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Civil Rights and Civil Liberties - United States

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Abstract

Civil Rights and Civil Liberties–United States: This 6,000-word essay, to be published in the Oxford Encyclopedia of Legal History, considers several issues concerning civil rights and civil liberties in the United States. First, it notes several problems with defining the topic. Second, it examines the historical conditions under which particular rights have gained popularity. Finally, the essay considers several issues involving the judicial enforcement of rights: the inclination and capacity of courts to defend unpopular rights; the enforceability of court decisions protecting rights; the unpredictable consequences of such rulings; and the characteristics of a right that render courts most likely to protect it.

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"Civil Rights and Civil Liberties–United States"
Michael J. Klarman

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This essay considers several issues concerning civil rights and civil liberties (hereinafter, "rights") in the United States. First, it notes several problems with defining the topic. Second, it examines the historical conditions under which particular rights have gained popularity. Finally, the essay considers several issues involving the judicial enforcement of rights: the inclination and capacity of courts to defend unpopular rights; the enforceability of court decisions protecting rights; the unpredictable consequences of such rulings; and the characteristics of a right that render courts most likely to protect it.

Definitional problems

All definitions of rights are problematic for at least three reasons. First, identifying the types of individual interests that ought to be protected from governmental interference is inevitably controversial. All laws prevent some people from engaging in certain types of behavior, and life in organized society would hardly be possible if government could not restrict certain individual actions. Still unsettled, however, is the question of which individual interests should qualify as rights, and thus be free from government regulation.

Two sample definitions illustrate this difficulty. That espoused by libertarians identifies as protected rights individual behavior that inflicts no harm on third parties. Yet defining what qualifies as cognizable third-party harm is itself controversial. For example, does the offense that one person may feel at simply knowing that others are engaged in certain behavior count as third-party harm? Moreover, few Americans would condemn all governmental regulation of behavior that inflicts no direct third-party harm. Mandatory seat-belt laws, motorcycle-helmet laws, and prohibitions on certain kinds of drug use are broadly accepted.

Another controversial method of identifying rights focuses exclusively on those that are enumerated in the Constitution. However, that document itself seems to foreclose this option by expressly denying–in the Ninth Amendment–that the enumeration of certain rights shall be

"construed to deny or disparage [the existence of] others." Moreover, a purely texualist method of identifying rights denies the possibility of "natural" rights that exist independently of government. Such an approach also limits future generations to the rights that were identified as important by the founding generation, unless a supermajority of the population can be mobilized to amend the Constitution to create additional rights. Yet different generations have valued different rights. For example, the rights to control one's reproductive choices and to choose one's sex partners have only recently been deemed fundamental. Why should the protection of such rights be foreclosed today simply because they were deemed unimportant–at least by affluent white men–two hundred years ago?

The second problem with defining rights has to do with their negative and positive dimensions. Negative liberty is freedom from governmental interference. Positive liberty is the existence of conditions that enable individuals to realize their potential or accomplish their objectives. These conditions may be attainable only through governmental intervention. Although some would treat the negative conception of liberty as axiomatic, both conceptions of rights have attracted support throughout American history. Even the founding generation, for example, would have regarded government's failure to protect against private trespasses on land as an interference with property rights, even though this is in fact a positive conception of liberty. So long as both positive and negative conceptions of rights have supporters, rights arguments are sure to exist on both sides of every significant policy dispute. Pro-choice advocates want women to be free from governmental interference with their reproductive choices; abortion opponents want the government to guarantee fetuses the right to life. The National Rifle Association wants citizens to be free from governmental interference with the right to keep and bear arms; residents of urban neighborhoods want the government to regulate guns so that they may exercise the right to walk their streets without constant fear of gun-related violence.

A third problem with defining rights involves the tension between a community's collective right to self-determination through the political process and an individual's right to be free from undue governmental interference. The individual right of women to reproductive choice is in tension with the political right of democratic majorities to regulate abortion. The individual right of gays and lesbians to be free of governmental discrimination based on sexual

orientation is in tension with the political right of democratic majorities to define the moral boundaries of their community.

For these three reasons, any definition of rights is bound to be contested.

Why Rights Expand

Definitional problems aside, particular rights have undeniably expanded over time. The right of free speech and the right against racial discrimination are more broadly defined and solidly protected today than they were a century ago. Under what conditions do rights expand?

