

**“...FREEDOM AND JUSTICE FOR ALL”:
The Continuing Struggle**

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Justice and Liberty for All: The Continuing Struggle

“The Sacred Rights of Mankind are not to be rummaged for, among old parchments, or musty records. They are written as with a Sun Beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power.”

~Alexander Hamilton

The Constitution of The United States is the “Supreme Law of the Land.” Its purpose is to lay out the form of government, its powers, the judicial system, and among other things the rights and liberties of the people. The constitution, as first adopted, did not lay out what our natural rights are. The preamble states: “We the people[...]establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” What these statements each mean has been a matter of real debate and interpretation by the people and the courts. In looking through the history of the United States, we find that many classes based on race, ethnicity, gender and sexual orientation have been denied those rights. In order for minority classes to be afforded their natural rights, the constitution has been amended 26 times. This situation could be interpreted as our system of justice working to protect the rights of the oppressed. In actuality, however, as we examine at the struggle to gain those “god given rights” we find that time and again it takes decades, even centuries to right the wrongs. While justice may be slow at times, this time lag is an indication that not only is there no simple solution, but our constitution does not, in fact, protect the minority from majority rule.

Our constitution was framed to protect us from unwarranted government intrusion. With the members of congress and the president being elected by majority vote, the majority has a greater voice in government. In 1866, Senator Jacob Howard (Michigan) expressed this sentiment: “[The Fourteenth Amendment] establishes equality before the law, and it gives to the humblest, the poorest, and the most despised... the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That sir, is republican government, as I understand it, and the only one which can claim the praise of a just government.”¹

The constitution was adopted in 1787, 11 years after the Declaration of Independence. It codified the natural rights of the people. However, this was not sufficient to protect our rights. While the Declaration of Independence states that all men are created equal, there has been a constant struggle, through the history of the United States of America, for certain groups to be afforded the protection of those liberties as a matter of law. From the beginning, slavery was legal, and women were not given the right to vote. In the constitution, African-Americans were determined to be 3/5 of a person. There have been laws preventing African-Americans from being educated and laws preventing women from voting or joining certain professions, such as law and medicine.

During the debates prior to the writing of the Constitution, there were two main factions, the Federalists and the Anti-Federalists. The Federalists were for the Constitution as is written, and the Anti-Federalists, who felt that the constitution did not protect the individual rights, wanted a stronger federal government. Actually one federalist, Alexander Hamilton, believed

that the Constitution went too far. He wrote, “Any enumeration of federal rights might be too limiting, carrying with it the implication that any right not included did not exist.”² This concept would be disproved many times. The laws that have been passed that discriminate and are contested in court are only found to be unconstitutional if they are determined by the court that the Constitution provides for those rights.

When the constitution was being written, there were many discussions and disagreements on how to protect the rights of the people. Anti-Federalists were not about to pass the constitution without more protection for the people and as the result they and the Federalists came to an agreement to draw up amendments further delineating our rights. After the ratification of the constitution, 12 amendments were introduced for consideration. Of these 10 were ratified, giving us the Bill of Rights.

Even with the addition of The Bill of Rights, the Constitution has had to be amended 16 more times. Many of the Amendments have afforded classes of people their natural rights. However, these are subject to interpretation, and the philosophical makeup of the court is often a determining factor in deciding the outcome of the cases. For example the Fifth Amendment states “nor shall any person [...] be deprived of life, liberty, or property, without due process of law”. Because the constitution does not define life, liberty and property, there is latitude to determine the scope of the rights. Although the constitution does not specifically say that there is a “right to privacy”, in recent history, the Supreme Court has determined that there is a constitutional right to privacy under our right to liberty. However, there are those who disagree with this interpretation. To determine the scope of our human right of liberty, we have to define “liberty”. Human Rights in the United States: A Dictionary and Documents, states it is “freedom from arbitrary or despotic control, and freedom to be subject and follow the rule of law.”³ In recent years, since the abortion issue has been taken up, there have been great debates over when life begins. Some would determine it to be at conception, others believe it to be when the fetus becomes viable if born, and still others believe it to be at birth. This is an important issue because this can change abortion laws and criminal acts, such as murder. Different state legislatures are free to pass laws regarding this but the final say would be the Supreme Court when they take on cases with that issue. The US Supreme Court has jurisdiction because the right to life is a constitutional issue.

