The United States Supreme Court and American Individualism

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THE UNITED STATES SUPREME COURT AND AMERICAN INDIVIDUALISM

by

Gary C. Roberts

A Dissertation
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Faculty of The Graduate College
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The United States Supreme Court occupies an unusual, oftentimes paradoxical position within American democracy. On one hand, it is an institution that seemingly lacks democratic legitimacy, and on the other, it is an institution that dutifully gives meaning to the nation's democratic values. The uniqueness and possibly the grandeur of the American Supreme Court is that it has historically been able to successfully combine these two apparently contradictory aspects in such a manner as to expand upon the nation's traditional sense of individualism—the whole notion of an individual's inalienable right to life, liberty, and property.

Using legal case analysis, the hypothesis of this research endeavor is that the United States Supreme Court has seemingly perpetuated, in some of its more fundamental constitutional decisions, an underlying predisposition toward those normative ideals that pertain primarily to classical democratic liberalism—that is, toward those normative ideals that pertain specifically to the value of individualism. It has done so through careful case selection, which has, in several instances, involved the liberties and protections guaranteed to the individual against the government by the Bill of Rights and by the Fourteenth Amendment.

While countless studies have been conducted on the U.S. Supreme Court, most of them have either sought to determine a proper role for the Court within American
democracy, or have sought to find ways of explaining the Court’s power. This research endeavor has been altogether different. Its objective has been to determine how the U.S. Supreme Court has used its unique institutional setting, as the final arbiter of constitutional law, to preserve and perpetuate the founding principles of classical liberalism (i.e., life, liberty, and property) within American political culture and society. As such, individualism has been its end; the Bill of Rights has been its means.
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Gary C. Roberts
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CHAPTER I

INTRODUCTION

Introduction

The United States Supreme Court occupies an unusual, oftentimes paradoxical position within American democracy. On one hand, it is an institution that seemingly lacks democratic legitimacy, and on the other, it is an institution that dutifully gives meaning to the nation's democratic values. The uniqueness and possibly the grandeur of the American Supreme Court is that it has historically been able to successfully combine these two apparently contradictory aspects in such a manner as to expand upon the nation's traditional sense of individualism—the whole notion of an individual's inalienable right to life, liberty, and property. The questions to ask about this paradox are: How has the Supreme Court accomplished this feat? In essence, what types of cases (i.e., issue areas and/or constitutional provisions) has it used to promote American individualism? Moreover, why has the Supreme Court seemingly felt compelled to pursue such an agenda? In other words, why has the Court assumed a substantial portion of the responsibility for ensuring that individualism remains an important part of American culture? Finally, what makes the Supreme Court institutionally suited to undertake such a task? What is it about the Supreme Court's particular institutional setting that allows it to be a pivotal player in protecting and expanding upon American individualism?
Statement of the Problem

If one begins with the supposition, as most scholars of judicial politics do, that the United States Supreme Court's primary objective under the Constitution is to act in the capacity as a counter-majoritarian institution, as a protector of minority rights, then it is only fair to hypothesize from this premise that the United States Supreme Court will endeavor to accept as legitimate any means it perceives to be significant to further enhancing the rights of the individual (Semonche, 2000, p. 1). This implies that the United States Supreme Court should accept as constitutional any means that it perceives to be of value in underscoring the democratic rights of the individual. We might think of this process as a "weighing process," whereby the Court balances the rights of the whole, or the majority, against the rights of the individual person or entity, as in property (Van Geel, 1991, pp. 12-14). As John Semonche writes:

Americans are united within a civic culture that is [both] strong and durable. These ties that bind are primarily legal, political, and spiritual; they nurture and promote the interests of the individual; and they are institutionalized within the American constitutional system. The Supreme Court of the United States, which is at the apex of the country's legal system, plays a central role in explicating, reinforcing, and expanding the range of these ties (p. 1).

Hence, if true, we should be able to demonstrate, through case analysis, that the Supreme Court has historically viewed American economic, political, and social democracy in individual terms. In other words, it has perceived the rights of the individual as far more important to American democracy than the rights of the whole. In this respect, such an analysis could very well lend credence to the notion that the United States Supreme Court has been an important contributor to American individualism.
Theoretical Problem

In order to properly understand American individualism, whether it be in its current form or historically, one needs to become familiar with its origins or roots. Only afterwards can he or she truly come to appreciate the longevity it has sustained in American culture. The theoretical foundation of American individualism can be traced to the early tenets of classical liberalism or, more aptly put, classical democratic liberalism. Such economic, political, and social thinkers as John Locke, Adam Smith, and John Stuart Mill have all, in one respect or another, contributed immensely to this early philosophical notion. Their writings have provided an ideological foundation upon which American individualism has been built and fostered. This has occurred, in large part, through the scholarly promotion of individual liberty—that is, an individual’s right to pursue whatever he or she wishes, so long as it does not inflict any degree of harm on another individual, without any undue restraint on the part of the state. We see this as most evident in classical liberalism’s pursuit of individual freedom (i.e., self-determination) within the economic, political, and social spheres of life.

Economically, classical liberalism places a great deal of emphasis upon such concepts as “personal consumption,” “entrepreneurship,” “market,” “private investment,” and “private property,” among others (i.e., capitalism). What do all of these ideas have in common? Quite simply put: Individualism. They all boil down to the individual using his or her own talent and initiative in such a manner as to freely engage in the market process. John Locke writes that each individual should be free in his or her own “life, liberty, and property,” with particular emphasis being placed upon “property” (Macpherson, 1980, p. 9). The individual, accordingly, should be freely able to make “private” that
which he or she "mixes with his or her labor"—that no one, particularly government, should be able to take his or her property without some form of consent (pp. 19, 73). Adam Smith further underscores this belief by stating that "among men, the most dissimilar geniuses are of use to one another; the different produces of their respective talents" (Smith, 1991, pp. 22-23).

Politically, classical liberalism also places a great deal of emphasis on the rights of the individual within the political process. John Stuart Mill writes, for instance, "that [the individual] is the only safe guardian of his [or her] own rights and interests—that [such] rights are only secure from being disregarded when the person interested is himself [or herself] able . . . to stand up for them" (Mill, 1991, p. 65). Hence, "the ideally best form of government," according to Mill, "is that in which the sovereignty, or the supreme controlling power, is vested in the entire aggregate of the community, every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government" (p. 64). In much the same fashion, John Locke stipulates that by man's own consent does he relinquish his natural liberty, his natural power, to form a civil government—a government solely bestowed with the duty to protect his "life, liberty, and property" (Macpherson, 1980, pp. 9, 52).

And finally, classical liberalism places particular emphasis on the rights of the individual (i.e., his or her own sense of self-determination) within the community at large, within the social sphere. John Stuart Mill writes that "the only part of the conduct of any one, for which he [or she] is amenable to society, is that which concerns others; in the part which merely concerns himself [or herself], his [or her] independence is, of right,
absolute" (Collini, 1993, p. 13). What does such a statement entail? Well, in part, unless the individual is harmfully infringing upon the rights of others, he or she should be freely able to do whatever he or she wishes to do. For Mill, such liberty included the individual's right to express his or her own opinion, to pursue his or her own tastes, and to associate with his or her own respected colleagues (pp. 15-16). If society should play a role in any one of these aspects, then it should only be one of persuasion—not compulsion (p. 13). Above all, the individual should be protected "against the tendency of society to impose its own ideas and practices as rules of conduct on those who dissent from them" (p. 8).

Research Problem

Of course, one might ask: Where exactly does the United States Supreme Court fit into all of this early philosophical discussion? More specifically, what do the Court's decisions have to do with classical liberalism? At first glance, not much, given that classical liberalism is philosophically concerned with questions of "what ought to be," and that the Supreme Court is empirically concerned with questions of "what is"; however, after careful analysis, one can begin to observe a close parallel between the tenets of classical liberalism and many of the fundamental constitutional decisions handed down by the Supreme Court. What makes such a relationship even more pertinent is the fact that, in some cases, it remains true regardless of the Court's particular ideological persuasion. This implies that while such noted judicial scholars as Harold Spaeth and Jeffrey Segal are certainly correct in asserting that personal values and attitudes do play a large role in each justice's decision making process, the adherence of the Court as a whole to
such principles as individual autonomy and individual rights remains even stronger, and if not stronger, then at least a central concern (Segal & Spaeth, 1993, pp. 64-73). Hence, while the primary emphasis of the attitudinal model is with each justice's own personal values and attitudes at the individual level, the primary emphasis of this model is with the whole Court's values and attitudes at the aggregate level.

From this, we might then hypothesize that many of the Supreme Court's justices are invariably conscious, in some capacity or another, of the nation's founding principles in their decision making process—again, regardless of their own personal predispositions. While the casual observer might disagree, asserting that such a statement is nothing more than mere ideology camouflaged as an empirical truth, the fact remains that we are not talking about the role of the government, per se. Instead, we are specifically alluding to the role of the individual within the nation's economic, political, and social stratosphere—his or her own personal autonomy within these realms. Moreover, even if ideology is the correct caption, we are not talking about an attitudinal arrangement of the Segal-Spaeth variety, (i.e., where a justice's personal preferences can be found along a liberal to conservative spectrum; pp. 64-73). No, the argument being made here is that the individual is nearly always, keeping in mind that there are clearly exceptions to any rule, considered in a one-dimensional fashion (Van Geel, 1991, pp. 12-14).\(^1\) The individual's

\(^1\) To underscore this statement, T. R. Van Geel provides a nice discussion of how the Supreme Court uses the Constitution's protection of individual rights as a "restraint" on the power of other entities, such as government, to not interfere with those rights (Van Geel, 1991, pp. 12-14). Such rights, Van Geel notes, are treated, in many cases, "as if they were absolute" (p. 13). Accordingly, he identifies six steps that the Court uses to define such a relationship. These include: (1) Does the Constitution recognize the claimed right?; (2) Is the right available in the circumstances of this case?; (3) Did the government's policy or practice infringe upon the right?; (4) What justification does the government offer for the adoption of its policy and how important are the interests the government seeks to promote?; (5) How important is the individual right at stake in the case?; and (6) What strategy of justification, tests, precedent, and other materials, should be used in crafting the opinion? (p. 14)

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personal rights are considered as paramount to all others, whether they be the state or some other entity (pp. 12-14).

In the end, though, it should be noted that if ideology does come into play, then it is only with respect to the Court's—its justices'—own preference toward certain areas of concern—meaning, that there may be particular issues that seemingly dominate much of the Court's time as reflected in its caseload. For instance, it is widely accepted that the Fuller Court (1888-1909) spent much of its time with “liberty of contract” cases, while the Warren Court (1953-1969) spent much of its time with civil rights and civil liberties cases. Two very different Courts, with two very different ideological agendas. Still, the pursuit of individual autonomy and individual rights remained consistent, only in different areas of concern. For the Fuller Court, individual autonomy within the economic sphere was far more compelling than the state's right to impose regulations—regulations that in its view would inhibit an individual's personal freedom to engage in “contracts,” of whatever sort. For the Warren Court, however, individual autonomy within the social sphere, say within criminal rights, was far more compelling than the state's right to prosecute without a proper accord given to due process of law.

Hypothesis

The hypothesis of this research endeavor is that the United States Supreme Court has seemingly perpetuated, in some of its more fundamental constitutional decisions, an underlying predisposition toward those normative ideals that pertain primarily to classical democratic liberalism—that is, toward those normative ideals that pertain specifically to the value of individualism.
Definition of Terms

A concept is the building block of a language; it is a "shorthand" description of the empirical world (Nachmiias & Nachmiias, 2000, p. 24). We might think of a concept in terms of its primary functions: (1) as a tool for communication; (2) as a tool for organization; (3) as a tool for generalization; and (4) as a tool for theory construction (pp. 24-26). However, a concept is truly meaningless without definition. Indeed, "if [the] concept [is] to serve [its] functions," then it must "be clear, precise, and agreed upon" (p. 26). That is why it is necessary to spend some time identifying and defining those concepts that are most relevant to the current research endeavor:

1. Classical liberalism is defined as a normative philosophical ideology which places particular interest on the right of the individual to pursue his or her own chosen agenda without any undue restraint on the part of the state. In essence, the individual, so long as he or she does not seek to harm other individuals, should be free to do whatever he or she desires with his or her own life, liberty, and property. Classical liberalism is very much rooted in the writings of John Locke, Adam Smith, Jeremy Bentham, and John Stuart Mill. While each one of these philosophical writers approaches classical liberalism from a different perspective, the final product is still very much the same—an individual's rights, his or her own happiness and development, are "nearly always" paramount to those of the state.

2. Constitutional decision is defined as a decision, a case, in which the Supreme Court has decided on some issue related to the United States Constitution. Most constitutional decisions have involved the Bill of Rights as well as the Fourteenth Amendment. Specifically, for purposes here, though, such decisions will tend to focus on property
rights, freedom issues, and due process. These particular types of decisions are selected for analysis because they are issue concerns that are readily observable across the Supreme Court's history, and because they are also cases in which we are most likely to find the individualist tendencies reflected in the principles of classical liberalism.

3. Democracy is defined, in the modern sense, as a representative political process whereby such standards as “effective participation,” “voting equality,” “enlightened understanding,” “control of the agenda,” and “inclusion of adults” are paramount to its overall legitimacy (Dahl, 1998, pp. 37-38). Democracy, however, like so many other similar concepts, such as “representation,” can be, and has been, defined in a number of diverse ways. Many of us are probably familiar with its early application in such Greek city-states as Athens, where democracy itself was direct, as in the people’s right to participate in policy discussion and formation but, at the same time, very restricted and limited to upper-class Athenian males. Most of us are probably also familiar with its later application in the Roman republic. These early versions of democracy, nonetheless, were not, in any sense of the term, what the founding fathers had in mind when they set out to create the American system of government. Of course, they similarly foresaw a very limited scheme of democracy—a democracy where the right to participate was limited to white propertied males—but their democracy also included other facets such as “representation,” a “bill of rights,” an “electoral college,” “checks-and-balances,” “separation-of-powers,” and “federalism.” The American system of government would be a democracy in only a very limited sense of the term. The people would have a right to participate in government through their representatives; they would have a right to vote for these representatives if they were white, male, and propertied; and their rights would be...
protected through a very complex, decentralized form of government. While, today, thanks to the expansion of the franchise, American democracy is much different from what the founding fathers initially created, many of its central tenets are still present. We still have a right to participate in government through our representatives; we still have a right to vote for these representatives; and our individual rights are still protected by a bill of rights as well as a complex network of governmental checks-and-balances.

4. Due process of law is defined as “a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private [individual] rights” (Black, 1979, p. 449). In other words, due process of law

implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controvert, by proof, every material fact which bears on the question of right in the matter involved (p. 449).

Originally, the due process clause of the Fifth Amendment only applied to the federal government; however, after the adoption of the Fourteenth Amendment at the end of the Civil War, it also became applicable to the states as well. In fact, the due process clause of the Fourteenth Amendment has become a tool by which the Supreme Court has selectively “nationalized,” or incorporated, most of the Bill of Rights onto the states (O’Brien, 1991, pp. 272-336). Today, such constitutional provisions as the Fourth Amendment’s protection against unreasonable searches and seizures, the Fifth Amendment’s protection against self-incrimination, and the Sixth Amendment’s right to counsel are just as binding on state governments as they once were, and still are, on the federal government. Other

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2 Barron vs. The Mayor and City Council of Baltimore, 32 U.S. 243 (1833).
provisions of the Bill of Rights, such as Fourth Amendment’s exclusionary rule, the Fifth Amendment’s protection against double jeopardy, the Sixth Amendment’s right to a speedy trial, and the Eighth Amendment’s ban against cruel and unusual punishments, are also applicable.\(^4\) And, of course, we cannot forget the various freedoms of the First Amendment—freedom of speech, press, and religion, as well as freedom of assembly and association.\(^5\)

5. Equal protection of the law is defined as a “guarantee . . . that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness” (Black, 1979, p. 481). While each individual citizen has been guaranteed the equal protection of the law under the Fourteenth Amendment, such protection was not historically forthcoming where citizens were viewed as “separate but equal.”\(^6\) Certainly, one does not have to search too far in history to find that the equal protection clause of the Fourteenth Amendment has only recently, as within the past few decades, provided relief to countless “categories” of citizens.\(^7\) Today, the equal protection clause has been made applicable by the U.S. Supreme Court to such areas as racial discrimination and state action, racial discrimination in education, affirmative action and reverse discrimination, gender-based discrimination, indigent-based discrimination, as


\(^6\) Plessy vs. Ferguson, 163 U.S. 537 (1896).

\(^7\) The term “categories” is used in place of such diverse adjectives as color, gender, race, and so on.

6. Equality is defined in two ways, both of which, Lawrence Herson notes, have historically been “troublesome” (Herson, 1984, p. 20). The first, equality of opportunity, stipulates that “each person shall be free to make what he or she is able of his or her life without undue government interference or assistance” (p. 21).9 This form of equality was most prevalent prior to the New Deal of the 1930s, when rugged individualism was appreciated as a preeminent virtue of American culture. It is more of a laissez-faire approach to life, where each individual is responsible for “pulling up his or her own bootstraps” and getting to work. As such, equality of opportunity “places the burden of success or failure on the individual” (p. 21). The second, equality of outcome, stipulates that “government shall take responsibility for making certain that each person receives something that approaches an equal share of life’s rewards” (p. 21). This form of equality is largely a post-World War II phenomenon and is predominantly synonymous with such government programs as job retraining, unemployment insurance, and welfare. As a whole, equality of outcome “suggests that responsibility for a person’s success or failure shall be shared by both the individual and society” (p. 21).

7. Freedom of religion is defined as the “freedom from dictation, constraint, or control in matters affecting the conscience, religious beliefs, and the practice of religion; [it is the] freedom to entertain and express any or no system of religious opinions, and to engage in or refrain from any form of religious observance or public or private religious

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9 It should be noted, though, that even equality of opportunity assumes that government will provide an equal playing field—that contracts, for instance, will be enforced irregardless of who is involved.
worship, not inconsistent with the peace and good order of society and the general welfare" (Black, 1979, p. 828). As so stipulated by the First Amendment of the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Simple in phraseology, but very complex in application. Indeed, as with many other cases, the Supreme Court has had to periodically grapple with providing a succinct interpretation to the religion clause, as in what exactly constitutes the "establishment of a religion" as well as what exactly constitutes the "free exercise thereof" (O'Brien, 1991, pp. 635-636)? Throughout, the Court has basically relied, at various times, on three distinct approaches to these questions: (1) the "strict separation" approach; (2) the "strict neutrality" approach; and (3) the "accommodationist" approach (p. 643). As the words themselves seemingly imply, the "strict separation" approach "requires state neutrality and a secular purpose for legislation"; the "strict neutrality" approach "requires not merely a secular purpose for legislation but bars all laws that either aid or hinder religion; and the "accommodationist" approach, "while maintaining that laws must have a secular purpose, allows for governmental accommodation of religion in ways that further religious freedom without endorsing a particular religion" (pp. 643-644). During the post-World War II era, all three approaches have periodically been influential with the Court at different times. The Vinson Court (1946-1953), for instance, was strongly influenced by the "strict separation" approach, the Warren Court (1953-1969) by the "strict neutrality" approach, and the Burger Court (1969-1986) by the "accommodationist" approach (pp. 643-654). The current Rehnquist
Court (1986-Present) has shown a tendency to favor the "accommodationist" approach.

8. Freedom of speech is defined as the "freedom . . . to express opinions and facts by word or mouth, uncontrolled by a censorship or restrictions of government" (Black, 1979, p. 828). Under the auspices of the First Amendment, freedom of speech has traditionally been interpreted by the U.S. Supreme Court in such a manner that "the government may not restrict protected expression because of its content, message, viewpoint, or topic unless the government establishes a compelling regulatory interest" (Klotter & Kanovitz, 1991, p. 47). This, however, has not meant that freedom of speech is an absolute freedom. The Court has also historically set aside categories—largely, on a case-by-case basis—that it has felt may very well fall outside the venues of the First Amendment. Such categories have included "obscene speech," "fighting words," "offensive speech," "threats," "speech posing a clear and present danger," and certain categories of "commercial speech" (pp. 46-64). Recent trends in the Supreme Court's interpretation of the First Amendment, though, have made such categories largely ineffective as determinants of constitutionality (pp. 64-67). The reason is that the Court has come to the realization that most cases involving speech are not clear-cut instances of constitutionality and unconstitutionality, as in the case of one category being protected and the other not (pp. 64-67). As such, today, the Court also places a great deal of emphasis on the overall "social value" in the speech to the "marketplace of ideas," thus creating different degrees of importance to speech within each category (pp. 66-67).