Certain rights may become more attractive when associated with political causes that have gained popularity. During the first half of the twentieth century, for example, freedom of speech was closely identified with the labor movement; it generally connoted the right of labor unions to organize, picket, and boycott. As a result of the Great Depression and the New Deal, the political and social status of organized labor grew tremendously in the 1930s. By decade's end, the Supreme Court for the first time had extended First Amendment protection to such labor union activity as organizing, picketing, and pamphleteering. Similarly, in the 1950s and 1960s, free speech became intertwined with another burgeoning cause: the civil rights movement. Not coincidentally, many of the landmark free speech decisions of the Warren Court derived from civil rights controversies. That Court's criminal procedure rulings further illustrate the point. Most criminal defendants are poor, and a disproportionate number are members of minority racial groups. The 1960s witnessed both a civil rights movement and a War on Poverty, and many justices of the Warren Court conceived of criminal procedure issues in terms of race and wealth discrimination.

Certain rights also seem to expand during wartime–an ironic connection, given that the short-term consequence of war is often a constriction of liberty. Examples of wars restricting rights are legion. The military detention and trial of civilians was widespread during the Civil War. Federal prosecutions under the Sedition and Espionage Acts of 1917-1918 suppressed criticism of the Wilson administration's conduct of World War I, and during World War II Japanese Americans were evicted from their West Coast homes and relocated to internment camps. Yet wars have also advanced rights in the longer term, especially by expanding the pool

of beneficiaries. The Revolutionary War led to the emancipation of slaves by northern states and a temporary increase in individual manumissions in some southern states. The Civil War not only emancipated the slaves but also expanded the civil and political rights of freedpersons. Women received the right to vote through federal constitutional amendment during World War I. The second world war inspired the modern civil rights movement and proved fertile ground for speech rights, especially those of labor unions and Jehovah's Witnesses.

Wars may advance particular rights for several reasons. First, Americans tend to define their war aims in democratic terms. The purpose of World War I was "to make the world safe for democracy," and the objective of World War II was to defeat fascism. To be sure, most white southerners supported a war against fascism without sacrificing their own commitment to white supremacy. Yet other Americans, less invested in Jim Crow, saw inconsistency in fighting Nazi doctrines of Aryan supremacy with a racially segregated army. Supreme Court justices, unable to reconcile the war's democratic ideology with the continued disfranchisement of southern blacks, invalidated the exclusion of blacks from Democratic Party primaries in 1944. Invoking thinly veiled references to eugenic experiments by Nazi scientists, the Court in 1942 declared unconstitutional the sterilization of recidivist criminals. In 1940 the justices, alluding disparagingly to the law enforcement tactics of totalitarian regimes, reversed criminal convictions that had been obtained through the use of psychologically coerced confessions.

The social upheaval produced by war has also promoted the expansion of certain rights by undermining traditional patterns of status and behavior. The Civil War, of course, entailed a cataclysmic disruption of the existing racial order. The women's suffrage movement, which had long failed in its efforts to amend the federal constitution to enfranchise women, triumphed during World War I, when military and industrial mobilization reduced the male labor supply and forced popular acceptance of women in nontraditional economic and social roles. Similarly, the extraordinary personnel demands of World War II created new civil and military opportunities for African Americans, thus accelerating the demise of traditional patterns of racial subordination. Blacks moved from the South to the North and from farms to cities, enhancing their political power and their ability to organize social protest. Many returning black soldiers refused to endure Jim Crow any longer. The war also upended the international political order,

liberating African and Asian nations from colonialism and forcing Americans to choose between abandoning white supremacy and sacrificing their pretensions to world leadership.

Lastly, because war generally involves common sacrifice for the general good, it has inescapably egalitarian implications. The sacrifices made by former slaves on Civil War battlefields helped secure postwar constitutional amendments guaranteeing blacks basic civil and political rights. The military contributions of Catholics during World War I accelerated their assimilation into America's cultural mainstream. If African Americans were good enough to fight and die for their country during World War II, then they were surely good enough to vote and to deserve federal government protection from lynching and other racially motivated violence.