Another factor that keeps unconstitutional laws in effect is that if a case were brought before them, which raises a non-constitutional issue and raises a constitutional issue, the Supreme Court would rather not rule on the constitutional issue if they can strike the law on non-constitutional issues.

Throughout the 230 years, since the founding of our nation, there is ample evidence that the Anti-Federalists were correct in their belief that the Constitution did not go far enough in protecting the individual rights of the citizens. As a nation, we view ourselves as the guardians of human rights, yet our history does not stand up to scrutiny. Warren E. Burger wrote, “We were the first people in history to found a nation on the basis of individual rights — a nation governed by ‘we the people.’ We have learned not just by studying the ‘old parchment,’ but by living out their promise.”⁴ I find that ironic since we are the first country to be founded in the idea that the government is there to protect our rights, but we have had monumental cases demonstrating the

suppression of those rights to whole classes of people. One outstanding example would be *Dred Scott v. Sanford* case.

There have been laws governing the activities and rights of minority classes from the beginning of the formation of the US. Many of these oppressive laws have been over turned through the tireless work of suffragists, Frederick Douglass was active on many fronts. He was an abolitionist as well as a key figure in the women's movement.

African-Americans have had to fight for basic dignity under the law since the conception of the Constitution. In the beginning, the way around granting African-Americans liberty was to declare them property and not citizens. The constitution states: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour But shall be delivered up on Claim of the Party to whom such Service or Labour may be due"

Even when particular states were ready to declare African-Americans citizens the US Supreme Court declared it unconstitutional. In the opinion of the now famous Dred Scott case, (*Scott v. Sanford, 1857*), Chief Justice Roger Taney wrote, "[Dred Scott] is not a citizen...and is not, therefore, entitled to sue in the United States courts."⁵ Tandy also declared the Missouri Compromise unconstitutional because it could not deprive a citizen of his property without due process of the law as guaranteed in the Fifth Amendment. He added that since a slave was property, slavery could not be banned in the territories. It was not until the thirteenth Amendment was adopted in 1865 that African Americans were recognized as citizens. However, they still faced an uphill battle. Once again, the laws enacted by the states interfered with the rights of those most needing protection. Poll taxes and laws prohibiting the illiterate were adopted. These laws directly affected the freed slaves, as it was unlikely that they would be able to afford the poll taxes. In addition, since most lacked an education they would not be deemed literate. Recognizing that the thirteenth amendment would not protect African Americans, the fourteenth and fifteenth amendments were passed.

Women, who had hopes that they would benefit by the civil rights bill had lessened their fight for women's rights and taken up the cause for African Americans. This action, however, did not prove to be fruitful for women to have equal protection under the constitution. Laws discriminating against women were still in force, and women were not considered equal to men. In the aftermath of the passage of the thirteenth, fourteenth, and fifteenth amendments, the woman suffragettes, and their supporters, picked up their fight for equality with a renewed determination. They were angered that they did not receive the benefits of the amendments and refused to sit back and let their voices be thwarted.