9. Ideology is defined as "a set of beliefs, values, and goals" that an individual holds in his or her own life (Gans, 1988, p. 1). Given that an ideology confines itself principally to values, it is normative in character. This means, more specifically, that it can be neither true nor false. An individual, for instance, may believe that the economy would operate much more effectively and efficiently if only the state would stop regulating aspects of it. This is an opinion, a set of beliefs about how one perceives the proper role of government within the economic sphere. Another individual may just as well disagree by believing that the economy needs state regulation. Two very different perspectives; two very different ideologies.

10. Individualism is defined as "the pursuit of personal freedom and of personal control over the social and natural environment" (Gans, 1988, p. 1). Another way of defining individualism is to perceive it as a "mode of life in which the individual pursues his [or her] own ends and follows his [or her] own ideas" (Herson, 1984, pp. 45-46). While individualism may be central to classical liberalism in theory, it is a reality to the American way of life. Indeed, the American system of government is designed to promote and protect the rights of the individual. This is most evident in the individual guarantees of freedom provided in the Constitution's first ten amendments—the Bill of Rights.

11. Judicial review is defined as the Supreme Court's "authority to review the constitutionality of legislative and executive acts"—both at the federal and state level (Fisher, 1990, A-21). While the power of judicial review is nowhere explicitly stated

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13 It should be noted, though, in a somewhat guarded manner, that values can be empirical as well, given that we can observe how these values actually play out in the real world. For instance, we can readily observe what impact a free market can have on society. We can see its effects.
within Article III of the U.S. Constitution, evidence does exist, prior to Marbury vs. Madison, which would suggest that some of the founding fathers expected that judicial review would be an implied power of the U.S. Supreme Court (pp. 43-46).\textsuperscript{14} Alexander Hamilton, for instance, discusses the Court’s power of judicial review—its necessity as well as its limitations—at length in Federalist No. 78 (p. 45). Not until Chief Justice John Marshall’s opinion in Marbury vs. Madison, though, did the Supreme Court’s power of judicial review become a lasting centerpiece to the Court’s institutional role within America’s complex system of checks-and-balances, separation-of-powers, and federalism. In that case, Marshall states: “It is emphatically the province and duty of the judicial department to say what the law is” (pp. 65). Accordingly, “if, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply” (p. 65). Whether or not the Supreme Court was explicitly intended by the founding fathers to have such a power of judicial review, the fact remains that it does have the power and that it has routinely exercised it.

12. Liberty is defined as the “freedom from all restraints except such as are justly imposed by the law” (Black, 1979, p. 827). We might think of liberty as possessing two rather distinct perspectives: “[the] freedom to pursue one’s own purposes, and [the] freedom from interference with that pursuit” (Herson, 1984, p. 20).\textsuperscript{15} However, it is important to note that an individual’s liberty is not absolute. Even the most diehard classical liberal would agree that liberty must be constrained within the parameters of what is right and

\textsuperscript{14} Marbury vs. Madison, 5 U.S. 137 (1803).
\textsuperscript{15} Another way of looking at this perspective is in terms of negative vs. positive liberty.
what is just. “The only freedom which deserves the name,” according to John Stuart Mill, “is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it” (Collini, 1993, p. 16). Accordingly, “each is the proper guardian of his own health, whether bodily, or mental and spiritual” (p. 16).

13. Liberty or freedom of contract is defined as “the ability at will, to make or abstain from making, a binding obligation enforced by the sanctions at the law; [it is] the right to contract about one’s affairs, including the right to make contracts of employment” (Black, 1979, p. 828). Liberty of contract became synonymous with economic substantive due process at the end of the 19th century and at the beginning of the 20th century. The U.S. Supreme Court, following the principle that it not only was obligated to protect the procedural aspects of the Constitution but also the substantive values of it as well, argued that the Fourteenth Amendment’s due process clause prohibited the government’s regulation of business enterprise (Biskupic & Witt, 1997, p. 296). In espousing the doctrine of a liberty of contract, Justice Rufus Peckham writes:

The ‘liberty’ mentioned in [the Fourteenth] Amendment means not only the right of the citizen to be free . . . in the enjoyment of all his [or her] faculties; [but also] to be free to use them in all lawful ways; to live and work where he [or she] will; to earn his [or her] livelihood by any lawful calling; to pursue any livelihood of avocation; and for that purpose to enter into all contracts which may be proper . . . (O’Brien, 1991, pp. 231-232).

14. Natural law or inalienable rights is defined as “a universal system of rules and principles to guide human conduct” (Fisher, 1990, p. A-21). Natural law is most often characterized in classical liberalism as an individual’s inalienable rights—his or her rights to life, liberty, and property. Thomas Hobbes, an early forerunner to classical

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16 Allgeyer vs. Louisiana, 165 U.S. 578 (1897).
liberalism, writes: "The Law of Nature is a precept or general rule, found out by reason, by which [an individual] is forbidden to do that which is destructive of his [or her] life or taketh away the means of preserving the same, and to omit that by which he [or she] thinketh it may be best preserved" (Curley, 1994, p. 79). While it is true that natural law is a fundamental premise to such political philosophies as classical liberalism, the fact remains that the very issue of natural law often elicits controversy (Fisher, 1990, pp. 54-55). Why? Well, in large part, natural law is a normative supposition, in that it can neither be proven as true nor false. An individual can state that he or she has an inalienable right to property, but this is the person's own belief or opinion. While such a statement is obviously supported by classical liberalism, it is still not a fact. Classical liberalism, too, is a normative philosophy.

Original intent is defined as a judicial method of interpretation whereby the wishes of the original authors of the U.S. Constitution, subsequent Amendments, such as the Fourteenth Amendment, and ordinary statutes, are given *prima facie* weight as a guide to the interpretation and definition of law. The doctrine of original intent asserts, for instance, that if the Supreme Court wishes to define "commerce," as it is outlined in Article I, Section 8, of the U.S. Constitution, then it should defer to the original definition of the founding fathers, as stipulated, say, within the Federalist Papers, Convention notes, or personal diaries. The original intent of the founding fathers should be adhered to as much as possible. Why? Well, in the words of Edmund Burke: "In history a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind" (Pocock, 1987, p. 124). More pertinent to the present

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argument, however, is the inherent belief that the doctrine of original intent, as espoused by those such as Robert Bork or Edmund Meese, prevents the Supreme Court, a non-elected institution, from engaging in policy making—a power believed to be properly reserved only to the elected institutions of government. The counterclaim to the doctrine of original intent is the view that the U.S. Constitution is a “living document” and should, thus, be adapted to the time in which it is interpreted. The “living document” approach emanates from the Constitution’s apparent lack of specificity—its overall generality. Such individuals as Justice Oliver W. Holmes and Justice William Brennan, among others, have historically supported the “living document” interpretation.

16. Political culture or political creed is defined “as a widely shared set of values concerning government and politics, a widely shared set of understandings as to what government ought to do, and a widely shared set of ideas concerning the purposes of public policy” (Herson, 1984, pp. 13-14). Lawrence Herson notes that while America’s political culture is vastly complex, it still can be narrowed down to what he categorizes as a “cultural inventory” (p. 20). Americans, he stipulates, have a strong desire for “liberty,” a keen sense of “equality,” a drive for “achievement,” a respect for “justice,” an admiration for the “rule of law,” an appreciation of “private property,” an affection for “localism,” and a love of “democracy” (pp. 20-24). Each one of these principles has historically, in one shape or another, composed America’s political culture. Most all of them, of course, were founding principles of American government.

17. Property is defined as “that which is peculiar or proper to any person” (Black, 1979, p. 1095). It entails a sense of “ownership—the unrestricted and exclusive right to a thing, [whereby the individual has] the right to dispose of a thing in every legal way, to
possess it, to use it, and to exclude [anyone] else from interfering with it” (p. 1095). Considered as a central tenet of classical liberalism, the very concept of “property” itself has undergone tremendous changes over the years. In its earliest form, property merely signified what many, such as John Locke, believed to be one of its distinguishing features—the fact that it becomes property, in the sense that it is private, once an individual mixes his or her labor with it (Macpherson, 1980, pp. 19). Such a view meant that the “individual possessed property in [his or her] person as well as in [his or her] goods—that the act of labor [itself] invested part of [his or her] personality in an object” (Fisher, 1990, p. 465). James Madison further underscored this perspective in Federalist No. 10 when he stated that it is “the diversity in the faculties of [individuals], from which the rights of property originate” (p. 465). Hence, we can see that the very concept of property, at least during the founding era, represented more than the mere physical possession of an object; it obviously encompassed something more, something rather “broad” in nature (p. 465). Louis Fisher writes: “People had property in their opinions, in the free communication of ideas, in religious beliefs, and the free use of faculties and ‘free choice of the objects on which to employ them’” (p. 465). While the U.S. Supreme Court would temporarily restrict the meaning of property in later years to what it felt the doctrine of laissez-faire economics espoused, it is true that, today, property “has come to represent a ‘bundle of rights’” (p. 465).

18. Right to privacy is defined as an individual’s “right to be let alone,” in his or her person, place, or things (O’Brien, 1991, p. 1146). While the right to privacy is nowhere explicitly provided for in the U.S. Constitution, the Supreme Court, nonetheless, has ruled that its “penumbras” can be found within the Bill of Rights, especially within
the First, Third, Fourth, Fifth, and Ninth Amendments, as well as in the Fourteenth Amendment (p. 1148). The right to privacy has most often been equated with an individual’s “reproductive freedom” and “personal autonomy” (pp. 1150-1245).

19. Substantive due process is defined as a procedural method whereby “the Constitution not only demands the government follow fair procedures but also protects certain substantive values” (e.g., economic and property rights) (Biskupic and Witt, 1997, pp. 296-297). The U.S. Supreme Court has periodically incorporated substantive due process to, for lack of a better word, read values into the Constitution that may not be explicitly stated within it but that the Court feels are implied by the substance of it (the Constitution) as a whole. The Supreme Court extensively used substantive due process as a means to prevent the government’s regulation of business enterprise during the late 19th century and early part of the 20th century. The Court’s rationale was simple: freedom of contract (pp. 296). The government could not regulate business enterprise because such regulation violated an implied “liberty of contract” between employers and employees (p. 296). While the Supreme Court eventually did retreat from its use of substantive due process within the business arena, it would, in later years, find another use for it. This time, though, it would use substantive due process to incorporate a “right to privacy” into the Constitution (p. 297).

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20 Slaughterhouse Cases, 16 U.S. 36 (1873); Mann vs. Illinois, 94 U.S. 113 (1877); Mugler vs. Kansas, 123 U.S. 623 (1887); Chicago, Milwaukee and St. Paul Railroad Co. vs. Minnesota, 134 U.S. 418 (1890); Allgeyer vs. Louisiana, 165 U.S. 578 (1897); Holden vs. Hardy, 169 U.S. 366 (1898); Lockner vs. New York, 198 U.S. 45 (1905); and Adkins vs. Children’s Hospital, 261 U.S. 525 (1923).
Limitations of Study

As with any research endeavor, while the objective will always remain consistent, to provide as accurate and insightful of conclusions as possible, there are always going to be limitations in the overall accuracy and applicability of the research itself. In this respect, the researcher acknowledges the existence of the following limitations to this study:

1. Even though the primary objective, in this case, is to determine whether or not the United States Supreme Court has had a tendency to underscore many of its constitutional decisions with several of the more pertinent tenets of classical liberalism, it can never be positively ascertained as to whether or not such a connection was consciously made by the Supreme Court itself. Indeed, it could well be the case that such a connection is nothing more than mere coincidence. The researcher thus can never be 100 percent confident that when the Court hands down a decision, it based that decision solely on classical liberalism. There may, of course, be indications of such an intention, but the researcher can never know with absolute certainty that the Court itself made such a connection. The only hope is to find enough pieces of evidence to make such a connection probabilistic.

2. Moreover, even though another objective, in this case, is to determine the role that the United States Supreme Court has played in fostering American individualism, again, for the same reasons stipulated above, it can never be positively ascertained as to whether or not this was in fact a consciously-made intention on the part of the Supreme Court itself. Clearly, it could be nothing more than a coincidental side-effect of the Court's overall decision making in particular areas of constitutional law. The aim, again,
is to make such a connection probable, based upon the amount of evidence presented within each case.

3. Finally, while the primary aim of this analysis is directed toward the United States Supreme Court itself—its hypothesized role in perpetuating classical liberalism—the intention is not to lay sole credit for such an endeavor at the footsteps of the “Marble Temple” (O’Brien, 2000, pp. 104-164). Indeed, it is fully acknowledged that the Court is only one institution among many others, including the President, Congress, the federal bureaucracy, political parties, as well as a whole host of state and local institutions. No, the objective here is to simply look at the Supreme Court’s particular role in this endeavor, while acknowledging that other institutions may have played a part too.

Review of the Literature

The availability of literature on the Supreme Court’s role in promoting or fostering American individualism, as a particular “ideological agenda,” is minimal at best. This by no means implies that there is no literature on the subject—only that the existing literature tends to be rather issue- or case-oriented. For instance, there is ample literature available on the Court’s role in such issue areas as property rights, freedom of ideas, and due process. However, there is little, if any, literature available on how these particular issue areas have enhanced American individualism—on how they have nurtured and promoted the basic liberal democratic principles upon which the United States was originally founded. To undertake such an endeavor, it is important to keep in mind that the literature itself does not necessarily have to be scientifically based, with independent, dependent, and control variables, so long as it remains logical, with well-
supported premises and conclusions. The literature can be philosophical as well as historical in character.

The best place to begin such an endeavor is to briefly examine what has been accomplished, thus far, with respect to determining what influence classical democratic liberalism may have had on the American founding fathers. In other words, what evidence exists which would allow us to conclude that the founding fathers were not only aware of classical liberalism—its principles, that is—but were deliberate in their attempts to make it a founding tenet of American government. There are any number of sources that we might turn to for answers, including: (1) the Declaration of Independence; (2) the Federalist papers; and (3) the debates in the federal convention of 1787 (Paul & Dickman, 1989, pp. 23-28). All of these works provide a first-hand glimpse into the “true” intent of many of the founding fathers. We know, for instance, from the Declaration of Independence, that Thomas Jefferson must have been a receptive student of classical liberalism. After all, he writes “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness [property]” (Witt, 1990, p. 933). Moreover, we also know, from the Federalist papers, that Alexander Hamilton, James Madison, and John Jay were clear proponents of a limited republican government, since they all, in one shape or another, advocated a form of government that was tightly hinged to such auxiliary precautions as checks-and-balances, federalism, and separation-of-powers. And finally, we know, from the debates in the federal convention of 1787, that while many of the other founding fathers did not necessarily expound a clear philosophical ideal of their own, they at least did share in the belief that the individual’s liberty should be safeguarded against any un-
necessary encroachment on the part of the government (Paul & Dickman, 1989, pp. 27-35). As Ellen Frankel Paul and Howard Dickman write: “The delegates to the Convention were undeniably concerned with the preservation of rights” (p. 30).

It is not enough to merely determine that classical liberalism was an important consideration to the founding fathers in their attempts to create a new government. We must also determine if there is evidence which would suggest that their “attempts” were lasting in nature. In other words, has classical liberalism had a lasting impact on American culture and society? There is much in the way of evidence to suggest that it has survived, if only partially. Indeed, Lawrence Herson writes that “for more than three centuries we have maintained a common culture whose political dimensions have been sustained with considerable tenacity” (Herson, 1984, p. 295). Such key values as liberty, equality, achievement, justice, precedent, rule of law, private property, localism, and democracy—all, in many respects, central to classical liberalism—mean as much today to Americans as they did nearly three-hundred years ago (pp. 20-24). They are now part of what Gunnar Myrdal calls the America political creed, “a profession of ideals so central to American thought that they [forever] inform and haunt our political life” (Myrdal, 1942, p. 4). As Alexis de Tocqueville once wrote, in his observations of the United States, during the 1830s: “[While] liberty is generally born in stormy weather . . . , it is only when it is old does one see the blessings it has brought” (Lawrence & Mayer, 2000, Vol. I, p. 240). The fact that classical liberalism has survived innumerable “difficulties amid civil discords” attests to the accuracy of this statement (p. 240). Classical liberalism—the whole notion, that is, of individual rights and liberties—is still “very much alive” within the United States (Shapiro, 1986, p. 273).
Finally, having determined that classical liberalism still lives and breathes in American culture and society, we must now turn our attention toward that entity which has enabled it to successfully do so. Since the hypothesis of this research endeavor seeks to determine what role, if any, the United States Supreme Court has played in this regard, it might behoove us to focus our primary attention on it. In essence, what literature exists which might lend credence to the notion that the Supreme Court has been an active participant in promoting and nurturing classical liberalism? The best place to begin such an endeavor is to simply examine what basic duties the Supreme Court is responsible for performing within American government and society. We know, for instance, that the Court is expected to resolve all "cases and controversies" that may arise under the United States Constitution (U.S. Constitution, Art. III, Sec. 2). We also know that the Court is responsible for providing definition to the Constitution through interpretation and for protecting its integrity through judicial review (Ball, 1987, pp. 15-17). Nowhere, though, is the Supreme Court more effective than in its duty as a counter-majoritarian institution, as a proponent of those individual rights and liberties that are explicitly spelled out in the Bill of Rights as well as in the Fourteenth Amendment. Indeed, Joan Biskupic and Elder Witt write: "The Bill of Rights promises individuals protection against the strong hand of government, [but] it is the Supreme Court . . . that has made this guarantee a practical, living reality (Biskupic & Witt, 1997, p. vii). John Semonche further underscores this statement by adding that "from the [very] beginning, the Court carved out for itself a special role: It would be the branch that clothed itself in the Constitution and interpreted that document to further the aims of the Preamble—the most important of which has been to secure 'the Blessings of liberty to ourselves and our Posterity'" (Semonche, 2000, p. 405).
Methodology

The particular methodology that is utilized in this research endeavor is specifically geared toward a more qualitative, historical-type of approach. While most modern studies in political science seek to explain political phenomena using quantitative means, the current undertaking does not really lend itself to such a method. Instead, it is more philosophical in character. The aim is to logically determine through selective case analysis (i.e., landmark decisions) what role, if any, the United States Supreme Court has played with respect to promoting American individualism. The premises, of course, are the principles of classical liberalism themselves, and the conclusions are the Court's decisions—their impact, that is, on promoting these principles in American culture and society. It is a form of inductive or probabilistic reasoning, whereby "generalizations express . . . a tendency for events to take place," as in $X$ tends to influence $Y$ (Nachmias & Nachmias, 2000, pp. 8-9). The only drawback in using inductive logic is that we can never be wholly confident as to the overall certainty of our conclusions; we can only be confident that they are probably correct (p. 9). Of course, our confidence can be significantly enhanced with the use of sound logical reasoning that is also firmly based upon established historical tendencies. In essence, does the selected case include the values at the heart of classical liberalism? Does it, in some manner, reflect principles that are prone to encourage and promote individualism? What is the Supreme Court's rationale for its decision? Does the final majority decision, in other words, nurture individualist tendencies? And, what has been the cultural and societal impact of the decision? Has it had the effect of further encouraging individualism?

The research subject, if one had to label it, is the case itself. Indeed, this is how
the Supreme Court expresses its views—its opinions on particular issue areas—before the public. The specific cases that are selected for this analysis are arrayed into three primary issue areas: (1) life (i.e., searches and seizures); (2) liberty (i.e., freedom of religion); and (3) property (i.e., liberty of contract). These particular cases are selected, in large part, because they are issue concerns that are readily observable across the Supreme Court's history, and because they are also cases in which we are most likely to find the individualist tendencies reflected in the principles of classical liberalism. In addition, the specific cases that are selected for this analysis are only those with majority opinions. Indeed, this will be how each Court is defined, as the predominant viewpoint that is held by a majority of its sitting justices at any given time, or in any given decision. This casts aside the enormous problem that could potentially be had by dealing with individual justices, with individual concurring or dissenting opinions. This also alleviates the problem of dealing with justices who step aside or leave the Court, for whatever reason, or with justices who join to or dissent from opinions that are, in some sense, atypical for them. Finally, since the primary objective in this research endeavor is to determine what role, if any, the Supreme Court has played in promoting American individualism, it is really necessary to examine the entire case history of the Court itself. Obviously, certain issues are more relevant to specific Courts, but in order to attain a fuller understanding of the historical evolution of individualism within American culture and society, we need to examine its progression through different Court eras. This will enable us to determine how it may have been helped or hindered by the Supreme Court at various junctions in American history.