Nor are wars and social reform movements the only contexts in which rights flourish. Paradoxically, rights have also expanded as a result of overzealous opposition to them. The Sedition Act of 1798, which Federalists enforced aggressively against Jeffersonian critics of the Adams administration, apparently generated a backlash against seditious-libel prosecutions and in favor of freedom of speech. Mob violence against abolitionist speakers and newspaper editors in northern states during the 1830s–violence that included tarring and feathering, the destruction of printing presses, and even murder–produced a countermovement favoring freedom of speech for antislavery agitators. Two thousand criminal prosecutions under the Espionage and Sedition Acts during World War I–targeting not only anarchists and communists but also socialists, pacifists, and civil libertarian critics of the Wilson administration–inspired the creation of the American Civil Liberties Union and probably facilitated the Supreme Court's expansion of free speech rights a decade later. The Nazi Holocaust ironically fostered religious toleration for American Jews. Most famously, nationally televised scenes of police brutality against civil rights demonstrators in Birmingham and Selma, Alabama, repulsed northern viewers and inspired the enactment of landmark civil rights legislation in 1964 and 1965.

Conditions under which courts enforce rights

A variety of governmental institutions have the capacity to identify and protect rights. One typically thinks of courts as the primary guardians of rights, but legislatures and executives

fill that role as well. An executive order by President Harry S Truman first created a right to be free from race discrimination in the federal military and civil service. In 1964 Congress created a right against racial discrimination in private employment and in public accommodations. Yet even those rights first recognized elsewhere generally depend on the courts for their ultimate enforcement. Moreover, political officers are commonly thought to be less likely than judges to protect rights that are not supported by public opinion. In *Chambers v. Florida* (1940), Justice Hugo Black proudly proclaimed the special obligation of courts to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement."

Yet history reveals that judges have little inclination or capacity to play this heroic countermajoritarian role. Because judges are themselves products of contemporary culture, they are unlikely to interpret the Constitution in ways that deviate significantly from prevailing views. Thus, the Supreme Court not only failed to take steps to end the greatest interference with rights in American history–African-American slavery–but actually intervened several times in defense of the institution. Likewise, the Court upheld racial segregation and black disfranchisement during most of the Jim Crow era, sustained seditious-libel prosecutions during World War I, validated Japanese-American internment during World War II, sanctioned the persecution of political leftists during the McCarthy era, and upheld government-mandated sex discrimination until after the emergence of the women's movement in the late 1960s.

The perhaps inevitable tendency of jurists to side with the majority has a natural ally in the conventional sources of constitutional law. Those sources–such as text, original understanding, precedent, and custom–are usually vague enough to accommodate dominant public opinion. When the Court decided *Plessy v. Ferguson* (1896), for example, these legal sources did not plainly bar racial segregation. "Separate but equal" seemed consistent with "equal protection"; the original understanding of the Fourteenth Amendment seemed to tolerate segregation; and judicial precedent strongly supported the practice. At a time when most white Americans favored racial segregation, the justices in *Plessy* easily sustained it.

The judicial accession to majority views, whether conscious or otherwise, means that oppressed minority groups most in need of judicial protection are least likely to receive it.

Groups must command significant social, political, and economic power before they become attractive candidates for judicial solicitude. The justices would not have dreamed of protecting women or gays under the Equal Protection Clause before the women's movement and the gay rights movement. Similarly, the Court objected to racial segregation and black disfranchisement only after African Americans became a vital New Deal constituency and began to achieve middle-class status and professional success, earning federal judgeships, a Nobel Peace Prize, and a military generalship. Justice Felix Frankfurter once noted that had a school segregation case reached the Court in the 1940s, he would have voted to sustain the practice because "public opinion had not then crystallized against it."

Judges lack not only the inclination but also the institutional capacity to protect unpopular minority groups. In *Giles v. Harris* (1903), Justice Oliver Wendell Holmes conceded that even if Alabama law disfranchised blacks in violation of the Fifteenth Amendment, the Court was powerless to provide a remedy, which must come instead from the political branches of the national government. In *Korematsu v. United States* (1944), Justice Robert H. Jackson's dissent insisted that the Court was powerless to interfere with military operations during World War II, including the eviction of Japanese Americans from their West Coast homes. When the Court invalidated school segregation in 1954, its subsequent remedial order condoned delay because the justices feared the consequences of issuing an unenforceable ruling and because they doubted, with good reason, the willingness of Congress and the president to enforce an order for immediate desegregation.

