319, 1937).

The first time the Supreme Court ''incorporated'' a provision of the Bill of Rights was in the case of Chicago, Burlington, & Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897), in which the property protection of the Fifth Amendment was held applicable to the states. No further expansion of civil liberties through the Fourteenth Amendment occurred until 1925, when the Court held that the freedom of speech was ''among the fundamental and personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states'' (Gitlow v. New York, 268 U.S. 652, 1925). Most of the provisions of the Bill of Rights have been applied to the states in this way.

Even after the Court held that provisions of the Bill of Rights could be made applicable to the state governments, the Justices differed in their understanding of the nature and the extent to which these amendments would be ''incorporated.'' Justice John Marshall Harlan I (dissent in Hurtado v. California, 110 U.S. 516, 1884) and Justice Hugo Black (dissent in Adamson v. California, 332 U.S. 46, 1946) were advocates of ''total incorporation''—the idea that all provisions of the Bill of Rights should be made applicable to the states. Justice Benjamin Cardozo (http://uscivilliberties.org/biography/3305-benjamin-cardozo-18701938.html), in Palko v. Connecticut, articulated the theory of ''selective incorporation,'' namely, that only those liberties in the Bill of Rights that are ''so rooted in the history and conscience of our people as to be ranked fundamental'' and ''implicit in the concept of ordered liberty'' should be incorporated. Other justices argued for ''incorporation plus''—that even more rights and liberties than those expressly recognized in the Bill of Rights should be held applicable to the states, such as the unenumerated right to privacy. Some have called for ''total incorporation plus,'' such as Justices Frank Murphy and Wiley Rutledge (dissenting in Adamson v. California, 332 U.S. 46, 1946) while others have advocated ''selective incorporation plus,'' such as Justice Arthur Goldberg, Chief Justice Earl Warren, and Justice William Brennan (concurring in Griswold v. Connecticut, 391 U.S. 145, 1965).

Those few provisions that have not been incorporated include the Second Amendment protection of the ''right of the people to keep and bear arms,'' the Third Amendment limitation on the quartering of soldiers in private homes, the Fifth Amendment right to indictment by grand jury, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment right against excessive fines and bail (http://uscivilliberties.org/3156-bail.html).

Economic and Noneconomic Rights

The protection of economic rights is usually thought of in terms of ‘‘substantive due process,’’ a doctrine that prevailed during the Lochner era.

The origin of due process of law in the Anglo- American legal tradition dates back to the Magna Carta (1215), when King John consented to the barons’ demands for certain rights, such as the right to a trial by a jury of one’s peers. Americans are guaranteed due process of law in the Fifth and Fourteenth Amendments. The Fifth Amendment guarantees that ‘‘No person shall be ... deprived of life, liberty, or property without due process of law.’’ The Fourteenth Amendment guarantees ‘‘... nor shall any State deprive any person of life, liberty, or property, without due process of law.’’

The principle behind ‘‘due process’’ is that government is forbidden to limit a person’s personal or property rights unless the government has done so through proper procedures. Initially conceived of as a procedural restriction on government’s authority, the concept of ‘‘procedural due process’’ can be thought of in terms of criminal procedure, or the rights of the accused. ‘‘Substantive due process’’ is the doctrine used by the Court to strike down economic regulation, such as the right of a worker to offer his services to an employer without governmental restrictions upon the conditions of employment and the inviolability of an individual’s property from governmental regulation (Casper, 219).

The first time the Court struck down a state law on substantive due process grounds was in the case of Allgeyer v. Louisiana, 165 U.S. 578 (1897). Justice Rufus Peckham, in an opinion for a unanimous court, laid out a broad articulation of the ‘‘liberty of contract’’ that gave the case its special significance in the development of ‘‘substantive due process’’ (Sullivan and Gunther, 457). Justice Peckham explained:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

The seminal case of this era was Lochner v. New York, 198 U.S. 45 (1905). At issue in the case was a New York law that limited the hours of employment in bakeries and confectionary establishments to ten hours a day and sixty hours a week. Justice Peckham again announced the opinion of the Court and held that the statute interfered with the liberty of contract between employers and employees: ‘‘the general right to make a contract in relation to ... business is part of the liberty of the individual protected by the Fourteenth Amendment.’’

Justice Oliver Wendell Holmes, Jr., in dissent, accused the majority of deciding the case based on an economic theory that a large part of the country did not entertain: ‘‘the Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.’’ Holmes declared that ‘‘a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen

to the state, or of laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the [Constitution].''

From the Lochner decision in 1905 to the mid- 1930s, the Court invalidated a considerable number of laws on substantive due process grounds, such as regulations of prices, labor relations (including wages and hours), and conditions for entry into business (Sullivan and Gunther, 466). The Court eventually repudiated Lochner and its progeny, and its name became synonymous with inappropriate judicial intervention in the legislative process (Sullivan and Gunther, 463).