The case analysis required for this research endeavor will be rather difficult as
well as extensive. Indeed, it would be very unlikely to find cases where the Supreme Court has openly acknowledged that it was following the founding principles of classical liberalism in its decision. Thus, it will be necessary to develop alternative means by which one can determine whether or not the values and ideas of classical liberalism are reflected in the Court’s final decision. The key is to maintain as much objectivity as is possible in their eventual application. The measures that seem most promising for this task include: (1) cases that involve issues surrounding life, liberty, and property; (2) cases that involve the federal government on one side of the issue and some other person or entity on the other; (3) cases that explicitly discuss, in some detail, the founding principles of American government as some form of justification for the current decision; (4) cases that explicitly discuss some aspect of individualism with particular reference to its virtues in American society; (5) cases that place a stronger burden of proof on the government, such as the need for government to demonstrate a “compelling interest”; and (6) cases that promise a strong individualist tendency in their overall societal impact. It should be noted, however, that not all of these measures are simultaneously required to make a sound appraisal of the Supreme Court’s decision and its relationship to some of the more central tenets of classical liberalism. A combination of two or more measures should be sufficient for the task. As discussed early on, such cases are likely to center around substantive due process issues, personal freedoms, and criminal rights and procedures.

Conclusion

The likelihood of finding that the United States Supreme Court has played a
significant role in promoting American individualism is high. We know that classical liberalism was very influential with the founding fathers, that it became a founding principle of American government, and that it has perpetuated itself, in one shape or another, throughout American cultural history. Individualism, one might say, is alive and well in the United States! The question of course is how has the Supreme Court helped to nurture its long-term survival? What role has it played in this historical process? Countless studies have been conducted on the Supreme Court. Most of them have sought to determine a proper role for the Court within American democracy, given its seemingly undemocratic stature. Others have sought to find ways of explaining the Court's power, on how its power is used, and on how it can potentially be curtailed or influenced, if need be. This research endeavor is altogether different; its objective is to determine how the Supreme Court has used its unique institutional setting, as the final arbiter of constitutional law, to perpetuate the founding principles of classical liberalism within American culture and society. An examination into the Court's interpretation of property rights, freedom issues, and due process of law should provide us with an answer.
CHAPTER II

FOUNDING PRINCIPLES OF AMERICAN INDIVIDUALISM

Introduction

One of the most important attributes of any research endeavor is to provide some historical basis or foundation as to what a particular concept or idea is and how it can be best described and explained. In this case, what historical evidence exists which would lend support to the proposition that classical liberalism was present at the founding of the American nation-state? In what way, if any, did classical liberalism influence America’s war and eventual independence from Great Britain? What impact did classical liberalism have on the founding fathers? How did classical liberalism influence American constitutional design? And in what manner has classical liberalism perpetuated itself throughout American history? These are questions that are absolutely essential to understanding just how important classical liberalism has been to American economic, political, and social thought—both then and now. More importantly, these are questions that are pivotal to understanding just how important classical liberalism has been to promoting and perpetuating American individualism. In the historical inquiry that follows, the development of classical liberalism and its eventual impact upon America will be explored. Throughout, a general examination will be conducted as to what classical liberalism, how classical liberalism came about, what exactly classical liberalism is, and how classical liberalism found its way into American culture. The historical inquiry will end with an
analysis into the origin and purpose of the institution of American government that is hypothesized to have been largely responsible for fostering classical liberalism as part of America’s founding creed—the United States Supreme Court. This will inevitably set the stage for subsequent analysis into the role that the Court has played in promoting and perpetuating American individualism.

Precursors of Classical Liberalism

Chapter One contained a general discussion of classical liberalism, therefore further detailed examination is needed to develop a more comprehensive definition. Questions such as where did it come from, how did it originate, and who, in particular, has been responsible for developing and perpetuating it need to be thoughtfully explored and analyzed. Classical liberalism is indeed a composition of many beliefs and values and, as such, “should be seen not in fixed and abstract terms, but as a specific historical movement of ideas” (Arblaster, 1987, p. 11). In this sense, as Anthony Arblaster writes: [Classical] liberalism requires an historical rather than a purely conceptual and inherently static type of analysis” (p. 11). Classical liberalism is not just the product of any one particular era or century; its roots go much deeper than that. Classical liberalism, much like any ideology, is dependent upon historical occurrence. Events whether by will or circumstance leave evidence of their own existence through time. Much of this evidence takes the form of an idea, a belief or a value. In much the same fashion as Justice Oliver W. Holmes’ “marketplace of ideas,” some of these beliefs or values, these ideas, have a way of surviving and leaving significant impression, while others have no audience (White, 1993, p. 413).
The objective of this chapter is to search for those events that help bring forth such ideas and then to search for those events that enhance and perpetuate them through time. In other words, what causes a certain idea to develop, and what enables that idea to stand the test of time? Some caution, though, in undertaking such a task is necessarily warranted. Indeed, "it would obviously be absurd to try to attach to precise a date to the beginning of anything so general as an ideology or movement of ideas. There are few, if any, absolute discontinuities in human history, and [those] in pursuit of origins and roots usually find themselves pushing further and further back into the past" (Arblaster, 1987, p. 95). Even so, there are points in time whereby certain ideas have become more readily apparent than others. With respect to classical liberalism, in particular, such points in time seemingly revolve around the Renaissance, the Reformation, the Age of Enlightenment, and the advent of capitalism (pp. 95-98). It is during this timeframe of about 500 years that individualism, probably the central most important idea of classical liberalism, develops into an accepted manner of understanding and appreciating human behavior (pp. 95-98).\(^\text{22}\)

The Renaissance

The Renaissance dates from the 14th and 15th centuries to such individuals as Leon Battista Alberti and Giovanni Picodella Mirandola (Perry, et al., 1985, pp. 277-279).

\(^{22}\) Of course, it would be incorrect to assume that individualism is only a product of the Renaissance: it is not (Perry, et al., 1985, pp. 95-98). Signs of individualism have existed even earlier (pp. 95-98). For instance, Thucydides places much of the blame on the cause of the Peloponnesian War in the hands of individualism (p. 61). "Love of power," he writes, "operating through greed and through personal ambition, was the cause..." (p. 61). Even Socrates stresses some sense of individualism in his belief that man's individual moral character could be reformed and made better through the active pursuit of reason (pp. 72-74). Even so, it is really not until the Renaissance that man's own sense of being becomes paramount—that his own humanity becomes central to his very existence.
The Renaissance is significant to the advent of classical liberalism because it marks what many historians, including Jacob Burckhardt, believe to be the beginning of "modern individualism" (Blum, et al., 1966, p. 65).\(^{23}\) It is during the Renaissance, for instance, that man is first really recognized as a gifted and creative being in his own individual right (p. 65). Prior to the Renaissance, man's existence was really only as a part of a larger community or "corporate body," such as that of his own class (p. 65). The Renaissance, however, begins the process of changing this by transposing man from a secularly-oriented being, seemingly recognized as only one among many, into more of a spiritualistic or individualistic one, recognized as a unique being set apart from the many (p. 65). As Leon Battista Alberti writes in 1434: "If anyone wishes to investigate carefully what it is that exalts and increases . . . honor and felicity, he will clearly see that men are themselves the source of their own fortune and misfortune" (p. 70). The Renaissance, with its emphasis upon individuality, places man at the center of the universe and makes him master of his own destiny (pp. 70-71). For the first time, man's own innate ability or talent and not just a preordained (i.e., privileged) position within society, becomes essential to his own existence—his own "destiny and greatness" (pp. 70-71). In alluding to how God might perceive of man, Giovanni Picodella Mirandola asserts: "We have made you neither heavenly nor earthly, neither mortal nor immortal, so that, more freely and more honorably the molder and maker of yourself, you may fashion yourself in whatever form you shall prefer . . ." (p. 70). In this sense, it is by man's own personal accomplishments, his own individual wherewithal, for which he should be judged and potentially admired (p. 71). Creativity, or one's own "talent, imagination, intelligence,

\(^{23}\) It is also considered to be the beginning of the modern era (Blum, et al., 1966, p. 65).
self-reliance, and ambition," is the key to individual success (pp. 70-71).

The Reformation

The Reformation can be traced to the 16th century and, in particular, the works of Desiderious Erasmus and Martin Luther (Perry, et al., 1985, pp. 285-312). At issue during the Reformation was whether or not the Catholic Church was the only true connection between man and God; was the Church a necessary intermediary between Christendom and Heaven? Clearly, at least for Erasmus and Luther, it was not. Erasmus, for instance, firmly believed that God was accessible through the Bible to all people, irregardless of their economic, political, or social standing (p. 286). Indeed, as Anthony Arblaster writes: “Erasmus stood for a kind of anti-theological Christianity which, in terms of Church policy, pointed clearly in the direction of an easy-going tolerance of doctrinal differences” (Arblaster, 1987, pp. 113-114). Martin Luther similarly believed that it was one’s own personal relationship with God, one’s own religiosity, that really mattered—not whether there was regular church activity (e.g., fasting) (Perry, et al., 1985, p. 301). “I wish to be free,” he writes, “... not to become the slave of any authority ... , for I shall proclaim with confidence what I believe to be true” (Bronowski & Mazlish, 1975, pp. 85-86). In this sense, Martin Luther believed that man was fully capable, in his own individual right, to know and understand God—that the relationship between man and God should only be mediated by means of the Bible and not the clergy (Perry, et al., 1985, p. 301). Such beliefs, as propounded by both Erasmus and Luther, would later have tremendous impact on the development of classical liberalism. Their belief that man was fully capable of understanding God on his own and without the
intervention of the Catholic Church was truly revolutionary for its time.\textsuperscript{24}

The Age of Enlightenment

The Age of Enlightenment, or Age of Reason as it is sometimes known, dates back to around the 17\textsuperscript{th} and 18\textsuperscript{th} centuries and such individuals as Rene Descartes, a rationalist, and Thomas Hobbes, an empiricist (Arblaster, 1987, p. 127; Perry, et al., 1985, p. 399).\textsuperscript{25} While rationalism and empiricism are different from each other, the former dealing with reason and the latter with observation, they do share the similarity of placing “stress on the experience of the individual as the basis of knowledge . . .” (Arblaster, 1987, p. 127). Rene Descartes, for instance, believed that every man can be a philosopher in his own right—that every man can find true knowledge, through the use of reason (p. 128). He wrote: “The power of judging rightly, and of separating what is true from what is false is equal by nature in all men . . . [that] reason itself, . . . inasmuch as it alone makes us men, and marks us off from the beasts, . . . is found whole and entire in each man” (p. 128). Descartes’ emphasis upon the individual as a rational being is further underscored when one turns to the empiricist, Thomas Hobbes (pp. 132-137). Hobbes depicted man as driven entirely by “appetites” and “aversions” (Curley, 1994, pp. 27-35).

On the one hand, man is driven toward that which is desirable and pleasurable and, on the other, he is driven away from that which is offensive and unpleasant (pp. 28-35). It is

\textsuperscript{24} Even so, some caution is warranted, for it would be stretching the truth to say that either of these men was an individualist in the truest classical liberal sense of the term. Martin Luther’s assertion, “the only liberty for which [serfs] should care is spiritual liberty, [and that] the only rights [serfs] can legitimately demand are those that pertain to [their] spiritual life,” does not necessarily exalt with classical liberal ideals (Bronowski & Mazlish, 1975, pp. 88-89).

\textsuperscript{25} Thomas Hobbes is also considered the “father” of classical liberalism because of his emphasis on social contract theory and also because of his belief that man is innately rational.
man's own self-interest that matters. Within Hobbes' state of nature, for instance, where there is no governing body other than the various laws of nature, each and every man is driven by "'competition,' 'diffidence,' and 'glory'" (p. 76). Man's desire for more and more leads him into a perpetual state of war with his fellow man (pp. 76-78). Hobbes asserted that within such a state, man has no more pleasure; he only has "a great deal of grief" (p. 75). When man comes to the realization that his life within the state of nature will only be one that is "solitary, poor, nasty, brutish, and short," he will endeavor out of self-interest to leave his horrible state of existence (pp. 76-77). It is in this regard that both Descartes and Hobbes look to man's self-interest as key to his own individual wherewithal. Whether it be the individual's pursuit of knowledge, his desire for pleasure, or his aversion to pain, man is keen enough to know what is in his own self-interest.

Laissez-Faire Economics

Laissez-faire economics can be dated to the 18th and 19th centuries and such individuals as John Locke and Adam Smith (Perry, et al., 1985, pp. 506-510). Laissez-faire economics is rightly associated with Adam Smith. He is after all considered to be the "father" of free-market enterprise. Still, there is more to laissez-faire economics than just the market system; there is also the notion of private property, another key precept of classical liberalism. John Locke defines private property as that which man "hath mixed his labor with, and joined to it something that is his own" (Macpherson, 1980, p. 19). This is man's own labor, his wherewithal, and his creativity. For Locke, private property belongs to only the "industrious and [the] rational" (p. 21). "Nothing was made by God," accordingly, "for man to spoil or destroy" (p. 21). Man must endeavor to use his
property—to be productive with it. Private property, in this sense, is really nothing more than an extension of man's own labor, his own being. If man's creativity, his private property, is combined to a free-market enterprise, the invisible hand, then a system of pure competition has been put together that is driven predominantly by man's own self-interest, his desire to accumulate more and more private property (pp. 28-29). The result is very simple; it is the promotion and perpetuation of individualism through economic self-determination. As Adam Smith writes: "Every man endeavors to supply by his own industry . . . . When he is hungry, he goes to the forest to hunt; when his coat is worn out, he clothes himself . . . ; and when his hut begins to go to ruin, he repairs [it], . . . " (Smith, 1991, p. 221). As such, "every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage . . . which he has in view" (p. 349). In this regard, man's pursuit of individual self-interest is clearly at home with capitalism. Indeed, it is man's self-interest that drives the market system—that ensures that society is yielded the goods that it wants at the prices it is willing to pay (Heilbroner, 1999, pp. 54-57).

Principles of Classical Liberalism

Although the philosophical precursors to classical liberalism are too expansive to cover exhaustively, what should be apparent at this point anyway is that man's own individuality has clearly been an evolutionary product of several historical events. Each event, beginning in large part with the Renaissance, has gradually added to the notion that

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26 It should be noted that since John Locke was very much against the "spoilage" of property, accumulation here is represented in terms of money. Money in this sense is something that is "lasting . . . that men might keep without spoiling" (Macpherson, 1980, pp. 28-29).
man should be admired and respected for his own unique individuality. While man is still very much recognized as a social creature with social needs, there is a much wider appreciation and acceptance of man because of his own individual merits and talents and not just those that have been laid down by a potentially conformist-oriented society. Indeed, as Anthony Arblaster writes: “Conformity is always suspect. [It] suggests . . . that people are merely following convention or fashion or the crowd, rather than acting out their own independent and spontaneous inclinations” (Arblaster, 1984, p. 46). What is needed now, though, is to fit this newfound appreciation for individuality within the larger context of classical liberalism. To do that, a more thorough understanding of “classical liberalism” is warranted. There are, of course, several angles or dimensions to classical liberalism; however, only those dimensions that are directly relevant will be explored. Among these are: (1) an individual’s right to life; (2) an individual’s right to liberty; and (3) an individual’s right to property. All three of these rights, in one shape or another, are essential to any understanding of classical liberalism and are imperative to the promotion and preservation of individualism.

Right to Life

What is an individual’s “right to life” in the classical liberal sense of the term, and why is it important to classical liberal thought? According to Lawrence Herson, an individual’s right to life “connotes a system of justice that is free of arbitrary action and pays proper attention to legal procedure” (Herson, 1984, pp. 46-47). While classical liberals perceive government as essential, primarily to protect man from man, they do not rejoice in having it. To such classical liberals as John Locke, government is a necessary
evil. Government is created by man's own consent for the sole purpose of protecting his
inalienable rights (Macpherson, 1980, p. 52). Once government moves beyond this realm
and begins to act arbitrarily or without regard to man's rights, man has the right to
withdraw his consent and to create a new government (pp. 107-124). Government, at
least from Locke's perspective, is bound by man's own consent (pp. 63-64). Man leaves
the uncertainty and the insecurity of the state of nature for the comforts and conveniences
of political society (pp. 65-67). Rule of law in that society is supreme. Not only is man
bound by the law, so too is government. In fact, rule of law is man's protection against
state and its institutions must operate within limits which are either laid down in an
explicit, written constitution, or take the form of a rather more vaguely conceived body of
'fundamental' laws and customs" (p. 72). "Part of the meaning of the rule of law," he
continues, "[is] a minimum of consistency and impartiality" (p. 73). Time and again,
Locke reiterates his position that government cannot be arbitrary "for nobody can transfer
to another more power than he has in himself; and nobody has an absolute arbitrary
power over himself or over any other" (Macpherson, 1980, p. 70). Rule of law, the con­
sistency in the law, is key to classical liberalism and is just as important to it as are man's
other inalienable rights—his rights to liberty and property. One might stipulate, as
Arblaster does, that without rule of law, liberty and property would be nothing more than
ideals (Arblaster, 1987, p. 71). The uncertainty and insecurity that man witnesses in the
state of nature would be no different in political society. However, with the rule of law,

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27 Rule of law and due process of law are used here interchangeably. Both connote a system of pro­
cedures whereby both the government and the individual are bound by the same laws.
man is safe and secure in knowing that he is protected against the potential arbitrariness of both his fellow man and government alike. It is the sanctity of the law that man hopes for when he consents to leave the state of nature to form a political society; it is the sanctity of the law that he is counting on to protect and preserve his inalienable rights once he is in political society (Macpherson, 1980, p. 66).

Right to Liberty

What about an individual’s “right to liberty”? How is it defined in classical liberal terms, and why is it essential to classical liberal thought? According to Thomas Hobbes, “the right of nature is the liberty each man hath to use his own power, as he will himself . . . . By liberty is understood . . . the absence of external impediments” (Curley, 1994, p. 79). In classical liberal terms, liberty can be thought of in much the same fashion as freedom. However, neither one should be thought of in absolute terms. Classical liberals typically do not think of liberty or freedom in the sense of allowing man to do whatever he wills; there are of course restrictions (Arblaster, 1987, p. 56). Most notable is the restriction on man’s ability to take his own life or that of another (Curley, 1994, p. 79). Thus, according to Hobbes, man’s first duty is to seek peace, and his second duty is to preserve his own life (p. 80). Liberty, in this sense, might be perceived in a “negative” fashion (Arblaster, 1987, p. 56). Man is free from whatever it is that may hinder or interfere with his own personal liberty. For classical liberals, such as John Locke, such hindrances or interferences are likely to come from government. Accordingly, “whenever the [government] endeavors to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, [it] put[s] [itself] into a state of war with
the people" (Macpherson, 1980, p. 111). It is government's duty, in this regard, to protect man's inalienable rights and not to infringe upon them.

Classical liberalism, through the likes of Hobbes, Locke, and others, places a great deal of emphasis upon man's existence within the state of nature. Hobbes depicts man's life within the state of nature as something akin to a "free for all"—a "war of all against all" (Curley, 1994, p. 76). All that really guides the state of nature are the various laws of nature (e.g., to seek peace and to follow it) (pp. 79-80). Locke follows Hobbes very closely although he sees man's life within the state of nature as one that is less horrific and uncertain. Locke's state of nature is one more akin to "reciprocal equality" whereby each man acts as his own enforcer of the laws (Macpherson, 1980, pp. 8-9). This, though, is a problem for Locke. While the laws of nature are paramount, Locke still believes that "civil government is the proper remedy for the inconveniences of the state of nature" (p. 12). He writes: "Though this be a state of liberty, . . . it is not a state of license" (p. 9). Man must still abide by the laws and of nature, and "God hath certainly appointed government" to help man with this endeavor (p. 12). Government's fundamental purpose, for both Hobbes and Locke, is to protect man's natural rights, his inalienable rights. Government is not to infringe upon these rights; it is merely to protect and uphold them. In this sense, man creates government out of necessity—to protect man from his fellow man, to preserve his own life, liberty, and property.