The limited inclination and capacity of judges to frustrate dominant public opinion explains why so many of the Court's famous decisions protecting rights do little more than convert a national consensus into a constitutional command that brings into line a few renegade states. *Griswold v. Connecticut*(1965), which ruled that the Constitution protects the right of married couples to use contraceptives in the privacy of their bedrooms, invalidated the laws of only two states. *Pierce v. Society of Sisters* (1925), which announced that parents have a constitutional right to send their children to private schools, affected the laws of only one state. Numerous landmark Court rulings have implicated the laws of only a handful of (often southern) states that had persisted in rejecting a strong national consensus: *Lawrence v. Texas* (2003) (the

right of consenting adults to participate in homosexual sex in the privacy of their bedrooms); *Plyler v. Doe* (1982) (the right of children of illegal aliens to receive public education); *Coker v. Georgia* (1977) (the right not to be executed for commission of the crime of rape); *Harper v. Virginia Board of Elections* (1966) (the right to vote without paying a poll tax); *Gideon v. Wainwright* (1963) (the right of indigent defendants charged with felonies to state-appointed counsel); and *Smith v. Allwright* (1944) (the right of blacks to participate in Democratic Party primaries). Courts are far more likely to bring outlier states into conformity than to rescue powerless minorities from majoritarian oppression.

Even in the civil rights context, courts played a more passive role than is commonly appreciated. *Brown v. Board of Education* (1954), the most celebrated civil rights decision of all time, was rendered possible only by the dramatic changes in racial attitudes and practices that were inaugurated or accelerated by World War II. In the 1920s, when a decision invalidating public school segregation would have been dramatically countermajoritarian, the justices unanimously–and casually–endorsed the practice. Nor did *Brown*, once decided, produce significant results before the political branches of the national government had mobilized behind it. That mobilization was a result of the civil rights movement, not of *Brown*, and the former had less to do with the latter than is commonly supposed.

To be sure, the Court does occasionally protect rights that do not command majority support–for example, the right of public school students to be free from collective religious observances and the procedural rights of criminal defendants. Yet even these rulings came only after strong majoritarian opposition had declined. The Court invalidated prayer and Bible reading in the public schools only after the evisceration of America's unofficial Protestant establishment. The criminal procedure revolution of the Warren Court was a result of shifting public attitudes toward race and poverty and of revulsion toward the law enforcement practices of totalitarian regimes.

Effectiveness of judicial enforcement

Even when courts declare the existence of a right, effective enforcement does not automatically follow. Numerous factors influence the efficacy with which rights are

implemented. When the beneficiaries of a right are united and impassioned, judicial enforcement is likely to be more efficacious. *Smith v. Allwright*, which invalidated the white primary, had a more immediate and sizable effect on black voter registration than *Brown* had on school desegregation, in part because southern blacks were more committed to procuring voting rights than integrated schools. Many southern blacks calculated that the right to vote would secure other rights through political action. By contrast, they were divided over the desirability of integrated education because segregated schools offered several advantages: job opportunities for black teachers at a time when few white-collar occupations were open to blacks, an educational environment relatively free from the stereotyping and humiliation that black children often experienced in integrated schools, and more sympathetic portrayals of black history and culture.

Another factor that influences the efficacy of rights enforcement is the intensity of opponents' resistance. Southern whites were less resistant to black suffrage and to the desegregation of higher education than they were to the desegregation of grade schools. By the 1940s many moderate whites in the South favored removing barriers to black political participation; black disfranchisement was comparatively difficult to justify in light of advances in black education and the democratic ideology of World War II. Many southern whites also supported black efforts to desegregate professional and graduate schools. By contrast, most white southerners adamantly opposed grade school desegregation, which involved young children, male and female, and thus for most whites connoted eventual miscegenation.