However, there is a contemporary debate about whether the Court continues to adhere to the doctrine of ''substantive due process'' in the context of announcing unenumerated rights, such as the right to privacy (particularly in the area of reproductive freedom and abortion rights). The Court declared that the right to privacy, while not specifically provided for in the Bill of Rights, can be found in the ''penumbras'' of the First, Third, Fourth, Fifth, and Ninth Amendments (Griswold v. Connecticut, 381 U.S. 479, 1965). Justice William H. Rehnquist, in dissent in Roe v. Wade, 410 U.S. 113 (1973), in which the majority ruled that the constitutional right to privacy extended to a woman's right to have an abortion, criticized the majority for espousing substantive due process in the Lochner tradition of passing on the wisdom of legislative policies and for engaging in ''judicial legislation'' by breaking up pregnancies into three trimesters with varying permissible restrictions (Pritchett, 320).

The Role of the U.S. Supreme Court in Protecting Civil Liberties

In the post-New Deal era, the Supreme Court has given more attention to the Bill of Rights and to the protection of civil liberties. Professor Robert G. McCloskey, in his seminal work, The American Supreme Court, defined three periods of the Supreme Court's history: (1) from the founding of the Constitution through the Civil War, in which questions of federalism were predominant (e.g., nullification, slavery, and the national bank); (2) from the Civil War through 1937, in which questions of the relationship between business and government were predominant; and (3) from 1937 to the present, in which the Court indicated there would be a shift in emphasis from strict scrutiny of economic legislation to a strict scrutiny of regulations that touch on the Bill of Rights. ''The Court, which had once been primarily occupied with the nation–state relationship, and some time later, with the business–government relationship, now became more and more concerned with the relationship between the individual and government'' (McCloskey, 122).

The turning point for the Court was signaled by Justice Stone in Footnote Four in U.S. v. Carolene Products, 304 U.S. 144, 152 (1938). Since 1937, the Supreme Court has relinquished its role as a socioeconomic review board and has assumed a new role, one more energetic in the protection of civil liberties. Civil liberties now occupy a ''preferred position.'' This phrase was first used by Chief Justice Stone in dissent in Jones v. Opelika, 316 U.S. 584 (1942):

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of their privilege, is capable of being used to control or suppress it.''

The doctrine that civil liberties occupy a preferred position means that there would be a presumption of unconstitutionality instead of a presumption of constitutionality when dealing with liberties essential to the democratic process. The burden of proof (http://uscivilliberties.org/themes/3262-burden-of-proof-overview.html) would fall on the legislature to prove why the statute passes constitutional muster. This has also been called the ''double standard,'' insofar as the Court indicated that it would apply a stricter standard to laws challenged as infringing on individual rights than it used for those attacked as abridging economic rights (Biskupic and Witt, 7).

There is ample justification for granting civil liberties a ''preferred position.'' First, protection of civil liberties is in accordance with the Constitution and the tradition of Western civilization. The purpose of a written constitution is to prescribe what government can and cannot do and to limit the exercise of the government's power in order to protect the liberty of the people. Civil liberties are vital in the maintenance of a democratic system of government. Second, the text of the Constitution implies that they will occupy such a preferred position. In particular, the language of the First Amendment declares in no uncertain terms: ''Congress shall make no law ...'' Finally, the Supreme Court is uniquely qualified to serve as the guardian of civil rights and liberties (see also Abraham, 22–28):

While there may be agreement that civil liberties occupy a preferred position, there are, nevertheless, competing approaches to the interpretation of provisions included in the Bill of Rights. Justice Hugo Black is known for his absolutist and literalist approach to the First Amendment. As Justice Black explained in Smith v. California, 361 U.S. 147 (1959): ''I read 'no law abridging' to mean no law abridging. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting those freedoms wholly 'beyond the reach' of federal power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are 'more important interests.'" Black argued that the ''balance'' sought by other justices in dealing with issues of expression was struck by the framers of the First Amendment in the eighteenth century. In declaring that ''Congress shall make no law ... '' the question of limits upon speech was answered once and for all: No laws infringing on the right to speak are consonant with the Constitution. (Casper, 29)

Black's absolutist–literalist position is in stark contrast to the balancing test (http://uscivilliberties.org/themes/3158-balancing-test.html) favored by justices who believe that the case for freedom must be balanced against the case for order and security (Pritchett, 30– 32). The clear and present danger test (http://uscivilliberties.org/themes/3610-clear-and-present-danger-test.html) was a form of balancing. A balancing approach was also employed by the Court when upholding the power of congressional investigation of communist activity in Barenblatt v. United States (http://uscivilliberties.org/cases/3167-barenblatt-v-united-states.html), 360 U.S. 109 (1959), in which Justice John Marshall Harlan II explained that there must be a ''balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.''