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28 It should be noted that more so for Hobbes, government's fundamental purpose is to provide security. Man gives up most of his rights, except the right of self-defense, when he leaves the state of nature.
Right to Property

Finally, what is an individual’s “right to property” in the classical liberal sense of the term, and why is it significant to classical liberal thought? While the whole notion of property is certainly nothing unique to man, in that property has existed since the beginning of time, it is classical liberalism that truly brings property to the forefront of early-modern economic, political, and social thought. Private property, in this sense, is absolutely pivotal to classical liberalism. It is pivotal in the sense that property is viewed by such classical liberals as an inalienable right—a natural right, a God-given right (Macpherson, 1980, pp. 18-30). Moreover, as Lawrence Herson writes: “Private property is [also] inextricably bound to the value of achievement, [or the ability] to do one’s best” (Herson, 1984, pp. 21-23). Private property, in this sense, is closely aligned to the notion of prosperity—that the individual can take his private property and make something productive out of it. Private property is, according to Locke, that which “man tills, plants, improves, cultivates, and can use the product of” (Macpherson, 1980, p. 21). Private property is that which man can “industriously and rationally” utilize for the “advantage of [his] life . . .” (pp. 20-21). Further, Benjamin Barber argues that a great deal of the importance placed on private property by classical liberals arises out of what he terms as “original right” (Barber, 1984, p. 74). Accordingly, “man is as he owns and is because he owns” (p. 75). As such, “from self-ownership, issues . . . the right to room or space for the owned self, . . . the right to the power that belongs to the owned self; and . . . the right to the product of self and labor as it is mixed with the otherwise commonly held bounty

29 An “original right” that is supported by longevity and tradition. Private property belongs to man, in this respect, because “it was [his] father’s, and his father’s before him” (Barber, 1984, pp. 73-74).
of nature” (p. 75). Private property, in this sense, is a virtue because it is an extension of man. Property originates with God and is given to mankind in common. Man’s inherent desire for “self-preservation, [his] need to consume, and finally [his] labor, are what create [his individual] right to [such] property” (Arblaster, 1987, p. 163). As Locke stated: “Though the earth . . . be common to all men, yet every man has a property in his own person; this no body has any right to but himself” (Macpherson, 1980, p. 19).

Revolutionary America and Classical Liberalism

Having identified the various beliefs and values of classical liberalism, the objective now is to determine in what manner it may have influenced the founding and eventual creation of the American nation-state. Indeed, there is little doubt that there have been any number of intellectual influences that could potentially be linked to early American economic, political, and social thought. Indeed, Bernard Bailyn suggests: “[The] study of the sources of [early American] thought . . . reveals, at first glance, a massive, seemingly random eclecticism” (Bailyn, 1992, p. 23). The key to this statement, though, is the phrase “at first glance” (p. 23). It is true that the founding fathers did have a large array of “political theory at their disposal” (McDonald, 1985, p. 7). However, only a select portion of this theory was really taken seriously enough to be perceived as useful to early American thought. This select portion includes the various attributes of Roman republicanism, English antiquity, and classical liberalism. While the founding fathers certainly looked to Roman republicanism as an historical basis for the creation of representative government and to English legal custom as a model for constitutionalism,

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30 And also a source of political power.
it is to classical liberalism that they turned for justification of America's independence and for the recognition of man's individual rights. It is in this sense that Herson says, "[John] Locke was taken to heart" (Herson, 1984, p. 35).

Classical liberal principles become rather commonplace in much of the literature immediately leading up to, during, and following the American Revolution. According to Bailyn, "in pamphlet after pamphlet the American writers cite Locke on natural rights and on the social governmental contract..." (Bailyn, 1992, p. 27). This is not to imply that John Locke was by any means the only influence upon Americans during this time. Others, such as Voltaire, Montesquieu, Coke, and Blackstone were just as influential. However, as Bailyn contends, "except for Locke's, their influence... was neither clearly dominant nor wholly determinative" (p. 30). As a result, it is John Locke's writings that seemingly set the tone for much of this period in American history. His writings not only proclaimed principles that were acceptable to revolutionary Americans, such as an individual's right to life, liberty, and property, but his writings also provided ample justification for America's eventual call for independence from Great Britain. Both of these perspectives are embodied in two of the most revolutionary American documents of this timeframe: Common Sense and the Declaration of Independence.

**Common Sense**

Probably no other document during the Revolutionary period aroused American resentment against the British anymore than did Common Sense, written by Thomas Paine in 1776. English by birth, Thomas Paine, like so many other colonial Americans of his time, had become incensed at what he perceived to be the "violent abuse of power" on
the part of the British government against the American people (Kramnick, 1986, pp. 63, 71). Accordingly, “the laying a country desolate with fire and sword, declaring war against the natural rights of all mankind, and extirpating the defenders thereof from the face of the earth, is the concern of every man . . .” (pp. 63-64). Of course, while Paine discusses at length his problem with hereditary monarchs as well as his belief that America should be an independent nation-state, it is really his discussion of the origin of government and the purpose of government that is of primary interest. It is in this regard that Paine’s *Common Sense* closely parallels classical liberalism. “[As] an exposition of general liberal theory,” Isaac Kramnick writes, “the intellectual roots of Paine’s first section are the late 17th century liberal ideals of John Locke . . .” (p. 38). Paine uses classical liberalism in much the same fashion as have many of its subsequent proponents, namely, as a justification for something else desired. Without question, Paine is arguing for America’s complete independence from Great Britain. As to whether or not he actually believes in some of the things he writes is anyone’s guess. Throughout, Paine refers to a “state of natural liberty,” much like Hobbes’ “natural condition” or Locke’s “state of nature” (p. 66). Does he really believe that such a “state” exists or has existed? It is impossible to really know. The fact that he uses the “state of natural liberty” precept is what is significant. It allows Paine to set the stage for what he believes to be the end or “necessity” of government (p. 66). And it allows Paine the ability to address why the American colonies should be independent of the British Crown.

Paine’s pamphlet simultaneously poses two opposing perspectives with respect to

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31 Much like John Locke before him, Thomas Paine could very well be using the “state of nature” precept as a starting point, as an explanatory principle of how he believes man should be governed. Does he believe that a state of nature actually did exist? Who knows? It could be a situation whereby ideology happens to fit present circumstances.
government—that while government is inherently bad, it is still needed (p. 65). Accordingly, "... government even in its best state is but a necessary evil" (p. 65). Much like Locke, Paine sees a difference between society and government, or between civil society and the state. Man creates society because he wants to do so; he creates government because he has to (p. 65). Civil society, in this sense, is perceived as something that encourages man's "happiness," while government is perceived as something that inhibits man's "wickedness" (p. 65). Again, much like Locke, Paine views man in his natural state of being as something akin to impulse and uncertainty (p. 65). There is no entity, in this regard, like government to ensure that law and order is maintained (pp. 65-66). Hence, the chief end of government, its very creation and its necessity, is to provide for the security and welfare of all mankind (pp. 65-66). Man surrenders some of his natural liberty, out of his own rational self-interest, in return for government's protection (pp. 65-66). Or as Paine suggests: "[Man] finds it necessary to surrender up a part of his property to furnish means for the protection of the rest" (p. 65). In either respect, the result is the same—government originates within man, out of self-interest, for the purpose of protecting man. Hence, it naturally follows that whenever government is no longer capable of such a task, of providing security and welfare, man reserves the right to rebel against the government and replace it with another (pp. 50-55). It is with this perspective in mind that Paine wrote: "A government of our own is our natural right" (p. 98).

The Declaration of Independence

If it was Thomas Paine's *Common Sense* that really helped spark America's animosity toward the British Crown, then it was Thomas Jefferson's *Declaration of
Independence that truly made such animosity lasting enough to call for complete separation and independence. Much like Common Sense, the Declaration of Independence is an argument, a justification, as to why the American colonies should be independent from Great Britain. Indeed, Thomas Jefferson was keenly aware that some kind of explanation was needed to justify America’s call for independence, not only to persuade the potentially doubting American colonialist but also to persuade a potentially suspicious world (Gruver, 1985, pp. 121-122). Nothing like this had ever been done before. If a would-be doubter could not be convinced of the justness of America’s cause, then at least he or she could possibly be made to at least understand it. This was Thomas Jefferson’s chief aim and goal—to explain the rationale behind America’s desire for independence. It is also in this regard that Jefferson brings forth many of the principles of classical liberalism. Although depicted as an “expression of American sentiments,” Jefferson’s Declaration of Independence is really an elaboration of classical liberal ideals, particularly those espoused by the likes of John Locke (Vile, 2001, p. 4).

Thomas Jefferson’s Declaration of Independence suggests an admiration and respect for classical liberalism in at least three important ways: (1) his discussion of human rights; (2) his discussion of the proper ends of government; and (3) his discussion of the people’s right to revolution. All three are without question very similar to that of Locke (pp. 4-8). With respect to human rights, Jefferson wrote: “All men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness” (Lyons & Scheb, 2003, p. 629). In much the same manner as Locke, Jefferson is eliciting the notion that man is born with certain individual rights and that these rights are his alone—that they cannot be infringed.
upon by the government. If anything, it is government’s sole responsibility, being premised upon man’s own consent, to “secure” these inalienable rights and to provide for “safety and happiness” (p. 629). It is when government can no longer adequately provide for these measures or starts acting against them that it becomes “destructive” (p. 629). Again, in concert with Locke, Jefferson asserts that, at this stage, government must either be “altered or abolished” (p. 629). Man does not consent to tyranny, and if it is tyranny that rules over him, then he is at liberty to revolt against it (p. 629). Jefferson does, though, go to great pains to explain that revolution is only justifiable “when [there has been] a long train of abuses and usurpations” (p. 629). Ideally, “revolutions [should] not happen,” according to Locke, “upon every little mismanagement of public affairs” (Macpherson, 1980, p. 113).

The Madisonian Model and Classical Liberalism

The product that was born out of America’s revolutionary experience is an ode to classical liberalism. While most textbooks on American politics typically label this product, the government that was created out of the Constitution of 1787, as the Madisonian model, it is much more than just that, an honor to one of our founding fathers and eventual presidents (Bardes, Shelley, & Schmidt, 2002, pp. 44-46). Indeed, it is also a description of a type of government—a regime-type. The Madisonian model is a composition of many beliefs, most notably, the virtues of representative democracy, a mixed government, federalism, a bill of rights, and an independent judiciary. These ideas have

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22 For purposes here, the term “mixed government” shall refer to separation of powers and checks and balances. This is done primarily because the two are so interrelated with one another.
come to represent a system of government whereby power is made to counteract power or, as stated by James Madison, whereby “ambition [is] made to counteract ambition” (Wills, 1982, p. 262). Power is purposely divided and subdivided in such a manner as to prevent any one individual or group of individuals (i.e., faction) from ever gaining too much influence within the political process. This random dispersal of power ensures that the government cannot become a tyranny in its own right with respect to society and, most importantly, with respect to the individual. The government, in this sense, is hostage to its own structural complexity, to the combination of representative democracy, a mixed government, federalism, a bill of rights, and an independent judiciary.

**Representative Democracy**

Believing that any form of direct democracy was inherently dangerous, especially given its turbulent past within the ancient world (e.g., Athens), the founding fathers were very much enamored with what they believed to be the alternative virtues of a representative (i.e., republican) form of government. As James Madison states in Federalist 39,

> it is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government (Wills, 1982, p. 189).

Republicanism, loosely defined, is a system of government whereby consent to govern is periodically given by the people to representatives who are selected for the purpose of

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33 The concept of “republicanism” should not be confused with classical republicanism, as in a certain respect for public virtue. Here, “republicanism” and “representative democracy” are used interchangeably. Both, while not direct products of classical liberalism, do foster a sense of individualism, as in individual protections against the state.
acting on those same people's behalf before government (p. 190). It is a system of
government that is very much attuned to an indirect or representative form of democracy.
The people select representatives who in turn represent them in government. The ac­
countability of these representatives, though, remains with the people who may opt for
whatever reason to choose new representatives at subsequent intervals (i.e., elections).
The key to republicanism, its very essence, is that it is ultimately premised upon the
consent of the governed, the people. Power emanates at the grassroots level with the
people and flows upward to the government. The government, in this regard, is beholden
to the people for both its power and its legitimacy.

There are, of course, other aspects of republicanism that were also enticing to the
Founding Fathers. Most notably the notion that a government premised upon the consent
of the governed implies the superficial existence of a social contract. Social contract
theory is very much at the heart of classical liberalism. Individuals consent with one
another for the sole purpose of leaving the state of nature to create a government. This is
done for any number of reasons. For instance, it might be done for the protection of life,
liberty, and property. Government's sole duty, in this regard, is to ensure that man's
inalienable rights are preserved. This is all that he consents to when he leaves the state of
nature and nothing more. Once government moves beyond this realm, say with respect to
violating these rights, man then has the right to withdraw his consent—to replace that
government with another. This in fact was the gist of the argument laid out by Thomas
Jefferson in his Declaration of Independence. The King of England has persistently

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34 It should be noted that the term "people" has had diverse meanings throughout America's history. Initially, the "people" simply referred to white, male property owners. However, since then, the term "people" has been expanded to include most all American citizens and even some non-citizens, regardless of race, color, gender, or what have you.
violated the natural rights of his American subjects. As a result, they in turn have a right to withdraw their consent, by force if necessary, and to create a new government—one whose sole purpose again is to protect these same rights.

**Mixed Government**

Fearful of concentrated power, such as that represented in a monarchial system of government, the founding fathers were also enamored with the various attributes of a mixed form of government. Heavily influenced by the likes of such individuals as Montesquieu, the founding fathers believed that power had to be divided (i.e., separated) and overlapped (i.e., checked and balanced) in such a manner as to forever prevent the formation of a tyranny (Wills, 1982, pp. 243-250). The system of government devised by the Constitutional Convention of 1787 is structured in this manner. It is a system whereby power is divided into three branches of government. The Congress is the legislator of the laws; the President is the enforcer of the laws; and the Supreme Court is the interpreter of the laws. The separation of the branches into distinct areas of concern ensures, according to James Madison in Federalist 47, that "the preservation of liberty" is maintained (p. 244). For, as he continues, "there can be no liberty where the . . . powers are united in the same person or body of magistrates" (p. 245). Again, "ambition [must be] made to counteract ambition" (p. 262). With the legislative, the executive, and the judicial powers divided between three branches, no one branch will be able to assume absolute control over all the reigns of government—to, in other words, act in an arbitrary and dictatorial manner (pp. 244-246).

This does not, however, mean that each department of government should be
totally separate and independent from the others. Indeed, as James Madison writes in Federalist 48: "Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation ... essential to a free government can never in practice be duly maintained" (p. 250). As a result, interdepartmental dependency is very much at the heart of the mixed government that was created out of the Constitutional Convention of 1787—interdependency that is not only maintained but is also enhanced by a complex network of checks and balances. It is these checks and balances, these powers that are seemingly overlapped between the legislature, the executive, and the judiciary, that ensure that no one department of government can ever act on its own accord with supreme felicity. And it is these checks and balances that ensure that no governmental tyranny (i.e., tyranny of the majority) can ever prevail against the will of the minority—that being, in this case, the individual.

Federalism

While the concept of federalism is nowhere specifically mentioned within the Constitution, it is still an important product of the Madisonian model (Bardes, Shelley, & Schmidt, 2002, p. 85). Its origins, though, are more a result of the final distribution of powers between the national government and the various state governments than any intentional act on the part of the founding fathers (p. 85). Indeed, as stipulated to by the Constitution, specifically within the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" (Lyons & Scheb, 2003, p. 640). In this sense, power is divided between the national government and the state governments in such a manner
as to allow each level of government to be semi-independent of the other (Bardes, Shelley, & Schmidt, 2002, p. 82). The national government's powers, its enumerated powers, are specifically granted to it by the states and the people, as spelled out in the Constitution, while the various states' powers, their police powers, are reserved to themselves (pp. 85-89). To ensure that there is no redundancy or duplication in the laws between the two levels of government, a supremacy clause is also added to prevent any conflict between the two (pp. 88-89). As set out in Article VI, Clause 2 (of the Constitution), "the Constitution and the laws of the United States which shall be made in pursuance thereof . . . , shall be the supreme law of the land" (p. 88). Meaning, more specifically, the laws of the national government will always seemingly prevail whenever similar laws are concurrently enacted by the state governments (pp. 88-89).

More importantly, though, federalism might also be thought of as a form of double security against any violation of the individual's personal rights on the part of either the national government or the various state governments. As James Madison writes in Federalist No. 28: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government" (Nivola & Rosenbloom, 1999, p. 78). Under such a scenario, the people, their rights, will necessarily predominate (p. 78). They will do so, in many respects, "by throwing themselves," accordingly, "into either scale" (p. 78). Whenever, the national government, for instance, becomes too encroaching upon the people's personal liberties, "they can make use of the

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35 Enumerated powers are defined as those "powers specifically granted to the national government by the Constitution" (Bardes, Shelley, & Schmidt, 2002, p. 85). Police powers are reserved powers of the states which grants them "the authority to legislate for the protection of the health, morals, safety, and welfare of the people" (p. 86).
other [i.e., the state governments] as the instrument of redress” (p. 78). The same can also be said in the other respect, with the national government being used as an “instrument of redress” against encroaching state governments (p. 78). In either respect, the national government and the various state governments check one another in such a way as to prevent the formation of any tyranny (pp. 78-79). Under such a system of double security, in the end, it is the people that quite naturally prevail, with the preservation of their own personal liberties (pp. 78-79).

Bill of Rights

Interestingly, although “the colonial experience, climaxed by the Revolution, honed American sensitivity to the need for a written constitution that protected rights . . . ,” few of the founding fathers believed that it was necessary to incorporate such rights directly into the document itself (Levy, 1999, p. 8). Their logic was simple: If the Constitution only provided the national government with certain delegated powers, and since no such powers existed with respect to the individual’s inalienable rights, then the national government was without power to do anything to them (pp. 19-20). In other words, why should the ability of government to restrict speech be limited, for instance, when that same government is without power to even do such a thing (p. 20)? What does not exist cannot logically be restrained (p. 20). Alexander Hamilton, in Federalist No. 84, even went so far as to say that a bill of rights would “not only be unnecessary in the proposed constitution, but would even be dangerous” (Wills, 1982, p. 437). His belief was that such an inclusion “may serve as a specimen . . . which would be given to the doctrine of constructive powers” (p. 437). Meaning, that if what does not exist can be
limited, then what does not exist can also be created—an even greater threat to individual
rights (p. 437). Such reasoning, at least for those such as Hamilton, was sound but would
not prevail in the long run. With the adoption of the Constitution hanging in limbo, the
addition of a bill of rights would become central to its eventual ratification.

The Bill of Rights, as originally set forth (in 1791), was a list of rights guaranteed
to the people of the United States against the national government. Interestingly, state
governments were not included, in large part, because it was generally believed that the
people were already protected at the state level, within the various state constitutions,
even though many of them did not even possess such protections (Levy, 1999, p. 21). 36
But as Leonard Levy recounts: "[The] states [that] had no bills of rights were [con­
sidered] as free as those with bills of rights" (p. 21). In this respect, it was the national
government that was perceived to be the greatest threat against individual liberties. In one
of many complaints leveled against the formation of a stronger national government,
Patrick Henry writes: "This Constitution is said to have beautiful features; but . . . sir,
they appear . . . horridly frightful, . . . [with] squints toward monarchy" (Ketcham, 1986,
p. 213). Such things as the creation of a president, the allowance for an elastic clause,
and the inclusion of a supremacy clause aroused great alarm among many so-called Anti-
federalists.

Believing that individual liberty could very well be at the mercy of a distant
government reminiscent of what existed in England, Anti-federalists demanded that a bill
of rights be included within the new Constitution (before they would ratify it). These

36 This logic would of course change in later years, as many states readily demonstrated their ability
to be just as repressive (e.g., Jim Crow laws). The original belief nonetheless was premised upon the fact
that some of the states already possessed a "bill of rights" and upon the fact that states were closer to the
people (i.e., could be more easily controlled).
individual rights, according to John DeWitt, another Anti-federalist, would ensure that "the compact itself is a recital upon paper of that proportion of the subject's natural rights" (p. 196). As a result, it would be left to James Madison, originally an opponent of a bill of rights himself, the task of determining which individual protections against the national government would be incorporated into the Constitution (Bardes, Shelley, & Schmidt, 2002, pp. 48-49). The significance of such an inclusion, according to Leonard Levy, was the fact that "America had [finally] become accustomed to the idea that government existed by a consent of the governed, that people created government . . . by written compact, that the compact constituted fundamental law, [and] that the government must be subject to such limitations as are necessary for the security of the rights of the people" (Levy, 1999, p. 24).