The enforceability of constitutional rights also varies according to the ease with which deprivations can be established. White southerners discovered early on that the most effective way to evade federal constitutional mandates was to delegate discretion to local administrators, who could maintain white supremacy without openly violating the Constitution. This is how southern blacks were excluded from jury service, disfranchised, and denied their fair share of public education funds. As blacks became better educated, however, voter registrars had a harder time seriously maintaining that black applicants had flunked literacy tests routinely passed by less well-educated whites. By contrast, a black defendant who crossed swords at trial with a white sheriff over whether his confession was voluntarily given found himself hard pressed to

convince white fact finders that his account was true. The attractiveness of rights-bearers also affects enforceability. Whites found it more difficult to empathize with black criminal defendants–indigent, often illiterate, frequently guilty of some crime even if not of the one charged–than with middle-class, well-educated blacks who endeavored to vote or attend public universities after World War II.

The relative availability of sanctions against violators also influences the enforcement of rights. Before the 1960s, law enforcement officers and jury commissioners had few incentives to respect the constitutional rights of black criminal defendants because civil and criminal sanctions were generally unavailable. By contrast, after *Smith v. Allwright*, voter registrars and party officials who refused to allow blacks to vote in party primaries were vulnerable, at least theoretically, to federal criminal sanctions. Recent precedents had also authorized civil suits for damages in voting rights cases. One reason that southern school boards successfully resisted *Brown* for so long is that the first school desegregation lawsuits never sought money damages, because of the well-founded supposition that white jurors in the South would not impose liability on public officials for resisting school desegregation. Indeed, the constitutional guarantee of a jury trial before the imposition of significant criminal or civil liability can be a huge impediment to the enforcement of any right that is unpopular in a locality.

Whether enforcement is sought by public or private means also affects a right's implementation; public enforcement is likely to be more efficacious. To be sure, the disparity is due in part to the fact that governmental actors rarely mobilize in support of a principle without the backing of the public at large. But the Justice Department and state and local prosecutors command far greater resources than do individual litigants, while bearing comparatively few risks. Thus, the pace of public school desegregation accelerated dramatically after the 1964 Civil Rights Act authorized suits by the Attorney General. Public enforcement also offers remedial options that are typically unavailable to private litigants, such as threats to terminate public funding for rights violators.

Individual litigants, by contrast, not only lack resources and stature but also may face economic reprisals, social ostracism, and even physical violence. Had *Plessy v. Ferguson* (1896) come out the other way, southern railroads would likely have remained segregated,

because blacks testing a right to nonsegregated travel would have jeopardized their lives in an era of rampant white-on-black lynching. By the 1950s lynchings were nearly obsolete, but civil rights litigants risked daunting economic reprisals. Because they feared retribution, blacks in Mississippi did not bring a single school desegregation suit until nearly a decade after *Brown*.

Effective lawyering is also essential to the enforcement of rights. Civil rights victories produced such meager results before World War II in part because few black lawyers practiced in the South; those who did were often badly educated and poorly trained. Most white lawyers would not take civil rights cases because of the stigma that attached. The National Association for the Advancement of Colored People (NAACP) had limited resources, was absent from much of the South until the 1940s, and was permitted to intervene only with the assistance of local counsel. Black criminal defendants were usually poor, and the court-appointed lawyers they received in capital cases often failed to challenge even clear violations of constitutional rights. By contrast, blacks who challenged violations of their voting rights were able to hire their own lawyers. After World War II, more white lawyers were willing to take voting rights cases, and more and better-trained black lawyers were practicing in the South.

The problems associated with poor lawyering and private enforcement can, however, be offset by the existence of an organization able to capture the benefits of litigation, while spreading the costs and the risks. In the civil rights context, isolated court victories made no meaningful difference. Follow-up litigation was invariably required to implement rights on a broader scale, and only a robust NAACP made it possible. Individual rights claimants, whether criminal or civil, can rarely afford the considerable sums necessary to litigate cases through the appeals process; civil litigants also face considerable personal costs, such as public opprobrium and the near total disruption of their lives. Only organizations such as the NAACP and the American Civil Liberties Union (ACLU), which represent individuals collectively, can effectively orchestrate litigation aimed at social reform. Without the vast expansion of the NAACP during and after World War II, the legal assault on Jim Crow could not have advanced very far.

The nature of the court in which rights violations are litigated also affects enforcement. State appellate and federal judges, better educated and more insulated from local opinion than

state trial judges, were better able to vindicate the constitutional rights of southern blacks. Unfortunately, the cases of black criminal defendants usually did not proceed beyond trial courts, primarily because state provision of counsel to the indigent did not generally extend to appeals, but also because procedural defaults frequently insulated trial errors from appellate review. By contrast, blacks litigating voting rights violations were free to choose their forum, and they usually selected federal court. They also tended to command the resources necessary to pursue appeals to courts that were more likely to sympathize with their claims.