This concept is expressed by over a century of women fighting for the right to vote. Samuel May expressed his dismay at this inequity: "But some would eagerly ask, should women be allowed to take part in the constructing and administering of our civil institutions? Allowed, do you say? The very form of the question is an assumption of the right to do them the wrong that has been done them. Allowed! Why, pray tell me, is it from us their rights have been received? Have we the authority to accord to them just such prerogatives as we see fit and withhold the rest? No! woman is not the creature, the dependent of man but of God. We may

with no more propriety assume to govern women than they might assume to govern us. And never will the nations of the earth be well-governed until both sexes, as well as all parties, are fairly represented and have an influence, a voice, and, if they wish, a hand in the enactment and administration of the laws.”⁶

Elizabeth Cady Stanton was an early suffragette, who worked tirelessly for the rights of women. She wrote the Declaration of Sentiments that was based on the Declaration of Independence. It was a Declaration of Rights for women. In it she stated: “Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.”⁷ This declaration was introduced in 1848 at the first Women’s Rights Convention in Seneca Falls, New York. Yet it was not until 61 years later that women were given the right to vote and 110 years later the right to sit on juries. Is this justice for all? Rather, this is an example of the abuse of power, by the legislature and the courts. Only one signer of the Declaration of Sentiments, 19-year-old Charlotte Woodward, was still alive to see women get the right to vote.

Wyoming became the first state to pass a law granting women the vote. Between 1893 and 1918, states were passing amendments granting women the right to vote, but it was not until 1920 that the 19th amendment giving women the right to vote was adopted. The National Woman's Party started by Alice Paul and Lucy Burns in 1917 was a major force behind its passage. When the nineteenth amendment finally passed everyone in attendance “broke into a spontaneous hymn of praise.”

Other restrictions were placed on women that disenfranchised them of their constitutional rights. Women were not able to sit on juries. When a woman married, any property that she owned coming into the marriage became the property of the husband. Women were forbidden from entering certain professions, such as the law and medicine.

Although it was not stated in the constitution, women were not allowed to sit on juries. This raised constitutional issues as women were not afforded the right to have juries of their peers. A woman on trial would not be afforded that right until the middle of the 20th century. There were also laws denying women property rights and in favoring men in divorce and custody laws. These laws were slowly overturned. Although these laws are no longer in effect, society has not been willing to change its views on women merely because the laws had changed. It has been an ongoing struggle for women to rise to power. While the court of public opinion may be slow to change, it is up to the courts to insist, through their decisions, that the rights of all are upheld.

When we pass laws out of fear, we run the risk of denying basic human rights to those we fear. In World War II, in response to the fear of attack by the Japanese, we sent all Japanese Americans to internment camps. In *Hirabayashi v U.S.*, the US Supreme Court ruled the camps unconstitutional, stating, “We must never forget, that it is a *constitution* we are estounding, a constitution intended to endure for ages to come, and, consequently, to be adapted to various *crisis* of human affairs.”⁸ While our judicial system did right this wrong, there were thousands of

men, women, and children affected by this fear-based law. We are again in a time of fear. In rushing to protect our nation from terrorists, we have chosen to ignore the basic natural rights of those captured and labeled as enemy combatants. We have also seen the erosion of our basic rights as citizens. With the Patriot act came freer wiretapping laws; searches and seizures of medical and business records were easily accessed by the government without adequate protections. Under the guise of national security, the government has effectively stripped us of some of our most cherished rights. The fear that was felt by all, and this allowed our leaders to forget that they were the custodians of our rights, and they abdicated their role. Instead of learning from the misguided attempts at security with the formation of the Japanese internment camps, we chose the easy path. The result was a divided country and distrust of our leaders.

We are now in a historic era. There is great turmoil over the rights of gays and lesbians. Laws regarding sodomy, adoption by homosexuals, and gay marriage are in the news on a daily basis. We see laws being passed refusing gays the right to marry and some courts upholding those laws and others overturning them. State constitutions have been amendment denying the right for gays to marry. Under our liberties granted in the constitution, we have the right to marry. This does not say heterosexuals have the right to marry. With these laws, the stated are denying a whole class of people this constitutional right. This is an example of majority rule suppressing the right of the minority. It also is an example of how public policy is dictating the law with the outcome being the disfranchisement of that group.