Independent Judiciary

With power fragmented and decentralized, the Madisonian model was not designed by any stretch of the word to be an efficient system of government. Still, the founding fathers were keenly aware that the Madisonian model did need to be an effective system of government. In other words, it had to work even if ever so slowly. To ensure its effectiveness, the founding fathers devised what might be referred to as a "referee" system. Typically, a referee, in the modern sense of the term, is an individual who is primarily responsible for ensuring that the rules of a particular game are followed as closely as possible. A referee ensures that the game is played fairly by all sides and, if need be, the referee determines who wins and who loses. The "referee" that the founding fathers had in mind with respect to the Madisonian model is the judiciary generally and
the United States Supreme Court specifically. Article III of the United States Constitution states: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (U.S. Constitution, Art. III, Sec. 1). How does the judiciary, the Supreme Court, serve as a "referee" in the American game of politics? What does it do?

The Supreme Court is without question an unusual institution within American government. For one thing, its members are not directly elected by the people. They are appointed by the President with the advice and consent of the Senate. Secondly, its members do not serve clearly defined terms. They are appointed for what amounts to life or, as the Constitution stipulates, "good behavior" (U.S. Constitution, Art. III, Sec. 1). It is these characteristics of the Supreme Court which allow it to be a quasi-independent component (i.e., institution) of American government. It is also these characteristics of the Court which allow it to serve out its role as final "referee." In this regard, the Court's most fundamental duty is to protect and preserve the Constitution of the United States—to ensure that the rights and the privileges contained therein are maintained for the present generation and secured for future ones. As Alexander Hamilton writes in Federalist 78: "The independence of the [Supreme Court] is requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves" (Wills, 1982, p. 397).

Conclusion

While the concept of individualism has existed since the 14th century, it is really
not until the advent of classical liberalism that it becomes truly appreciated as a central component of human behavior. Indeed, the whole notion of individualism is at the core of classical liberal thought and is best represented in its acceptance of man as a rational being with certain inalienable rights to life, liberty, and property. The belief that man is an individualistic animal fully capable of taking care of his own destiny has many ramifications. Most notable among them is the realization that man does not need the help of an overly intrusive government. Man only consents to the creation of government to protect his life, liberty, and property—to provide for some sense of order and stability—and no more. Whenever government begins to act arbitrarily or without regard to man's inalienable rights, man reserves the right to withdraw his consent and, if need be, to revolt and replace that government with another. It is in this regard that the individual's rights, his interests, are paramount to those of the state.

Without question, classical liberalism, with its keen sense of appreciation for the individual, would have tremendous influence upon America's founding, from the period of publication of Common Sense (1776) to the adoption of the Bill of Rights (1791). The principles of classical liberalism can be found throughout. Classical liberalism thus served as a justification of America's war and eventual independence from the British crown. Indeed, as Thomas Jefferson wrote in his Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and property—that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness (Bardes, Shelley, & Schmidt, 2004, p. 521).

Moreover, classical liberalism also underscored America's creation and adoption of a
new constitution. One might stipulate that the very essence and design of American government pays sincere homage to classical liberal principles. The respect and admiration for the rights of the individual embodied in classical liberalism can be found throughout American constitutionalism. Whether it be by means of republicanism or federalism, the protection of the individual and, in particular, the individual's rights are the primary basis of American government.
CHAPTER III

THE INDIVIDUAL’S INALIENABLE RIGHT TO LIFE: AN ANALYSIS
INTO THE U.S. SUPREME COURT’S UNDERSTANDING
OF UNREASONABLE SEARCHES AND SEIZURES

Introduction

One of the principal themes advocated by classical liberalism and, in particular, John Locke is that an individual has an inalienable “right to life.” By “inalienable,” Locke is referring to man’s natural right, or his God-given right. Man is given the “right to life” through the very creation of his own being; he is, in other words, born with such a right. Merriam Webster’s Collegiate Dictionary defines the term “inalienable” as that which is “incapable of being alienated, surrendered, or transferred” (Webster, 1993, p. 586). Because man is born with such a right, neither he nor any other entity (e.g., government) may conceivably alter the nature of its possession. It is an innate part of himself and, as such, an essential part of his own inner being. By “right to life,” Locke is referring to man’s right to “a system of justice that is free of arbitrary action and pays proper attention to legal procedure” (Herson, 1984, pp. 46-47). It is a system whereby an individual’s “worth and dignity” are considered as paramount to the interests of society and, in particular, to the interests of state (p. 46). Rule of law, as applied to both ruler and ruled alike, ensures that the individual’s rights, his right to life, remain guarded against any potentially arbitrary, undue government intrusion. This is the individual’s inalienable right, to be guaranteed some sense of procedural due process on the part of the state.
Man's inalienable right to life is very much at the heart of America's founding and is certainly key to the development of the Madisonian model. Indeed, one of the strongest condemnations of the British government by Thomas Jefferson, among others, was that it had consistently violated the procedural due process rights of its American subjects. To the say the very least, the American colonial experience with King George III has been "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny" (p. 521). Accordingly, the King of Great Britain has, among other things, .

refused his assent to laws; . . . obstructed the administration of justice; . . . made judges dependent on his will alone; . . . abolish[ed] the free system of English laws; . . . tak[en] away our charters; . . . suspend[ed] our own legislatures; . . . [and] abdicated government here (pp. 521-522).

The key, of course, is to determine in what manner if any the United States Supreme Court has preserved and perpetuated such precautionary devices as set forth by the Founding Fathers to ensure that no such tyranny on the part of government could ever potentially happen again with respect to an individual's inalienable right to life. Although there are several such devices found within the U.S. Constitution's Bill of Rights, including an individual's protection against self-incrimination, double jeopardy, and cruel and unusual punishment, none are probably any more significant to an individual's procedural due process rights than the protection afforded against unlawful searches and seizures. This right provides procedural protection of the individual against the state and thus preserves one of the central most important tenets of classical liberalism, an individual's "right to life."

The Eighth Amendment's protection against "cruel and unusual" punishment will be covered extensively within the concluding chapter, Chapter VI, which will look at other protections beyond just those covered here.
The History Behind Unlawful Searches and Seizures

According to the Fourth Amendment of the United States Constitution, "the right of the people to be secure in their homes, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. Constitution, Amend. 4). The fundamental basis of the Fourth Amendment is the whole notion that an "[individual's] home is [his] castle" and that no one person, group or entity, speaking primarily of government, shall have the right to violate the sanctity of that castle without some prior recourse to procedural due process (Vile, 2001, p. 154). Clearly, in this regard, the individual's inalienable right to life, or his right to due process of law, is considered by far more significant than any particular ambition or desire on the part of the state. As such, the Fourth Amendment was incorporated into the U.S. Constitution for the specific purpose of protecting the rights of the individual against what James Madison has referred to as "the superior force of an interested and over-bearing majority" (Wills, 1982, p. 43). Of course, this does not mean that the government is forever prevented from searching the individual's "homes, houses, papers, and effects"; it only means that the government is forever prevented from searching them in an arbitrary manner (U.S. Constitution, Amend. 4). In lieu of the Fourth Amendment, the government must adhere to some sense of procedural due process before it can even think of infringing upon an individual's right to life. The individual's protection against unreasonable searches and seizures is sacrosanct against any potentially arbitrary action on the part of the state.
The historical basis of the Fourth Amendment’s protection against unreasonable searches and seizures is very much rooted in English legal custom, or what might be referred to here as English heritage (Cummings & Wise, 2001, p. 34). Indeed, according to Leonard Levy: “The Fourth Amendment would not have been possible but for British legal theory, which Britons of North America inherited and cherished as their own” (Levy, 1999, pp. 150-151). There are, of course, any number of precedents within English heritage that would eventually serve as a foundation for the protection against unreasonable searches and seizures but none of them have been any more influential than the Magna Charta of 1215 and the “inspiring imagery” that was eventually born out of it (Levy, p. 151). The Magna Charta of 1215, oftentimes referred to as the “Great Charter,” is really the first written constitution of Great Britain. Being a constitution of sorts, a list of grievances as well as demands, the Magna Charta sought to address what many of the feudal barons of England at the time perceived as an arbitrary abuse of royal power by the monarch, King John (Perry, et al., 1985, p. 209).38 The significance of the Magna Charta of 1215 for present purposes, though, is really its discussion of the issue surrounding “due process” within Clause 39. Indeed, it is this aspect of the Magna Charta that many, including Robert Beale, among others, have periodically referred to as being the primary source of the whole notion that “a man’s house is his castle” (Levy, 1999, pp. 151-153).

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38 One of the significant problems that the barons had with King John was their belief that he had shown ill regard for traditional feudal practices. For instance, he had demanded far more revenue from them than he was entitled to, plus he had punished many of them without proper due process (i.e., trial) (Perry, et al., 1985, p. 209).
While Clause 39 of the Magna Charta does not specifically allude to an individual's protection against unlawful searches and seizures, it is this component of the Great Charter from which it has historically been derived. As stated within: "No freemen shall be taken or imprisoned or diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land" (http://www.cs.indiana.edu/statecraft/magna-carta.html). Still, although the Magna Charta was instituted in 1215, it was not until 1589 that anyone even thought of making the connection between its contents (i.e., Clause 39) and a man's right to some sense of household privacy (Levy, 1999, p. 151). As with the whole episode that eventually culminated with the adoption of the Magna Charta in 1215, again, royal prerogative, or the abuse thereof, was at issue. Indeed, according to Robert Beale, the royal court, from which he was also a member, had shown unbridled disrespect for the privacy of a man's home (p. 151). Whenever the court was so obliged, its officers were free to enter into any man's home, search through his personal effects, and take whatever they desired, or that which they considered to be evidence (p. 151). Such actions on the part of government, at least in Beale's mind, were in clear violation of the Great Charter (p. 151). For, although Clause 39 does not speak directly to privacy itself, it may be carefully construed or inferred from it (pp. 151-152). This, according to Leonard Levy, is what has become part of the "inspiring imagery" or "creative glosses" that encapsulates the Magna Charta (p. 151). Oftentimes, "what mattered was not what Magna Charta actually said but what people thought it said or, rather, what it had come to mean" (p. 151).

Colonial Experience With Searches and Seizures

Robert Beale was certainly not alone in his belief that the Magna Charta implied some sense of protection against the rummaging effects of an otherwise overzealous government bent upon invading the privacy of a man's home. Others, too, followed in Beale's steps including, among them, Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone (Levy, 1999, pp. 150-154). All of them would have a tremendous influence upon early colonial American legal thought, specifically as it would relate to the whole notion that "a man's house is his castle" (p. 151). Throughout the colonial period, particularly after the English Parliament adopted the usage of writs of assistance (i.e., general search warrants) in 1662 and then extended them on to the colonies in 1696, the British government routinely showed little if any regard for the sanctity of the subject's personal effects (i.e., home) (O'Brien, 2003, pp. 835-836; Levy, 1999, pp. 156-157). Such writs enabled British authorities (e.g., customs officials) to arbitrarily "enter and go into any house, shop, cellar, warehouse, room, or any other place, and in case of resistance, to break open doors, chests, trunks and other package, and there to seize any kind of goods or merchandise whatever prohibited" (Peck, 1992, p. 121). The primary purpose of these general warrants was, in most cases, to collect contraband that was typically smuggled to avoid paying royal taxes (pp. 120-121). This was especially true at around the time of the French and Indian Wars within colonial America (1756-1763) and shortly thereafter, when England imposed additional taxes on various goods to help compensate for the war effort (Vile, 2001, pp. 1-2). For instance, in 1764, the British implemented the Sugar and Currency Acts; and in 1765, the British implemented the Stamp and Quartering Acts (Gruver, 1985, pp. 106-111). These acts were subsequently followed
by the Townshend Act in 1767 and then the Intolerable Act in 1774 (pp. 111-117). Such arbitrary actions on the part of the British government, as at least perceived by the American colonialists, would have a tremendous effect upon the American colonies, initially spawning resentment and, in time, outright challenge.

One of the first and most significant challenges in the American colonial court system that was used to determine whether or not Clause 39 of the Magna Charta of 1215 did in fact infer some sense of privacy on the part of the individual and his personal effects came in 1761 within the Colony of Massachusetts (Klotter & Kanovitz, 1991, pp. 174-175). In what has since become known as the “Writs of Assistance” case or the “Paxton’s” case, the issue at hand was whether or not the British government could in fact use general warrants, or writs of assistance, to search merchant property throughout the city of Boston (pp. 174-175). Operating under a general writ issued by King George II in 1755, James Paxton, an English customs officer, routinely used the writ to search for smuggled contraband for the Crown as well as for his own personal gain (Peck, 1992, p. 121). Described as a “rat gnawing at the [city’s] innards,” Paxton was by far the most disliked English official presiding in Boston at the time (p. 121). His unseemly reputation plus his arbitrary use of searches and seizures came to a head in 1760 (p. 121). With the death of King George II, under whose power the general writ had been originally issued, Paxton would need to apply for a new writ under the new monarch, King George III; however, as routine as that may be, this would be the spark that would ignite colonial challenge to the arbitrary use of such writs (pp. 121-122). Eager to challenge the legitimacy of such writs on behalf of the American colonies was James Otis, Jr., former advocate general for the English Admiralty (p. 122). The gist of Otis’ argument: Such
writs are illegal because they are simply too general and because they place too much power “in the hands of every petty officer” (p. 122). Accordingly, general writs are nothing more than devices that can be used for “revenge, ill-humor, or wantonness” (p. 122). This, in Otis’ mind, was “the most destructive of English liberty, and the fundamental principles of the constitution” (p. 122). While Otis, in the end, did in fact lose the case, he did leave significant impression upon the American colonies (p. 123). In fact, John Adams, who actually did observe the trial, would later comment that “then and there the child Independence was born” (p. 123).

**Constitutional Debate Over the Fourth Amendment**

Given the colonial experience with the writs of assistance, it is little wonder that the founding fathers would feel compelled to incorporate a protection against the use of general warrants within the U.S. Constitution itself. Ironically, though, this was an issue of debate. Many, including Alexander Hamilton, believed that such a protection was not really warranted, citing that...

> bill of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince... They have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants (Wills, 1982, p. 436).

Others, such as Thomas Jefferson, were a bit more wary of the new constitution believing 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 rest on inference” (Peck, 1992, p. 62). Ultimately, the very ratification of the Constitution itself would be dependent upon the inclusion of some form of a bill of rights. The founding fathers had...
become estranged into two dominant camps: the Federalists and the Anti-federalists. While the Federalists (e.g., Hamilton) did not believe a bill of rights was essential to the new constitution, the Anti-federalists (e.g., Jefferson) would not sign on until one was added to it. In the end, it would be James Madison who would seek to bring the two sides together in compromise. In response to Jefferson’s concerns, Madison wrote:

> My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to supply it even by amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and, if properly executed, could not be of disservice (p. 62).

However, Madison’s perceived lack of enthusiasm for the addition of a bill of rights worried some Anti-federalists (p. 69). Believing that Madison could very well be waffling on the idea, “Anti-federalists [soon] spread rumors that [he] opposed a bill of rights” (p. 69). Fearing that the last few states may not ratify the Constitution (e.g., North Carolina and Rhode Island), and fearing that his own bid for Congress could very well be in jeopardy, Madison was compelled thereafter to strengthen his own position on the matter of including a bill of rights by openly stating:

> It is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the states for ratification, the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, [etcetera] (p. 69).

Of course, believing that a bill of rights should be added to the U.S. Constitution and having some idea as to which rights ought to be included within such a bill soon demonstrated itself to be a particularly onerous task, especially for James Madison. Between 1787 and 1789, more than 200 recommendations were offered up by the various

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40 The dispute arose primarily because of disagreements over the functioning of the Articles of Confederation—America’s first constitution. Federalists believed that it needed to be either fixed or scrapped, while Anti-federalists believed that it was working just fine.
states for inclusion into a bill of rights (Levy, 1999, pp. 1-43). Interestingly, though, while Madison, and others, were compelled to sort through and condense the myriad of rights offered, historical experience would soon lend a hand. Nowhere was this more evident than with respect to what would become the Fourth Amendment—the individual’s protection against unreasonable searches and seizures. The experience with the British government’s utilization of general warrants would serve as a clear precedent for what not to allow in the new government. Still, although Madison, and others, were keenly aware that some sort of protection against general warrants ought to be included, the exact phraseology of such an inclusion would become an issue of debate. As a source and a guide, Madison, and others, turned to what many of the states had already included in their constitutions with respect to the issue of searches and seizures (pp. 168-179).^41

However, in many of the states, including Virginia and Pennsylvania, there was reluctance to completely outlaw the use of general warrants (pp. 168-170). Both states clearly expressed disdain for the “grievous and oppressive” manner of general warrants but only went so far as to stipulate that they “ought not to be granted” (p. 168). Other states, such as Maryland and Delaware, were eager to cite general warrants as “illegal” but remained vague on the specificity as to what grounds such a document might be voided (pp. 170-171).^42 In the end, it was the directness, specificity, and succinctness of Massachusetts’ constitution that would most impress Madison and his colleagues. Strongly influenced by the Writs of Assistance case in 1761 and written by John Adams himself, witness to the

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41 Several of the states implemented their own constitutions shortly after America’s Declaration of Independence in 1776.
42 Both Maryland’s and Delaware’s constitutions did not provide for a “specificity” requirement as to what items may be searched and seized—an awkward contradiction to their outlawing of general warrants as “illegal” (Levy, 1999, pp. 170-171).
event, Article XIV of the document states:

Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to the civil officer, to make search in suspected places, to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities, prescribed by the laws (Levy, 1999, pp. 170-171).

The significance of Massachusetts’ constitution, at least for Madison, was not just the fact that it provided for a guarantee against unreasonable searches and seizures but that it also referred to such a guarantee as a fundamental “right” that “every subject” possesses (p. 171). The allowance for such a protection against “unreasonable searches and seizures” as a basic human right would become central to the eventual development and ratification of the Fourth Amendment to the U.S. Constitution (p. 171). Indeed, as should be evident below, the parallel between the two documents is rather striking:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (U.S. Constitution, Amend. 4)

The U.S. Supreme Court and Unlawful Searches and Seizures

Ideally, a central principle of American constitutionalism is the inherent belief that the judiciary is the final interpreter of the law. Meaning, the judiciary is responsible for determining the definition of the law as it specifically relates to the U.S. Constitution. Thus, according to Chief Justice John Marshall, “it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule” (Nivola & Rosenbloom, 1999, p.
This is how the U.S. Supreme Court must understand the U.S. Constitution. It must interpret it, or give meaning to it. The U.S. Constitution is by no means a specific document; it is very general and vague in most of its content. By the fact that the U.S. Constitution is so general enables it to be adapted to the generational circumstances or differences that may exist at the time of its interpretation. By no means, for example, does “unreasonable” mean today what it may have meant during the founding era. But given such broad language as contained within the Constitution, the Court can readily apply new interpretations to fit new generations. This does not, however, mean that the Court has the right to read into the U.S. Constitution what may not exist, or what may not be inferred. According to former Attorney General Edwin Meese III, “those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was” (Fisher, 1990, p. 88).

Understanding the Language of the Fourth Amendment

Language is undoubtedly the single most important aspect of the law. Words carry with them an array of historical occurrences, traditions, and understandings. One might say that a word is just not a word; it can and often does have a history behind it. Within America’s constitutional arrangement, it is the judiciary that is responsible for understanding constitutional language. What does a particular word or phrase mean? More specifically, as in this case, what does the language of the Fourth Amendment of

\[\text{Marbury vs. Madison, 5 U.S. 137 (1803).}\]

\[\text{This quote is taken from an excerpt used by Louis Fisher: The Doctrine of Original Intent: Attorney General Meese Versus Justice Brennan (Fisher, 1990, pp. 86-91).}\]
the U.S. Constitution mean; what does it entail? At first glance, the Fourth Amendment looks rather simple and straightforward: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (U.S. Constitution, Amend. 4). The problem arises, though, when the Amendment is broken down into its constituent parts. For instance, what constitutes an “unreasonable” search and seizure, as opposed to a “reasonable” one? Moreover, what does “probable cause” mean? “The answers to [such] questions are,” according to Lee Epstein and Thomas Walker, “of critical importance if the Fourth Amendment is to have any force” (Epstein & Walker, 2001, p. 486).