The clarity of legal instructions formulated by higher courts also influences the implementation of rights by lower courts. Even though most federal judges in the South thought *Brown* was wrongheaded, their sense of professional obligation generally deterred them from openly defying it. Yet *Brown II*, which ordered school desegregation "with all deliberate speed," was so vague as to be meaningless. This standard enabled segregationist judges to condone delay and evasion with ease, and it provided the few southern jurists who supported desegregation with no political cover.

Even when controlling law is comparatively clear, however, rights litigation can only redress problems that are grounded in law. The Court's invalidation of all-white primaries meant little at a time when blacks in the Deep South still risked serious reprisals for attempting to vote. School desegregation litigation ultimately had a limited integrative effect because of segregated housing patterns and white flight. Even if courts had greater enforcement powers, their tendency to define constitutional rights as negative constraints on government rather than as entitlements to positive governmental intervention would limit the utility of rights litigation. Because white supremacy depended less on law than on entrenched social mores, economic power, ideology, and intimidation, the amount of racial reform that litigation could produce was inevitably limited.

Judicial enforcement of rights is further undermined when resistance is geographically concentrated. *Roe v. Wade* (1973), which invalidated most criminal prohibitions on abortion, divided national opinion just as *Brown* did. But opposition to *Roe* was spread throughout the nation rather than concentrated in one region. Virtually all white southerners disagreed with *Brown*, and in the 1950s whites had most of the political, economic, social, and physical power

in the South. This meant that virtually all officials who were responsible for enforcing *Brown*–school board members, judges, jurors, politicians, and law enforcement officers–disagreed with it. Such domination of the political and judicial machinery by a group so unified on the salient issue presents a formidable challenge to the enforcement of rights.

The contrast between *Brown* and *Roe* illuminates another factor relevant to the enforcement of emerging rights: market forces. Regardless of how much opposition there was to abortion, capitalism ensured the development of a market to supply what those exercising the *Roe* right demanded: abortion services. *Brown* created no comparable market opportunities because hardly any southern whites wanted grade school desegregation. Anyone who established private integrated schools after *Brown*, performing a market function analogous to that of abortion clinics after *Roe*, would have done a very poor business indeed.

One potential conclusion is ironic and unsettling: judicial enforcement of rights is least effective when rights-bearers are most desperately in need. Not only is the Court, which generally reflects prevailing social mores, unlikely to side with litigants who lack significant social standing, but even when such parties have established rights on their side, the power to enforce them is lacking. When southern blacks were most oppressed, they were unable to bring suits to challenge the enormous, and obviously unconstitutional, racial disparities that existed in school funding. Challenges to criminal convictions obtained in trials that were conducted while mobs surrounded the courthouses reached the Court only in the 1920s and 1930s, when racial conditions in the South had improved enough for liberal organizations to support such cases. Litigation requires willing lawyers, economic resources, and some measure of protection from majority hostility. Because the truly oppressed are likely to have none of these things, the doors of the courts may as well be closed to them.

Unpredictable Consequences of Court Decisions

Not only are court decisions sometimes difficult to enforce, but their consequences may be unpredictable or even counterproductive. Indeed, many landmark Supreme Court rulings that protect rights have generated powerful political backlashes that have threatened to undermine those very rights. *Miranda v. Arizona* (1966) not only expanded the rights of criminal suspects

but also fueled Richard Nixon's presidential election on a law-and-order platform, which in turn led to the appointment of federal judges who were less sympathetic to such rights. *Furman v. Georgia* (1972), which invalidated arbitrary applications of the death penalty, apparently mobilized popular support for capital punishment; within four years of the ruling, thirty-five states had amended their death penalty statutes to address the Court's constitutional qualms. *Roe v. Wade* mobilized right-to-life opposition that had not previously played a significant role in American politics. Within a few years of the Hawaii supreme court's 1993 ruling that marriage could not be limited to heterosexuals, more than thirty states and Congress had passed "Defense of Marriage" acts.