While the Constitution was designed to protect the minority from the majority, this has not proven not to be the case in many instances. Many laws were upheld by the Supreme Court repeatedly even though they were unconstitutional. The justification in the opinions are often based on what public policy is, and as public policy is often based on the majority view on what is good for society, this, in itself, is an excuse to discriminate. In addition, it is considered appropriate to uphold a law based on the history of upholding the particular interpretation. If this interpretation interferes with the liberties of some then that needs to be changed. Some recent cases have been *Bower v Hardwick* that upheld a law banning sodomy between homosexuals because of a moral code. While *Bower* was eventually overturned in *Lawrence v. Texas*, 539 U.S. , 123 S.Ct. 2472 (2003), this is an example of the will of the majority trampling on the constitutional rights of the minority. The court was unwilling to uphold *Bower v Hardwick* in *Lawrence v. Texas*. Justice Kennedy writing the majority opinion stated: “[...]but this Court’s obligation is to define the liberty of all, not to mandate its own moral code.”⁹

On another note, if we look at the sheer numbers of prisoners on death row having their convictions vacated as the result of being found innocent after DNA results prove them innocent, we need to question the efficiency of the judicial system. If a man is on death row for over 20 years when he is innocent, this directly contradicts the view that it is better to free the guilty than to convict one innocent person. It is obvious that if there are so many found innocent, many more men who are innocent will never get justice. Many times, a prisoner is denied the right to a new trial due to technicalities and the rules of the court. This would indicate that not only have innocent people been found guilty, but also there have been innocent people put to death.

There have often been attempts by the government to erase the inequities that have interfered with certain classes of people to partake in society on a level playing field. These laws

would include affirmative action, American disabilities act and gender discrimination laws. After hundred years of oppressive laws, our legislators have finally come to understand that those inequities will not just right themselves. While it may be inconvenient for those who have benefited from the laws written in ways that are slanted towards their success at the expense of others, it is not the intent of our founding fathers to oppress anyone. In the overturning of some of these unfair laws, judges have often been given the derogatory label “activist”. The constitution lays out our natural rights, and then it is up to the judges have to determine if a particular behavior falls within those rights. They also have to determine if there has been a repression of those rights. It is easy to call a judge an “activist judge”. It is much less easy to put aside our moral compasses and really view an objectionable behavior or position within the guidelines of the constitution.

When a law that affects the majority is passed, or overturned, they see their position in society as being threatened. Whether it is based on economics or social issues, when there is oppression, the majority does not have to fear that what they have will be taken from them. Their social stature is more likely to be preserved. However, the opposite is the truth. Frederick Douglas aptly states it when he said, “Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”¹⁰

It is up to Congress to pass laws protecting our natural rights. However, our system of electing legislators and of lobbying for bills tips the scales of justice to the wealthy and powerful. Billions of dollars are being used by wealthy corporations and agencies to influence politicians. In addition, because the politicians are elected by the majority, they naturally want to pass laws that will be approved of by the majority. This is a main component of a democracy, yet the legislators need to remember that they also represent the minority voices in their districts. It is especially important to remember that they represent the economically disadvantaged because they do not have the resources to make their voices heard. Often, the desires of corporate America are in opposition to the rights of the common man, and the lawmakers do not always keep their role as protectors of our rights, their foremost responsibility.

While the disenfranchisement of some may be beneficial to those in power, it is the polar opposite of the purpose of our constitution. It is up to the courts to give voice to those members of our country. The constitution has been amended to undo its glaring mistake of declaring African-Americans property, which was the one clause in the constitution that denied people their natural rights. Although we do have a checks and balancing system in place, it can take years or decades for the courts to overturn unconstitutional laws. This is an affront to the value system on which our nation is built. The job of upholding the natural rights of the people in America is a great responsibility. Our judges on lower courts and the justices on the Supreme Court have shouldered that responsibility. They must preserve the human rights so dear to our nation. It is imperative that we as a society continue to insist that those who are the custodians of our natural rights have the same reverence for those rights, as did the framers of the constitution.

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