The right of the people to be secure in their persons, houses, papers, and effects, .... The word “right” itself is rather self-explanatory. Indeed, to some degree, it has already been covered in the sense of man possessing an inalienable “right” to life, liberty, and property. However, in typical terms, a “right” is nothing more than “that which is proper under law, morality, or ethics” (Black, 2000, p. 1060). It is “something that is due to a person by just claim, legal guarantee, or moral principle” (p. 1060). In this case, man has a “right,” a “just claim,” to be secure in his own “person, house, paper, and effect, against unreasonable searches and seizures ....” (U.S. Constitution, Amend. 4). A problem in terms of definition, though, arises when we turn to the rather general and broad sweeping language of “persons, houses, papers, and effects” (U.S. Constitution, Amend. 4). What exactly is a “person,” a “house,” a “paper,” and an “effect?” One way to determine the scope of such language is to begin by defining it as the “premises” and “areas”
that are protected by the Fourth Amendment to the U.S. Constitution (Klotter & Kanovitz, 1991, p. 258). Again, however, the concepts of "premises" and "areas" are just as vague in their specificity, or the lack thereof. At one time, the U.S. Supreme Court ruled that a "dwelling," whether occupied or momentarily unoccupied, carried with it the Fourth Amendment's protection against unreasonable searches and seizures (p. 258).45 The Court defined "dwelling" as an individual's home, apartment, hotel room, or place of business (Klotter & Kanovitz, 1991, p. 258). Only when that individual permanently "vacated" his "dwelling," his home, apartment, hotel room, or place of business, did his Fourth Amendment protection subside or end (p. 258). Of more recent, the U.S. Supreme Court has modified its understanding of "premises" or "areas" in at least two important ways. In 1967, in the case of Katz vs. United States, the Court ruled that the Fourth Amendment extends to "people" and not necessarily to just "dwellings"—that each individual carries with him, wherever he is, "a reasonable expectation of privacy" (389 U.S. 347, 351-361).46 And in 1987, the Court, again, amended its understanding of "premises" and "areas" by developing a four-pronged test, reiterating its earlier position on "dwelling," that the protection of the Fourth Amendment extends to: (1) the proximity of the area to the [dwelling]; (2) whether the area is within an enclosure surrounding the [dwelling]; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passers-by (Klotter & Kanovitz, 1991, p. 258).47

... against unreasonable searches and seizures, shall not be violated... The

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word "unreasonable" can have a multitude of different meanings, mostly all dependent upon the manner and the timing in which the term is applied. *Black's Law Dictionary*, for instance, defines "unreasonable" as "not guided by reason; irrational or capricious" (Black, 2000, p. 1247). As it relates to the Fourth Amendment, "unreasonable" carries with it a procedural component. A search and seizure that is not procedural may quite respectfully be considered as "unreasonable." However, a search and seizure that is conducted pursuant to procedure may quite respectfully be considered as "reasonable." In this context, procedural due process determines the "unreasonableness" or "reasonableness" of a given search and seizure. *Black's Law Dictionary* defines "procedural due process" as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights" (p. 406). A search and seizure that is conducted in lieu of the Fourth Amendment’s requirements for a search warrant would then be considered as "reasonable." All other searches and seizures would be considered as "unreasonable," provided, of course, that the U.S. Supreme Court has not allowed for what it considers to be "reasonable" exceptions to the rule. Such exceptions have historically included what is often referred to as a search "incident to a lawful arrest," a "voluntary consent" search, a "plain view" search, a search through "lawful impoundment," "stop and frisk" search, and "compelling government interest" search.

... and no Warrants shall issue, ... A "search warrant" is a rather simple concept in and of itself. As defined, a "search warrant" is "a written order authorizing a

51 Cooper vs. California, 386 U.S. 58 (1968).
52 Terry vs. Ohio, 393 U.S. 1 (1968).
law-enforcement officer to conduct a search of a specified place and to seize evidence" (Black, 2000, p. 1085). But a problem arises when we get to the point of who "shall issue" such a search warrant (U.S. Constitution, Amend. 4). The U.S. Constitution is rather vague on this notion, in the sense that it does not provide any clear indication at all as to who should be authorized to issue search warrants, as to who should determine whether or not law enforcement have met their minimum threshold of probable cause. As a result, the U.S. Supreme Court has ruled, in lieu of an individual's procedural right to due process of law, that a search warrant "shall [be] issue[d]" by a "neutral, detached magistrate."54 What this means is that "the issuance of a search warrant is a function of the judicial branch of government" and is not the domain of law enforcement officers and prosecuting attorneys who have a vested interest in the search (Klotter & Kanovitz, 1991, p. 191).55 As clearly stipulated to by Justice Robert Jackson in the case of Johnson vs. United States:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent (333 U.S. 10, 13-14).

... but upon probable cause, supported by Oath or Affirmation, .... The word


"probable cause" can have a multitude of different meanings. *Black's Law Dictionary* defines "probable cause" as "a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime" (p. 977). "Probable cause," as such, "amounts to more than a bare suspicion but less than evidence that would justify a conviction" (p. 977). "Probable cause" may also be thought of in the context of the term "reasonable suspicion," which is "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity" (p. 1018). In the context of the Fourth Amendment's protection against unreasonable searches and seizures, law enforcement must have "probable cause" in order to obtain a search warrant (U.S. Constitution, Amend. 4). What this entails is that the police must have reasonable suspicion that they will find illegal contraband (e.g., illegal narcotics) within the specified area or location that they wish to search. In the case of *Brinegar vs. United States*, for instance, the U.S. Supreme Court ruled that "probable cause" must involve "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act (338 U.S. 160, 175).* The U.S. Supreme Court underscored this perspective in the case of *Illinois vs. Gates* by pointing out that "probable cause" must take into consideration an "assessment of probabilities in [a] particular factual context" (462 U.S. 213, 232). What both cases similarly propound is an earnest belief that "probable cause" is a "fluid concept" that must eventually turn on

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57 *The case of Illinois vs. Gates*, 462 U.S. 213 (1983), actually overrules two earlier decisions that followed *Brinegar vs. United States*, 338 U.S. 160 (1949). Both *Aguilar vs. Texas*, 378 U.S. 108 (1964), and *Spinelli vs. United States*, 393 U.S. 410 (1969), sought to put into place a rigid two-pronged test that police had to follow in order to use an informant's tip. The two-pronged test involved, first of all, the adequacy of the informant's own knowledge about the matter and, secondly, the reliability of that knowledge (Epstein & Walker, 2001, p. 488).
the “totality of the circumstances” in which it is involved (462 U.S. 213, 230-233). As such, “probable cause” exists . . .

where ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed (338 U.S. 160, 175-176).

. . . and particularly describing the place to be searched, and the persons or things to be seized (U.S. Constitution, Amend. 4). One thing that the U.S. Supreme Court has determined is that while the “place to be searched” does not have to be “particularly described” with utmost specificity, its description does at least need to be “practically accurate” (Klotter & Kanovitz, 1991, pp. 202-203). What does “practically accurate” entail? According to John Klotter and Jacqueline Kanovitz, “the description must be sufficiently definite so as to clearly distinguish the premises from all others” (p. 202). The objective, of course, is to be specific enough so as to prevent the usage of open-ended general searches but practical enough so as to allow law enforcement to do its job (pp. 202-203). In 1987, the U.S. Supreme Court even allowed for the possibility of a “good faith” type of error with respect to a police search, stating, with some caution, that “we must judge the constitutionality of their [the police’s] conduct in light of the information available to them at the time they acted” (480 U.S. 79, 85). Likewise, “the persons or things to be seized” must be “particularly described” as well (U.S. Constitution, Amend. 4). The primary purpose of this requirement is to ensure, again, that law enforcement is not left with an unspecified or a general warrant that could be used for whatever purpose (Klotter & Kanovitz, 1991, pp. 204-205). In the case of Lo-Ji Sales, Inc. vs. New York, for instance, the U.S. Supreme Court ruled that “the Fourth

Amendment [does not] countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out" (442 U.S. 319, 325).\(^5^9\) Hence, “the persons or things to be seized” must be adequately described in such a manner “that even an officer who is unfamiliar with the case can read the description and know what items should be seized” (Klotter & Kanovitz, 1991, pp. 204).

**Incorporation of an Exclusionary Rule Into the Fourth Amendment**

The various principles born out of such language are at the heart of American constitutionalism and serve as the primary basis for protecting and preserving American individualism. Throughout, the U.S. Supreme Court has shown a respect for the individual’s rights while, at the same time, acknowledging the need on the part of the state to provide some sense of law and order. There are, of course, any number of cases that stand out with respect to the protections guaranteed by the Fourth Amendment to the U.S. Constitution. However, some of these cases are more significant to constitutional law than others. We might refer to such cases as “landmark” decisions in the sense that they have become absolutely contingent to understanding a particular area of the law. Concerning the Fourth Amendment’s protection against “unreasonable searches and seizures,” such historic cases have seemingly revolved around the Supreme Court’s application of the so-called exclusionary rule. The gist of the exclusionary rule is that “evidence obtained by an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution will not be admitted as evidence in court” (Klotter & Kanovitz, 1991, p. 177). In this respect, the exclusionary rule has become one of the Court’s primary tools to

ensure that the state does not arbitrarily encroach upon the Fourth Amendment rights of
the individual and his personal effects—to ensure, in other words, that the individual’s
due process rights, his right to life, are preserved and protected.

Interestingly, the exclusionary rule is nowhere specifically stated or alluded to
within the U.S. Constitution; and yet, this very same rule has become pivotal to the
enforcement of the Fourth Amendment. The development of the exclusionary rule within
American jurisprudence evolved at the beginning of the 20th century, in the case of Weeks
vs. United States (232 U.S. 383). Prior to this case, American courts followed the com-
mon law principle that “it would be a dangerous obstacle to the administration of justice
to hold that because evidence was obtained by illegal means, it could not be used against
a party charged with an offense” (Klotter & Kanovitz, 1991, p. 178). The Weeks case,
however, transformed this argument by putting into place an enforcement mechanism that
could be used to punish police in the event that they did violate an individual’s Fourth
Amendment rights against unreasonable searches and seizures. The exclusionary rule can
be looked at as a consequence, as a punishment for bad police work. Thus, according to
Justice William Day:

The tendency of those who execute the criminal laws of the country to obtain conviction
by means of unlawful seizures and enforced confessions, the latter often obtained after
subjecting accused persons to unwarranted practices destructive of the rights secured by
the Constitution, should find no sanction in the judgments of the courts, which are
charged at all times with the support of the Constitution, and to which people of all con-
ditions have a right to appeal for the maintenance of such fundamental rights (232 U.S.
383, 392).

Clearly, the Fourth Amendment would have no due process value at all if law en-
forcement was able “to discover and seize the fruits” of an illegal search and then be able

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to keep them for prosecutorial effect (232 U.S. 383, 392). The very purpose behind adding the Fourth Amendment to the U.S. Constitution was to ensure that “the sanctity of a man’s home and the privacies of [his] life” were safeguarded against any arbitrary action on the part of the state—that against the state, man has an “indefeasible right of personal security, personal liberty, and private property” (232 U.S. 383, 391).

The exclusionary rule, though, as adopted in *Weeks vs. United States*, was only initially applicable at the national level and, as such, did not apply to the various states. It would be almost 50 years before the U.S. Supreme Court would feel obliged to extend the procedural protection afforded by the exclusionary rule onto the states, via the due process clause of the Fourth and Fourteenth Amendments (338 U.S. 25). Of course, this is not to say that the Court did not dabble with the idea during the interim period. In 1949, in the case of *Wolf vs. Colorado*, the Court considered the idea but then seemingly backed away from it. Speaking for the Majority, Justice Felix Frankfurter stated:

> The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order (338 U.S. 25, 27-28).

Much of the Court’s rationale in the *Wolf case* revolved around the notion that other deterrents at the state level might be just as effective in curtailling police misconduct as the exclusionary rule (338 U.S. 25, 30-33). The proximity of the police to the community, the Court noted, for instance, could potentially have the same effect as the exclusionary rule, ensuring that any due process violations on the part of local law enforcement would

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61 This is actually a quote from a quote, contained within the case of *Weeks vs. United States*, 232 U.S. 383 (1914). The quote used by Justice William Day is taken from the case of *Boyd vs. United States*, 116 U.S. 630 (1886).

be readily observed and corrected (338 U.S. 25, 32-33). Still, while such reasoning was notable and quite possibly even plausible given the right circumstances, others on the Court fundamentally disagreed with its basis premise—that “a state’s reliance upon other methods which, if consistently enforced, would be equally effective” (338 U.S. 25, 31). Justice Frank Murphy, writing in dissent, stated:

Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass. Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all (338 U.S. 25, 41).

Justice Frank Murphy's logic, though in dissent in the Wolf case, would eventually become the majority viewpoint some 11 years later. The case of Mapp vs. Ohio would serve as the “leading case” to selectively incorporate the Fourth Amendment's exclusionary rule onto the states via the Fourteenth Amendment's due process clause (367 U.S. 643). Again, just like the Weeks case, there is a strong sense of respect and admiration for an individual's procedural right to life or due process of law. Speaking for the majority, Justice Tom Clark wrote: “Since the Fourth Amendment’s right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government” (367 U.S. 643, 655). Contemplating staunch criticism of the Court's decision to uphold the exclusionary rule by making it further applicable to the various states, the majority reiterated a point made in an earlier decision—that “for good or for

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Mapp vs. Ohio, 367 U.S. 643 (1961). Selective incorporation or incorporation theory is defined as “the view that most of the protections of the Bill of Rights are applied against state governments through the Fourteenth Amendment's due process clause” (Bardes, Shelley, & Schmidt, 2004, p. 553).
ill, [the government] teaches the whole people by its example . . . [and] if [it] becomes a
lawbreaker, it breeds contempt for law; it invites every man to become a law unto him-
self" (367 U.S. 643, 659). Clearly, in this regard, it is better that "the criminal go free
because the constable has blundered" than to reward the constable for his blunder (367
U.S. 643, 659).

Exceptions to the Applicability of the Exclusionary Rule

In nearly all cases, there is going to be an exception to every rule and nowhere is
this more true than with respect to the exclusionary rule. Just as the U.S. Supreme Court
has been willing to exclude evidence that it considered constitutionally detrimental to an
individual’s due process rights, it has also shown some leeway with respect to law en-
forcement. Does this mean that the Court has reneged on its duty to uphold the rights of
the individual against the state? One could certainly get that impression; however, the
Court has neither yet dismissed the relevance of the protections afforded by the Fourth
Amendment in preserving the individual’s rights, nor has it yet completely abandoned the
usefulness of the exclusionary rule in ensuring that those rights are respected by law
enforcement. Rather, the Supreme Court has shown a degree of understanding with
respect to the needs of law enforcement, particularly at a time when the crime rate has
started to soar, during the 1970s and 1980s. One might say that while the Court has in no

way abandoned the personal protections guaranteed to the individual by the Fourth

64 The quote that Justice Tom Clark borrows in Mapp vs. Ohio, 367 U.S. 643 (1961), comes from
Justice Louis Brandeis’ dissenting opinion in the case of Olmstead vs. United States, 277 U.S. 438, 485
(1928).
65 The quote that Justice Tom Clark borrows, in this case, comes from then-Judge Benjamin Cardozo
in the case of People vs. Defore, 242 N.Y. 13 (1926).
Amendment, it has at least considered that the timing of such protections is an issue of real concern—that the Court must somehow acknowledge that the rights of society must be weighed in conjunction with the rights of the individual. As John Klotter and Jacqueline Kanovitz write: “The exclusion of evidence is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition” (Klotter & Kanovitz, 1991, p. 182). Having said this, there are at least three noticeable exceptions that the U.S. Supreme Court has carved out of the exclusionary rule as applied by the Fourth and Fourteenth Amendments. These include, in general terms, a “collateral use” exception, an “inevitable discovery” exception, and a “good faith” exception.66

First of all, the “collateral use” exception is really a product of the case, United States vs. Havens (446 U.S. 620).67 In it, the U.S. Supreme Court ruled that “a defendant’s statements made in response to proper cross-examination . . . are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and is inadmissible as substantive evidence of guilt” (446 U.S. 620, 620-621). The exclusionary rule, as such, while potentially applicable in such a situation as this, cannot be used as a shield, as a defense, for perjury (446 U.S. 620, 627). Accordingly, the “integrity of the fact-finding goals of the criminal trial . . . [cannot] permit or require that false testimony go unchallenged” (446 U.S. 620, 627). The government, in this sense, has a right to challenge or impeach such testimony (446 U.S. 620, 627-628). Secondly, the “inevitable discovery” exception is a product of the case, Nix vs. Williams (467 U.S.

66 Other exceptions exist but not in relation to the exclusionary rule. Notable exceptions such as “plain view” are more directly pertinent to the Fourth Amendment’s requirement for a search warrant than the exclusionary rule.
In it, the U.S. Supreme Court ruled that the "exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial" (467 U.S. 431, 446). As a matter of fact, the Court reasoned, such an exclusion would "wholly fail to take into account the enormous societal cost of excluding truth . . . in the administration of justice" (467 U.S. 431, 445). And, "nothing in this Court's prior holdings supports any formalistic, pointless, and punitive approach . . ." (467 U.S. 431, 445). Finally, third, the "good faith" exception is a product of the case, United States vs. Leon (468 U.S. 897). In it, the U.S. Supreme Court ruled "that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment" (468 U.S. 897, 909). Recognizing that the exclusionary rule, when strictly construed, can exact "substantial societal costs," the Court reasoned that some "balance" must be allowed between an individual's right to privacy, his due process rights, and society's right to justice (468 U.S. 897, 907-922). Allowing for the admission of evidence that was sought for and seized on the basis of what was believed at the time to be sound Fourth Amendment principles ensures such balance (468 U.S. 897, 913).

Considerations Beyond the Dictates of the Exclusionary Rule

A consideration to keep in mind with respect to the Fourth Amendment's protection against unreasonable searches and seizures is that there is obviously more to this amendment than just the exclusionary rule. Indeed, the exclusionary rule is a device that

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the U.S. Supreme Court has adopted to ensure “good police conduct” as well as “judicial integrity” but that is certainly not all of it (Klotter & Kanovitz, 1991, p. 177). What should never be overlooked is the fact that the Fourth Amendment also carries with it a “reasonable expectation of privacy” (389 U.S. 347, 360).70 Certainly, it is plausibly accurate, to paraphrase Justice Tom Clark, that the Fourth Amendment would be seemingly useless without some sort of tool, such as the exclusionary rule, to punish would-be transgressors of its procedural due process requirements (367 U.S. 643, 656-660).71 But it should also be remembered that the exclusionary rule is really a Court-created phenomenon, and did not become part of the Fourth Amendment until the early part of the 20th century.72 In this sense, while the exclusionary rule is certainly key to the preservation of an individual’s procedural due process rights, the Fourth Amendment is inherently, so to speak, already in possession of such protection—that while law enforcement may not always be penalized by the courts for violating such rights, there are still certain individual parameters that they must abide by in order to achieve their aim. Among these include the area or location of such a search and seizure. In this regard, is there an “artificial boundary” wherein law enforcement are expected to remain in order to respect the sanctity of an individual’s own existence? In other words, does the Fourth Amendment’s protection against unreasonable searches and seizures recognize a difference between the “public sphere” of an individual’s existence and the “private sphere?”

The first case that the U.S. Supreme Court used to delve into this debate, as to whether or not a public-private dichotomy really exists with respect to an individual’s

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rights, was the case of *Boyd vs. United States* (116 U.S. 616). The gist of the case revolved around whether or not the national government could in fact compel an individual to produce evidence (e.g., invoices, affidavits, letters, papers, or statements) that could very well be used to demonstrate personal guilt in a particular matter or situation (116 U.S. 616, 622-623). Drawing on the historical experiences that colonial America incurred with England’s use of general warrants, the Court reasoned that it could not . . . (116 U.S. 616, 622-638). The Court’s rationale: “It is not the breaking of . . . doors, and the rummaging of . . . drawers, that constitutes the essence of the offense; but it is the invasion of [an individual’s] indefeasible right of personal security, personal liberty, and private property” (116 U.S. 616, 630). “. . . to require such an [individual] to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property,” the Court reasons, “is surely compelling him to furnish evidence against himself” (116 U.S. 616, 637). And this, to put it bluntly by the Court, is assuredly “erroneous . . . unconstitutional and void” (116 U.S. 616, 638). In this sense, the Court inferred a rather “liberal” interpretation of the Fourth Amendment—that it is the judiciary’s solemn duty “to be watchful for the constitutional rights of the citizens, and against any stealthy encroachment thereon” (116 U.S. 616, 635). Anything less, the Court concluded, could very well “depreciate . . . [the] constitutional provisions for the security of person and property”—“person or property” being defined here as tangible assets that have some vested proprietary value (116 U.S. 616, 635). The government only needs a “first footing,” a precedent, that is “illegitimate and unconstitutional” to begin the process of denying an individual his right to due process of law (116 U.S. 616, 635).