Brown produced precisely this sort of backlash. As southern blacks, inspired by the Court's ruling, filed school desegregation petitions and lawsuits, southern whites mobilized extraordinary resistance in response. Southern politics moved dramatically to the right, racial moderates collapsed, and extremists prospered. Progress in the areas of black voter registration, university desegregation, and the integration of athletic competitions was halted and then reversed. Politicians used extremist rhetoric that encouraged violence; some of them, such as Bull Connor and Jim Clark, correctly calculated that the violent suppression of civil rights protests would win votes.

Judicial decisions cause such backlashes because they disrupt the order in which social change might otherwise have occurred. In the early 1950s, most southern blacks were more intent on securing voting rights, curbing police brutality, improving black schools, and winning access to decent jobs than to integrating grade schools. Most southern whites shared a partially inverse hierarchy of racial preferences: They were far more resistant to desegregating grade schools than they were to making concessions on black voting or equalized school funding. Given these preferences, absent *Brown*, political negotiation between blacks and whites over racial reform was unlikely to have focused on grade school desegregation so soon. But courts respond to agendas set by litigants, not politics. By demanding change first in an area where whites were most recalcitrant, *Brown* incited massive resistance.

Yet judicially induced backlashes may themselves have unpredictable consequences, thus further complicating efforts to assess the importance of civil rights decisions. The white-on-

black violence that *Brown* ignited, especially when directed at peaceful protestors and broadcast on national television, produced a counter-backlash. In 1954 most northerners agreed with *Brown* in the abstract, but their support was too tepid to offset the determined resistance of southern whites. It was the violence against peaceful civil rights demonstrators that transformed national opinion on race and led to the enactment of landmark civil rights legislation.

Rights that courts are likely to protect

The complexities of defining rights that were discussed earlier enable courts to exercise broad discretion when deciding which rights to protect. In the nineteenth century, courts were more likely to protect contract and property rights; in the second half of the twentieth century, they were more likely to protect the right of free speech and the right against racial discrimination. Their discretion has never been unfettered, however, and contemporary public opinion–much more than conventional legal sources–significantly constrains judicial volition when it comes to defining rights. For example, Supreme Court justices were not about to identify a right against racial segregation in public schools until the dramatic changes in racial attitudes and practices had swept the nation around World War II.

Yet the fact that public opinion constrains judicial discretion does not mean that it eliminates it. Within the bounds set by contemporary culture, which rights are courts most likely to protect? Much depends on the personal predispositions of judges. When southerners and Democrats controlled the antebellum Court, the justices protected the rights of slave owners to the return of fugitive slaves and to carry slaves into federal territories without interference from the national government. New Deal Democrats favored the free speech rights of labor unions and of racial and religious minorities. Over the pasttwo decades, conservative Republicans on the Court have favored the rights of whites not to be disadvantaged by affirmative action and minority voting districts, the right of property owners to be compensated for regulatory interferences with the value of their land, and the right of organizations such as the Boy Scouts to exclude people based on their sexual orientation.

Though judges are likely to protect rights that resonate with their own values, those values are not a random sample of those held by Americans at a particular point in time. Judges

are not perfect mirrors of contemporary society. At a minimum, they differ from average Americans in three ways: They are more likely to be lawyers, to be well educated, and to be relatively affluent. These systemic differences undoubtedly influence the sorts of rights that courts deem worthy of protection. Lawyers tend to value judicial process, and judges have historically been more protective of the procedural rights of criminal defendants than has the public at large. Opinion polls reveal that well-educated people have significantly different–that is, more liberal–attitudes toward abortion, school prayer, and gay rights than ordinary Americans. Thus, even after three decades of Court appointments by mostly Republican presidents, the justices remain more willing to protect abortion rights, to ban school prayer, and to invalidate anti-gay legislation than is the average American. Finally, affluent people are more likely to oppose wealth redistribution than are average citizens. Over the course of American history, the Supreme Court has frequently checked legislative efforts to redistribute wealth; on the very rare occasions when it has mandated redistribution, it has done so only in the mildest of forms.

In the end, courts may be more inclined and better able to protect some rights than others. But the overall contours of freedom in American society are more dependent on public opinion than on judicial rulings. Most of the rights that courts choose to protect are solidly supported by public opinion. On the few occasions when this is not so, judicial enforcement is unlikely to be efficacious. The great jurist Learned Hand had it just about right:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.

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