While Carolene's ''Footnote Four'' ushered in a new era of jurisprudence more attuned to the protection of civil liberties, especially during the Warren Court, justices have held contrasting positions regarding the role of the Supreme Court in protecting civil liberties. Two competing conceptions of the judicial role are ''judicial activism''—the Supreme Court must play an activist role in protecting civil liberties from government interference—and ''judicial selfrestraint''— the unelected, politically unaccountable justices should play a restrained role in socioeconomic legislation as well as legislation infringing on civil liberties and must not set aside government action unless that action is unreasonable.

The Supreme Court plays a unique role as a bulwark in the protection of individual rights and liberties. Alexander Hamilton, in Federalist No. 78, believed that the courts would serve as ''bulwarks of a limited constitution, against legislative encroachments'' and that they would ensure the enforcement of the Constitution as the supreme law of the land. Likewise, James Madison, in his speech presenting the Bill of Rights to the First Congress argued that ''If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights'' (speech before the U.S. House of Representatives, June 8, 1789).

Modern Challenges to Civil Liberties and the Bill of Rights

There is a need always to be vigilant in the protection of civil liberties. Even though the guarantees are written in the Constitution, the provisions must be interpreted and enforced by the courts. Chief Justice Charles Evans Hughes is reported to have said when he was governor of New York, ''We are under a Constitution; but the Constitution is what the courts say it is'' (Meiklejohn, 32).

The Supreme Court, in interpreting the Constitution, has not always lived up to its role as the ''bulwark'' of individual rights and liberties. For example, in the notorious Dred Scott decision (Dred Scott v. Sandford (http://uscivilliberties.org/cases/3716-dred-scott-v-sandford-60-us-393-1857.html), 19 How., 60 U.S., 393, 1857), Chief Justice Roger Brooke Taney held that persons of African decent were ''not included and were not intended to be included, under the word 'citizen' in the Constitution,

and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.'' In Korematsu v. United States, 323 U.S. 214 (1944), the Court upheld the internment of Japanese Americans during World War II.

Moreover, a shift in personnel on the Court can limit or overturn prior rulings that provided for more expansive protection of civil liberties. For example, the right of a woman to choose whether to terminate her pregnancy that was announced in Roe v. Wade has been upheld by the Rehnquist Court only by the slimmest of majorities. With the appointments of new justices, Roe could be overturned. Indeed, the National Abortion Rights Action League (NARAL) made Supreme Court composition an issue in the 2000 presidential campaign, putting the slogan ''It's the Supreme Court, Stupid'' on signs and bumper stickers in order to remind voters that the next president might have the opportunity to appoint a Supreme Court justice who could in turn decide the fate of the Roe precedent. Other scholars have argued that even when the Court hands down well-intentioned pronouncements, it is ineffective in producing significant social reform (Rosenberg, The Hollow Hope).

Moreover, each generation faces new challenges and setbacks in the effort to protect civil liberties. Throughout American history there are numerous examples of restrictions on civil liberties, especially during times of war: the Alien and Sedition Acts (http://uscivilliberties.org/legislation-and-legislative-action/3049-alien-and-sedition-acts-1798.html) of 1798; censorship of the press, suspension of habeas corpus, and expropriation of property during the Civil War; the Espionage and Sedition Acts during World War I (see also Civil Liberties in World War I); the Smith Act; the actions of the House Un-American Activities Committee (HUAC); Japanese internment during World War II (see also Civil Liberties in World War II); the treatment of antiwar demonstrators during the Vietnam War; and security concerns in the aftermath of 9/11 and the War on Terror (see also Civil Liberties in Wartime). For obvious reasons, it has been said that ''civil liberties and individual freedoms are one of the first casualties of war'' (Linfield, 4).

Justice Thurgood Marshall noted that ''history teaches us that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure'' (Skinner v. Railway Labor Executives Association, 489 U.S. 602, 1989). In balancing the need for national security against the protection of civil liberties, the Court has tended to side with the government in restricting individual liberty. For example, regarding the freedom of speech, Justice Oliver Wendell Holmes, Jr., explained that ''when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right'' (Schenck v. United States, 249 U.S. 247, 1919).

Chief Justice Rehnquist, in All the Laws but One: Civil Liberties in Wartime, explained that it would not be reasonable to believe that future wartime presidents would act differently than Presidents Lincoln, Wilson, or Roosevelt or that future Supreme Court justices would decide cases any differently than

past justices had (Rehnquist, 224). In the post-9/11 era, national security concerns and the War on Terror are used to justify infringement on civil liberties. Consider, for example, the controversial enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (115 Stat. 272) and the detention of enemy combatants at Guanta´namo Bay (see also Terrorism and Civil Liberties).

James Madison, in Federalist No. 48, expressed skepticism of the value of ‘‘parchment barriers’’ against ‘‘overbearing majorities.’’ American history has shown that we must be always on guard against infringements on individual rights and liberty, lest the Bill of Rights’ provisions become ‘‘mere parchment barriers.’’

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