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The case of *Olmstead vs. United States* further underscored the notion set forth in *Boyd*, although more constrictively, that an "indefeasible right of personal security, personal liberty, and private property" exists, only so long as it relates to "tangible material effects or an actual physical invasion" (277 U.S. 438, 466).⁷⁴ Such privacy does not exist, the Court reasoned, with respect to telephone wires, which "are [no more] part of [an individual's] house or office . . . than are the highways along which they are stretched" (277 U.S. 438, 465). In this sense, there is no justification for "an enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing and sight" (277 U.S. 438, 465). The case of *Katz vs. United States*, however, would later overturn such reasoning (389 U.S. 347).⁷⁵ Returning to more of a "liberal construction" of the Fourth Amendment, as earlier espoused by the *Boyd* case, *Katz* expanded upon the scope of what constitutes "tangible material effects or an actual physical invasion" (277 U.S. 438, 466). Speaking for the Court, Justice Potter Stewart writes: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures; [and such] considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth" (389 U.S. 347, 359). Whenever there is a "reasonable expectation of privacy," the protections that are guaranteed to an individual within the Fourth Amendment hold fast and true (389 U.S. 347, 360). The key though of course is that the "expectation" itself be "reasonable," meaning that it is "one that society is prepared to recognize" (389 U.S. 347,

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Conclusion

The resulting cultural and societal impact of the Fourth Amendment should be somewhat obvious; it is a strong admiration for the various tenets of individualism. Throughout, the U.S. Supreme Court has shown a remarkable degree of respect for the rights of the individual, as stipulated to by the American Bill of Rights. Such respect has even elicited the creation of a "tool," the exclusionary rule, to adequately ensure that the rights of the individual are preserved and protected. Of course, the exclusionary rule has not been without its critics. Since its application on the national government in 1914 and its application on the various state governments in 1961, justices from one era or another have all questioned the constitutionality of excluding evidence from a trial that was deemed to have been in violation of an individual’s right to due process of law. Much of the criticism has stemmed in large part from the notion that the exclusionary rule is nowhere explicitly provided for within the Fourth Amendment of the U.S. Constitution—that if the founding fathers would have intended such a rule to exist, they would have incorporated it into the Fourth Amendment themselves. Others have asserted that an exclusionary rule is by implication essential to the preservation of the Fourth Amendment’s protection against unreasonable searches and seizures. What else can a court do but deny the admissibility of evidence that was attained without due respect for the Fourth Amendment rights of the individual? Of what value would an individual’s

76 The case of *Kyllo vs. United States*, 000 U.S. 99-8508 (2001), expanded upon the notion of “reasonable expectation of privacy” by restricting the police from using thermal imagers to detect the presence of heat within a particular dwelling.
protection against unreasonable searches and seizures be if law enforcement were able to keep the “fruits of a bad search?” Clearly, there would be no incentive, other than maybe a respect for rule of law, for police officers to follow the requirements laid out in the Fourth Amendment. In this sense, there is a deterrent value to the exclusionary rule, if nothing else. Even of recent, while the U.S. Supreme Court has been willing to carve out exceptions to the applicability of the exclusionary rule, the fact remains: the exclusionary rule does still exist. And the Court has been unwilling, in this regard, to go the entire distance and dismantle the rule in its entirety.

In lieu of the Fourth Amendment, the U.S. Supreme Court has also made it clear that with respect to an individual’s due process rights, there is a division between what might be referred to as a “public sphere” and what might be referred to as a “private sphere.” Early on, the Court reasoned that such an expectation can only extend to those particular items in which there was a vested proprietary interest on the part of the individual. Meaning, more specifically, only “tangible property,” such as an individual’s personal effects, could be considered as being protected by the Fourth Amendment. Such a strict interpretation of the Fourth Amendment has since been altered, to allow for an expansion to those persons, places, or things in which there might be a “reasonable expectation of privacy.” As aforementioned, though, the term “reasonable” is not to be construed as something akin to “anything goes.” Rather, it is to be understood in terms of what society believes to be “reasonable” at the time of the occurrence. An individual, for instance, who uses an open public telephone booth, with no doors or windows attached, must realize that his conversation may very well be subject to public hearing. However, an individual within his own home has some “reasonable expectation” to believe that his
movements are not being monitored by a thermal detection device used by the police—that he is in fact guaranteed some “reasonable expectation of privacy.” This expectation goes to the heart of the Fourth Amendment and ensures that whenever government feels that it must encroach upon the “life” of an individual,” it must do so with procedural due process in mind—that an individual’s inalienable right to life is sacrosanct unless otherwise procedurally stated. The endeavor now is to see if the same also holds true with respect to an individual’s inalienable “right to liberty”—his right to the free exercise of his religion without any undue government interference.
CHAPTER IV

THE INDIVIDUAL’S INALIENABLE RIGHT TO LIBERTY: AN ANALYSIS INTO THE SUPREME COURT’S UNDERSTANDING OF RELIGIOUS FREEDOM

Introduction

Another of the principal themes advocated by classical liberalism is its belief, again as propounded by the likes of John Locke, that an individual also possesses an “inalienable right to liberty.” While the whole notion of “inalienable” has already been discussed, in the sense that it is something innate or a part of being, the concept of “liberty” itself needs further elaboration and explanation. To carry Locke’s oft-quoted statement one step further, an individual not only has an “inalienable right to life,” he also has an “inalienable right to liberty.” Still, an individual’s “right to liberty” should not be misconstrued as anything even closely resembling perfect or unfettered freedom. By no means would John Locke advocate that an individual has an inalienable right to absolute liberty, to do whatever it is that he so wills to do. Indeed, as John Locke writes:

Freedom then is not . . . a liberty for everyone to do what he lists, to live as he pleases, and not to be tied by any laws: but freedom of men under government is, to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the law of nature (Macpherson, 1980, p. 17).

Hence, an individual’s inalienable right to liberty may be aptly defined as the freedom that the individual possesses absent any “arbitrary or undue external restraint [by] government” (Black, 2000, p. 743). In this sense, government is still deemed some degree
of regulatory power when it can compellingly demonstrate an inherent need to protect "the public’s health, safety, and welfare" (p. 743). One might stipulate, to use an old cliché, that "your freedom ends where my nose begins." The law, according to John Locke, is absolutely pivotal to the organization and well-being of society. Man leaves the uncertainty of the state of nature for the comforts and conveniences that are to be found within political society. Certainly, man would not consent of his own freewill to allow everyone an absolute right to interfere with everyone else's freedom, particularly his own. So, how should an individual’s "right to liberty" be understood? What are the limits beyond which an individual cannot freely exercise his own liberty without interfering with that of another? These are questions that the U.S. Supreme Court has had to grapple with for the better part of 200 years, particularly with respect to an individual's right to the free exercise of his own religion. While the U.S. Supreme Court has fostered and preserved the sanctity of the liberty that exists with respect to religious exercise, it has also maintained the classical liberal stance that no freedom is absolute—that there are instances, within a free society, whereby one's liberty can become an impediment to the liberty of others, or whereby one's liberty can become an obstacle to the well-being of a free and democratic society. Throughout, though, the U.S. Supreme Court has still demonstrated a keen sense of admiration and respect for the rights of the individual—that the individual’s practice of his religion should be viewed as paramount to all other interests, unless an alternative compelling state interest is demonstrated. As John Vile writes: "The Court itself has sometimes referred to [such a] guarantee . . . as enjoying what it called a ‘preferred position’" (Vile, 2001, p. 129).

77 This quote is more or less referring to all of the constitutional guarantees contained within the First
The History Behind Freedom of Religion

According to the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (U.S. Constitution, Amend. 1). Without question, there is probably no other aspect of American constitutional law that incites more controversy and debate than the First Amendment's treatment of "religion" (Vile, 2001, p. 130). In large part, what makes religion such a central component of American legal jurisprudence is the fact that America was founded upon religious principles. The first English settlers that came to America sought escape from religious persecution (Patrick & Long, 1999, pp. 1-8). They wanted to be able to practice their own religious beliefs without any undue governmental influence. This is especially true of the Pilgrims which settled within the Plymouth area at around 1620 (p. 2). Toleration of one's own religious beliefs and values was central to their endeavors, and the principal reason they emigrated to America (pp. 2-5). Unfortunately, though, as time would pass, the whole notion of toleration began to slowly subside, even for them (pp. 2-3). Those who had escaped religious persecution soon demonstrated a similar tact in dealing with those that seemingly disagreed with their own religious beliefs and practices (pp. 2-4). In time, within many of the American colonies, such as the Massachusetts Bay colony, religious intolerance was just as rampant as it had been within Great Britain (pp. 2-4). In fact, some of the colonies, soon to be states, freely engaged in what might be considered as the "establishment" of religion (pp. 2-4). Such historical experiences, both within Great Britain as well as within the American colonies,
would have profound influence upon the founding fathers. So much so, in fact, that they would incorporate a protection within the Constitution to not only allow an individual to freely exercise his own religion but also to be free of any state-sponsored religion. While certainly not advocating anything closely resembling absolute freedom, the founding fathers were at least adamant in their belief that toleration was key to the liberal society that they were hoping to set forth. Indeed, as James Madison writes: “The religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is, in its nature, an [in]alienable right . . . ” (Pfeffer, 1979, pp. 15-16).

English Heritage and Freedom of Religion

The historical basis of the First Amendment’s religion clauses, both establishment and free exercise, is very much rooted in English antiquity (Peck, 1992, pp. 83-89). But for religious persecution within England, the Separatists, or Pilgrims as they have since become known, may never have set sail for America in search of freedom (pp. 84-85). The system that they were fleeing was one premised very much upon a close historical alliance between church and state (pp. 83-84). Beginning as far back as 1000, the Roman Catholic Church routinely used its power and wealth to establish such a relationship throughout Western Europe, including England itself (pp. 83-84). And with the passage of time, the two entities, according to Robert Peck, “began to share an unshakable identity of interests” (pp. 83-84). The relationship, though, was really not one of equal

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78 Quote is taken specifically from James Madison’s *Memorial and Remonstrance Against Religious Assessments* (1785).
power, shared between monarch and pope; rather, it was one of monarch subservient to pope (pp. 84-85). For, "control over land as well as belief made the [Pope] a formidable political figure in the Western Europe" (p. 84). Few kings challenged the Pope's position and those that did, such as King John in the 13th century, came to eventually regret it (Perry et al., 1985, p. 209). Indeed, it was not until the 16th century that the very notion of "king and country" would challenge and then eventually preempt papal power (pp. 308-310). In fact, within England, during the year 1534, King Henry VIII declared himself head of his own church, the Church of England (a.k.a., the Anglican Church) (pp. 308-309). Desiring a male heir, the King had asked the Pope for an annulment of marriage (pp. 308-309). However, on becoming impatient with what he perceived to be the Pope's lack of interest in the matter, the King angrily petitioned and received Parliament's blessing for an acceptance of Reformation (i.e., Protestantism) and a schism with the Church of Rome (p. 309). The result of this action would set in motion a whole host of historical events that would eventually culminate with the adoption of the First Amendment to the U.S. Constitution in the year 1791.

Probably the single-most important outcome of England's official disavowal of the Roman Catholic faith was the intolerance, mass confusion, and eventual civil wars that ensued. Since Protestantism was now to be considered as the official state religion of England, King Henry VIII readily declared war on any other denomination, including Catholicism, that attempted to flourish alongside it (Peck, 1992, p. 84). To make matters even worse, upon the death of King Henry VIII in 1547, England would change official

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79 King John actually confiscated Church property in an effort to finance his war with France. Such action, however, eventually led to the development of the Magna Charta of 1215, whereby his own vassals sought to restrain what they believed to be an abuse of monarchical power (Perry et al., 1985, p. 209).
state religions two times over the next decade (Perry et al., 1985, p. 309). His daughter, Queen Mary, would revert England back to Catholicism in 1553, and his other daughter (Mary's successor), Queen Elizabeth I, would revert England back to Protestantism in 1558—both times with ensuing religious persecution (p. 309). England would, for the most part, remain Protestant, at least as officially recognized by the state, until the ascension of King James I in 1603 and King Charles I in 1625 (pp. 359-360). Both kings sought strenuously to return England to its Catholic roots and to a system of divine absolutism (pp. 359-360). Their ambitious endeavors, however, ended in revolution in 1640, and with the execution of King Charles I (pp. 359-361). Kings Charles II and James II, both sons of Charles I, attempted to restore order to England in 1660 and 1685 respectively (p. 361). Both being Catholics, though, turmoil still ensued (p. 361). As a matter of fact, King James II, on ascension to his brother's throne in 1685, and realizing that a Catholic restoration was moot, attempted to make goodwill overtures by allowing for the free exercise of religion (Peck, 1992, p. 87). In 1687, he even decreed a Declaration of Indulgence, which forgave punishment to anyone that was charged with practicing a faith (e.g., Catholicism) outside that of the official state's religion (i.e., Anglican Protestantism) (p. 87). However, his lack of Anglican Church support still cost him his throne (p. 88). 80 In 1688, he was peacefully succeeded by the royal couple William and Mary who were both placed on the throne by an act of Parliament (Perry et al., 1985, p. 361). And in 1689, the English Bill of Rights was adopted, which granted to all Protestants a sense of religious liberty (Peck, 1992, pp. 88-89). Catholics or any other non-Protestant sect were not granted similar freedoms (pp. 88-89). As a matter of fact,

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80 This event is often referred to as the “Glorious Revolution” (Perry et al., 1985, p. 361).
the English Bill of Rights forbade England from forever being "governed by a popish prince, or by any King or Queen marrying a papist" (p. 89). Religious toleration was allowed but only if one was an Anglican Protestant!

Colonial Experience With Freedom of Religion

With England as its backdrop, the stage was set for a free and tolerant American colonial society, or at least so it seemed. While many of the original immigrants came to America in search of religious freedom, they too quickly learned how to be just as intolerant as their British counterparts. In fact, throughout America's early colonial experience, religious persecution, while maybe not as tumultuous as it had been within England, was just as common (Peck, 1992, p. 89). Indeed, as Melvin Urofsky and Paul Finkelman write: "The English who came in the first half of the 17th century—even those who fled religious persecution—did not carry in their cultural baggage any belief in religious pluralism or toleration. Thus, once here, they set about establishing religion as a bulwark of both state and society" (Urofsky & Finkelman, 2002, p. 26). Of course, every colony that was established in the New World was quite different from any other in the sense that it "established" its own version of religious faith (pp. 26-27). For instance, the first religious dissenters from England to arrive in America were the Pilgrims that settled at Plymouth in 1620 (Patrick & Long, 1999, p. 2). Their ambition was rather simple: To advance their own version of the Protestant faith (p. 2). However, it would be the Puritans, who began to settle within Massachusetts Bay (i.e., modern-day Boston) in 1630, that would have the greatest impact on early colonial American religious thought (p. 2). Much larger in number, the Puritans saw no difference between church and state,
so long as the two were of the same denominational faith (p. 2). As stated in their original charter:

We do of our further grace, certain knowledge and mere motion give and grant to the said Governor and Company, and their successors, that it shall and may be lawful to and for the Governor or deputy Governor and such . . . to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions . . . for the directing, ruling, and disposing of all other matters and things whereby our said people inhabiting there may be so religiously, peaceably and civilly governed, as their good life and orderly conversation, may win and invite the natives of that country to the knowledge and obedience of the one true God and savior of mankind, and the Christian faith, which in our royal intention, and the adventitiously free profession is the principal end of this plantation . . . (Patrick & Long, 1999, p. 10).

Compared to most other Protestant denominations at the time within the American colonies, Puritanism was by far the most intolerant and rigidly applied (p. 3). Within New England, there was only one religious faith entitled to any sort of liberty and that was Puritanism (p. 3). All other faiths were denied such a right (p. 3). However, liberty should not be construed as anything even closely resembling that of today's understanding of it (pp. 12-13). Puritans had liberty but only in the sense that they were rightfully obligated to be devout Puritans (pp. 12-13). Anything less could very well subject the individual to punishment and retribution (e.g., fine, imprisonment, or even banishment) (p. 3). Such rigid thinking with respect to religion, though, would eventually provoke controversy and dissent, and with both, the first glimmer of hope for some essence of religious liberty within America.

The colony of Rhode Island, established in 1636, for instance, served as a kind of religious sanctuary for those who had fallen victim to Puritan orthodoxy and had been sent into exile (Patrick & Long, 1999, p. 3). Founded by Roger Williams, a banished Puritan himself, the colony of Rhode Island promoted an individual's right to religious liberty (p. 3). As set forth in the Rhode Island Charter of 1663:

No person within the said colony, at any time hereafter, shall be any wise molested,
punished, disquieted, or called in question, for any differences in opinion in matters of
religion, . . . ; but that all and every person and persons may . . . have and enjoy his and
their own judgments and consciences, in matters of religious concerns . . . ; they
behaving themselves peaceably and quietly and not using this liberty to licentiousness
and profaneness, nor to the civil injury or outward disturbance of others; any law . . .
using or custom of this realm, to the contrary hereof, in any wise, notwithstanding . . .

Likewise, the colony of Pennsylvania, established in 1682, also served as a kind of
religious sanctuary (p. 4). Founded by William Penn, a banished Quaker from England,
the colony of Pennsylvania promoted not only an individual’s right to religious liberty
but also an individual’s right to freedom of conscience (p. 4). As stipulated to by the
Great Law of Pennsylvania of 1682:

No person . . . who shall confess and acknowledge one Almighty God to be the creator,
upholder, and ruler of the world and that professeth him or herself obliged in conscience
to live peaceably and justly under the civil government, shall in any wise be molested or
prejudiced for his or her conscientious persuasion or practice, nor shall he or she at any
time be compelled to frequent or maintain any religious worship, place, or ministry
whatever, contrary to his or her mind, but shall freely and fully enjoy his or her Christian
liberty in that respect, without any interruption or reflection . . . (Patrick & Long, 1999, p.
18).

Still, even with the great strides made in these colonies, among others (e.g., Delaware),
religious intolerance of Roman Catholics, Jews, and nonbelievers remained common
throughout (pp. 5-6). For only a short period of time, Roman Catholics were granted
some degree of religious freedom within the colony of Maryland, but such freedom
would not last (pp. 5-6). By the time of the American Revolution in 1776, most all of the
colonies recognized denominational differences within the Protestant faith, and many of
them even went so far as to sanction multiple established religions—with the stipulation,
though, that they were all Protestant (pp. 6-8). “Genuine religious toleration . . . was
[clearly] the trend,” so long, of course, as that trend remained religious-based and
Protestant (p. 8).
Constitutional Debate Over Freedom of Religion

If anything, the religious experiences both within England as well as within early colonial America, demonstrated to the founding fathers the apparent need to protect the individual from government and to allow that same individual the liberty to choose his own religious beliefs and values. Of course, while many of the founding fathers, or at least those that were Federalists, did not believe such a stated protection was actually needed, especially given the fact that the national government only possessed delegated powers and as a result could not do what was not specifically granted to it, they did place religion at the top of their agenda when it became evident that a bill of rights would have to be added, at the demand of the Anti-federalists, as a restriction on national powers. With this in mind, James Madison made his proposals on “establishment” as well as “free exercise” to Congress on June 8, 1789 stating: “The amendment which [has] occurred to me, proper to be recommended by Congress to the State Legislatures, [is this]: ... the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, or on any pretext, infringed” (Patrick & Long, 1999, pp. 61-62). After slight modification within both chambers of Congress as well as between them, the resulting amendment that was proposed to the U.S. Constitution read as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Constitution, Amend. 1).

The issue surrounding the “establishment of religion” was one that basically provided for two different interpretations. On one hand, the fact that “Congress shall...
make no law respecting an establishment of religion” might be interpreted to mean that a rigid “wall of separation” would remain steadfast between church and state; and, on the other, the fact that “Congress shall make no law . . . ” might also be interpreted to mean that no preference should be given by the state to any particular type of church (i.e., religion) (Levy, 1988, pp. 174-181). The former interpretation does not allow for any entanglement whatsoever, while the latter allows for some entanglement so long as it is not preferential in treatment (pp. 174-181). Given the records that do exist on this matter, both Thomas Jefferson and James Madison would seemingly appear to cast their lot on the side of a rigid “wall of separation” (Epstein & Walker, 2001, pp. 143-146). In his letter to the Danbury Baptist Association, for instance, Thomas Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State (O’Brien, 2003, pp. 665-667).

This only reiterated Jefferson’s earlier position, as set forth in his *Virginia Act for Establishing Religious Freedom*, that “no man [should] be compelled to frequent or support any religious worship, place or ministry whatsoever” (Pfeffer, 1979, p. 19). That to do so, would be an “infringement of [his] natural right” and also a corrupting influence upon the “very religion [such action] is meant to encourage” (p. 19). In a similar vein, James Madison, likewise, expressed concern over the potential dangers of rolling religion and state onto the same pathway. In his *Memorial and Remonstrance Against Religious Assessments*, Madison incorporated mankind’s history as a primary reason why church

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82 It should be noted that the “non-preferential” perspective on church and government was predominantly supported at the state level by Anti-federalists, such as Patrick Henry. Thomas Jefferson, of course, was an exception to this manner of thinking.
and state should remain separate (pp. 15-18). At no time in history has a close relationship between church and state yielded anything of positive value, either to the religion, to the civil authority, or to the people (pp. 16-17). If anything, all that has ever resulted is "superstition, bigotry, and persecution..." (p. 16). As such, "the preservation of a free government requires...that neither of them be suffered to overleap the great barrier which defends the rights of the people" (p. 16).

The issue surrounding the "free exercise of religion" also carried with it similar perspectives, at least as espoused again by the likes of Thomas Jefferson and James Madison. Both coming from the standpoint that an individual has an inalienable right to liberty—meaning that an individual has a preordained right to do whatever he wishes so long as it does encroach upon the rights of others—Jefferson and Madison believed that "freedom of conscience" was absolutely essential to a free and well-ordered society (pp. 14-15). In fact, according to Jefferson, the state has "no authority over [our] natural rights, only [those] as we have submitted to [it]; the rights of conscience we never submitted, we could not submit" (p. 14). This does not, of course, imply that the state is forever prevented from intervening between a man and his right to liberty (p. 14). Assuredly, "the legitimate powers of [state] extend to such acts...as are injurious to others" (p. 14). But there is a noted distinction, in this regard, between an individual’s beliefs and that same individual’s practices (p. 14). Whether he chooses to believe in "twenty gods or no God" is completely irrelevant and has no direct impact upon the rights of his fellow citizens within society (p. 14). What does matter, though, is when the individual’s beliefs are translated into actions (p. 14). The individual’s belief in "twenty gods" is fine in and of itself, so long as he does not attempt to forcibly impose his belief
relentlessly on others (p. 14). As Jefferson notes, merely believing in something “neither picks my pocket nor breaks my leg . . .” (p. 14). In much the same fashion, James Madison also advocated that the free exercise of religion be left to the “conviction and conscience of every man” (p. 16). Accordingly, “we assert for ourselves a freedom to embrace, to profess, and to observe, the religion which we believe to be of divine origin” (p. 16). Such a “right is, in its nature, an [in]alienable right . . .,” but only so long as it is not directed “by force or violence” (pp. 15-16).

The U.S. Supreme Court and Freedom of Religion

In its role as “guardian” of the American Constitution and “protector” of individual rights, the U.S. Supreme Court has been deemed the responsibility to try to make sense of the First Amendment’s clauses on religion. Undoubtedly, there is historical precedent or tradition, as aforementioned, but the Court must still try to understand exactly what is meant by the phrase, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Constitution, Amend. 1). To begin, it is fairly obvious that the protection itself is only applicable against Congress (i.e., the national government). As the phrase itself states: “Congress shall make no law . . . .” This means, at least initially anyway, that the protections afforded the individual by the First Amendment are guarantees against the national government—not the various state governments. This of course would change, through the application of the due process clause of the Fourteenth Amendment and selective Court incorporation, several decades down the road. The U.S. Supreme Court must also provide definitional detail or parameter to such words as “establishment” and “exercise.” Specifically, what
does the phrase “Congress shall make no law respecting an establishment of religion” entail? What does it mean, for instance, to “establish” a particular religion? And, what does the phrase “Congress shall make no law . . . prohibiting the free exercise [of religion]” involve? Should such “free exercise” be perceived as absolute, as in Congress may never “prohibit the free exercise” of an individual’s religion, or should such a statement be perceived as “qualified,” as in Congress may sometimes “prohibit the free exercise” of an individual’s religion? Moreover, the U.S. Supreme Court must also try to understand what exactly is meant by a “religion.” In other words, when is a “religion” perceived as a “religion?” And by what standard, if any, can the Court judge the integrity of a particular religion? Ideally, the answers to such questions as these will determine the degree of admiration and respect the U.S. Supreme Court may or may not hold in regards to an individual’s “right to liberty”—his right to practice his own religion without any undue government influence or intrusion.

Understanding the Language of the Religion Clauses

As already alluded to, one of the most difficult tasks for the U.S. Supreme Court in its role as final interpreter of the U.S. Constitution is to make some sense out of the immensely broad and vague language contained therein. And, without question, no other task is more daunting for the Court than its duty and obligation to provide meaning to the religion clauses of the First Amendment. As written, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Constitution, Amend. 1). Given what has already been provided, the statement itself requires at least three definitions: (1) What is a religion; (2) What is an established
religion; and (3) what is the free exercise of a religion? Comprehension of these questions and their respective answers (i.e., definitions) is absolutely pivotal to any understanding of the U.S. Supreme Court’s role in protecting and preserving the individual’s inalienable right to liberty, particularly as set forth in his liberty to freely exercise his own religion.

First of all, what is a religion? According to Black’s Law Dictionary, a “religion” is “a system of faith and worship usually involving belief in a supreme being and usually containing a moral or ethical code; especially, such a system recognized and practiced by a particular church, sect, or denomination” (Black, 2000, p. 1036). Given the obvious lack of clarity and precision in such a definition, it should come as no real surprise that the U.S. Supreme Court has had, to say the very least, a difficult time in trying define the term “religion.” Still, it is a task that the Court must endeavor to undertake, even if only reluctantly, to determine the breadth and scope of the First Amendment’s protection of individual rights. The first case that the Court used to define religion was Reynolds vs. United States (98 U.S. 145). Involving the Mormon religion and its practice of polygamy, the Court asserted, through Chief Justice Morrison Waite, that a “religion” may be defined based upon the “history of the times” (98 U.S. 145, 162). By this, the Court more or less reasoned that if a “religion” was new or not broadly recognized, it or its various practices could not claim constitutional protection under the First Amendment—that to believe in something is one thing but to practice it is quite another (98 U.S. 145, 166-167). A few years later, in Davis vs. Beason, the Court, through Justice Stephen Field, narrowed its understanding of “religion” even further by limiting it to the existence of a

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83 Reynolds vs. United States, 98 U.S. 145 (1879).
single "Creator" or "Maker" (133 U.S. 333, 342). Such narrow understandings of "religion" were, however, eventually overturned in the 1940s, in the case of United States vs. Ballard (322 U.S. 78). Writing for the Court, Justice William Douglas stated that "men may believe what they cannot prove, [and] they may not be put to the proof of their religious doctrines or beliefs" (322 U.S. 78, 86). Ideally, in this respect, it is the sincerity of the "religious beliefs" held by a religion's followers that truly matters—not the truthfulness of them (322 U.S. 78, 85-88).

Secondly, what is an "established" religion? Again, according to Black's Law Dictionary, an "established religion" is "a particular religion [that the] government creates or favors" (Black, 2000, p. 449). Historically, the clearest example of an "established religion" would be that of the Anglican Church of England during colonial times. As a sponsored religion, the Anglican Church was set up, preserved, protected, and perpetuated by the state—all at the dire expense of other faiths and religions. Such an example, though, really undermines the true intent of the Establishment Clause. No doubt, it is certainly true that Congress may never establish an official state religion for the United States. But such a prohibition has quite frankly not been that much of an issue for real concern. Instead, the gist of the matter comes down to the "fine lines" or "gray areas" that are found in between. For instance, does the reimbursement for transportation costs to parents of parochial school children constitute an "establishment" of religion? Or, does the recitation of prayer before morning classes begin in a public school constitute an "establishment" of religion? What about a provision for a state-funded instructor

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84 Davis vs. Beason, 133 U.S 333 (1890).
of sign-language to be assigned to a disabled student at a parochial school? Is that promoting the "establishment" of a religion? In earnest, these are the types of questions that the U.S. Supreme Court has had to grapple with since the addition of the First Amendment to the U.S. Constitution in 1791. These are not the types of questions that involve Congress purposely setting out to create and promote a national religion. Even the founding fathers were seemingly confused as to what exactly constitutes the "establishment" of a religion (Levy, 1988, p. 176). As Leonard Levy writes: "The ratification controversy yielded no evidence that reveals [any certain] understanding . . . of the term "establishment" (p. 176). The only thing that is truly clear is that the founding fathers intended the "establishment clause . . . to protect religion from government, and government from religion" (p. 194). And to this, one might very well add, everything in the middle was to be left up to the courts to decide.

Finally, third, what is meant by the "free exercise" of a religion? Black's Law Dictionary defines "freedom of religion" as "the right to adhere to any form of religion or none, to practice or abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religion" (Black, 2000, p. 533). With respect to "religious liberty," Black's Law Dictionary also adds, "[so] long as [the exercise itself] is consistent with the peace and order of society" (p. 743). The latter addition to this definition is probably the single-most important aspect to understanding just exactly what the "free exercise" of a religion truly entails. Any individual may, of course, believe in whatever he wishes. Indeed, according to John Locke, Thomas Jefferson, and James Madison, every individual has an inalienable, God-given right to liberty—to be free from

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external impediment (i.e., government). However, does this mean, or would these same men advocate, that the individual may do or say whatever it is that he wishes to do or say? In other words, does an individual have an “absolute” right to liberty, as in an “absolute” right to perfect, unhindered freedom? Certainly not! An individual’s liberty extends only so far as it does not impose on the liberty of others. As Black’s Law Dictionary itself indicates, an individual’s liberty must be “consistent with the peace and order of society” (p. 743). No freedom or liberty is without its limitations. If no such restrictions on liberty were permitted, in all likelihood, anarchy would eventually prevail. And for this very reason, in lieu of John Locke, government exists—to establish peace and order. An individual may freely believe in whatever religious faith he chooses to; however, when that individual translates his belief into practice, he must realize that no such freedom is “absolute.” In this sense, the “free exercise” of religion is a “qualified” liberty, whereby it must be evaluated in the context of what effect it may have on others within society.

**Principles Set Forth by the Establishment Clause**

Having some idea as to the history of a particular clause within the U.S. Constitution is one thing, but being able to adequately apply that history in the modern context is quite another. Such has been the challenge for the U.S. Supreme Court and its understanding of the First Amendment’s Establishment Clause. Indeed, according to Robert Peck, “finding a defensible formula for analyzing issues of church-state separation has proven [rather] elusive for the [U.S.] Supreme Court (Peck, 1992, p. 209). On one side of the issue, there are those who believe that a strict separation of church and state
may be inferred by the constitutional phrase, “Congress shall make no law respecting an establishment of religion” (O’Brien, 2003, pp. 668-670). Others, however, read the very same statement and believe that it may only be inferred that Congress may not establish any preference with respect to religion—that all religions should be treated the same (pp. 668-670). The former belief advocates a rigid “wall of separation” with no entanglement; the latter belief advocates a softer “wall of separation” with non-preferential entanglement (pp. 668-670). The ensuing historical dilemma for the U.S. Supreme Court has been “how to draw the line between” the two positions—between what has since become known as “high-wall theory” and “non-preferentialism” (pp. 668-670). The task at present, though, is to determine in what manner, if any, the U.S. Supreme Court has used the Establishment Clause to protect and preserve American individualism, as specifically represented in the individual’s right to liberty. In this sense, there are basically two areas that the Court has examined with respect to the Establishment Clause. The first area tends to involve certain types of state- or government-funded aid to religious organizations (e.g., textbooks to parochial schools, or tax exemptions for church supplies). And the second area tends to involve what might be considered as state or government promotion of certain religious exercises or practices (e.g., prayer in school, or Christmas festivities). It is the second area that is of primary concern, in large part, because it is in this area that the U.S. Supreme Court has attempted to promote the “disestablishment of religion.” Of course, one might very well ask: What does “disestablishment of religion” mean or entail? And, more importantly, what does the “disestablishment of religion” have to do with an individual’s right to liberty?

One would have to be naïve not to notice that religion has played a major

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component throughout America’s history. Yes, Thomas Jefferson, James Madison, among others, have all advocated that a rigid “wall of separation” be maintained between church and state. Their argument: The two have had an historical tendency to corrupt one another. Indeed, one only has to peruse the historical accounts of colonial Americans to truly appreciate the inherent dangers of combining church and state into one. But the fact remains, America was founded upon certain religious principles and, to say the very least, these very same principles continue to underscore American governance. Really all one needs to do is to look at American money, attend an opening session of Congress, or watch a newly-elected president being sworn into office to truly appreciate the fact that religion is still very much a part of American government. Given the relationship that has existed in the United States between church and state, the U.S. Supreme Court has really not had to concern itself so much with the “establishment” of religion as it has with the “disestablishment” of it. What does this specifically mean? The Court has really had to separate what has already been put in place, between church and state. It has had to “disestablish” religion from the state’s sphere of influence. Probably the best example of a situation whereby the Court has had to “disestablish” religion has involved prayer in public schools. Prayer has more than likely existed in public schools since their initial inception; however, it was not until 1962 that the U.S. Supreme Court examined the constitutionality of the issue. For instance, does a state’s requirement for prayer to be recited at the beginning of a public school day constitute an “establishment” of religion? What about the reading of Bible verses within a public school? Does this constitute an “establishment” of religion? What if such practices have “always” been done? If it has always been done that way, so to speak, then there should be no problem with it. Correct?
The issue of "establishment," after all, only involves those scenarios in which the state actively sets out to promote or establish a particular religion. Right? What if the prayer itself is nondenominational, or even better, what if the prayer itself is nondenominational and silent? Does this constitute an "establishment" of religion? These are issues that the U.S. Supreme Court has had to grapple with for the better part of a half century, or at least since it has begun the process of "disestablishment."

Of course, one might just as well ask: What does any of this have to do with an individual's right to liberty? In other words, what does "establishment" or even "disestablishment" have to do with an individual's freedom of religion? And, how might the U.S. Supreme Court's actions, in either respect, enhance or undermine American individualism? The answer to any of these questions is rather simple. If the government does not "establish" a particular religion, then it is leaving the choice of the matter up to the individual. Just the same, when the Court attempts to "disestablish" a religion, it is freeing the individual from a perceived sense of obligation or cooptation. No longer does the individual have to participate, whether by choice or not, in an activity that he is seemingly uncomfortable with. In the case of *Engel vs. Vitale*, for instance, which involved a state-sanctioned nondenominational prayer in public school, Justice Hugo Black wrote: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain" (370 U.S. 421, 431).*89* "Thus," he continues, "the Establishment Clause stands as an expression of principle . . . that religion is too personal . . . to permit its ' unhallowed perversion' by a civil

magistrate” (370 U.S. 421, 431-432). Expressing similar sentiment, in a later case involving a state’s requirement that Bible verses be read at the beginning of each public school day, Justice Tom Clark, in the case of School District of Abington Township, Pennsylvania vs. Schempp, aptly stated:

The place of religious in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality (374 U.S. 203, 226).

The U.S. Supreme Court has also stricken down voluntary moments of silence in public schools, as it did in the case of Wallace vs. Jaffree, asserting that “just as the right to speak and the right to refrain from speaking are complementary components . . . of individual freedom . . . , so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority” (472 U.S. 38, 52). Even public school-sponsored prayers at graduation ceremonies and football games have come under Court scrutiny (505 U.S. 577 and 530 U.S. 790).

Writing for the majority in the case of Lee vs. Weisman, a case involving prayer at graduation ceremonies, Justice Anthony Kennedy writes: “The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students . . . [To] the dissenter of high school age, who has a reasonable perception that she is being forced by the state to pray in a manner her conscience will not allow, the injury is no less real” (505 U.S. 577, 593). All of these cases seemingly exhibit issues of “establishment” or “disestablish-

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ment,” as the case may be. But, what about an individual’s right to the free exercise of his religion? What has the Court said in this regard?

Considerations Beyond the Establishment Clause

Just the same as the U.S. Supreme Court must work to prevent the government from excessively entangling itself with religion, in potentially establishing or promoting religion, it must also ensure that the government does not unnecessarily “prohibit the free exercise” of religion (U.S. Constitution, Amend. 1). While the first part of the statement deals primarily with government and its direct relationship with religion, the latter part of the statement mostly involves the relationship between the individual and his religion. The state is certainly involved with both aspects but to a different degree. In the first, the state cannot involve itself in the establishment of a particular religion; however, in the second, the state cannot deny an individual the liberty to exercise a particular religion. According to David O’Brien, the “free exercise clause itself embodies the principle of freedom from governmental coercion in choosing a religion or no religion” (O’Brien, 2003, p. 785). However, as already noted, an individual’s right to liberty is not to be understood in absolute terms; there may very well be limitations on such freedom. To believe in some particular faith or idea is one thing but to actually practice it is quite another. As Thomas Jefferson himself wrote: “The legislative powers of the government reach actions only, and not opinion” (O’Brien, 2003, pp. 665-667). Historically, as will become evident, the U.S. Supreme Court has to a large extent deferred to the rights of the individual to freely exercise his own religion. At the same time, though, the Court has also recognized that there may very well be times when the state may have a “compelling interest” to
intervene and possibly curtail or police such exercise. But even then, the Court still has in most cases given benefit of the doubt to the rights of the individual.

Probably the most drastic position taken by the U.S. Supreme in regards to an individual's free exercise of religion is when it has applied what might be referred to as a "belief-action" scenario. Typically, this distinction usually encompasses a perceived practice of individual free exercise that seemingly goes against the rudimentary customs or legal traditions of a given culture or society. The case of *Reynolds vs. United States* in 1879 is a prime example of such a scenario (98 U.S. 145). The gist of the case involved the practice of polygamy as then exercised by the Mormon religion of Utah and a statute of Congress which forbade the practice of polygamy (98 U.S. 145, 161-168). Writing for the majority, Chief Justice Waite reasoned that while "Congress was deprived of all legislative power over mere opinion, [it] was left free to reach actions which were in violation of social duties or subversive of good order" (98 U.S. 145, 164). As such, "polygamy has always been odious among the northern and western nations of Europe . . . and from the earliest history of England, polygamy has been treated as an offense against society . . ." (98 U.S. 145, 164). Therefore, "to permit this [practice] would be to make the professed doctrines of religious belief superior . . . [to that of government] . . . and in effect to permit every citizen to become a law unto himself (98 U.S. 145, 166-167). "...plural marriages shall not be allowed" (98 U.S. 145, 166).

Of more recent, the U.S. Supreme Court has seemingly moved away from the rigid "belief-action" test it applied to the *Reynolds case* in 1879. In *Reynolds*, the legitimacy of a particular religious exercise or practice was judged in large part based

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upon what was generally deemed acceptable at the time. In this sense, it was the religion itself that was more or less put on trial. However, in such cases as *Sherbert vs. Verner* and *Wisconsin vs. Yoder*, the Court has attempted to strike more of a balance between the rights of an individual to freely exercise his own religion and the rights of the state to maintain good order and security (374 U.S. 398 and 406 U.S. 208). In both cases, the U.S. Supreme Court expounded what has since become known as the “least drastic means” test or the “compelling interest” test. In *Sherbert vs. Verner*, for instance, the Court, through Justice William Brennan, ruled that a state may not deprive an individual of unemployment compensation simply because he refused to work on the day of his religious exercise (e.g., Sabbath) and as a result was fired from his job (374 U.S. 398, 410). Applying the “least drastic means” scenario, the Court “consider[ed] whether some compelling state interest enforced in the eligibility provisions of the [state’s] statute justifies the substantial infringement of [an individual’s] First Amendment right (374 U.S. 398, 406). Indeed, “it is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation” (374 U.S. 398, 406-407). “No such abuse or danger has been advanced in the present case” (374 U.S. 398, 407). In the case of *Wisconsin vs. Yoder*, the Court likewise reasoned, this time through Chief Justice Warren Burger, that “the essence of all that has been said and written on the subject is that only those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the [individual’s]

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95 It should be noted for accuracy that the case of *Sherbert vs. Verner*, 374 U.S. 398 (1963), actually involves a female. But since male identity has been used throughout, given its emphasis within classical liberalism, it has been used here as well.
free exercise of religion” (406 U.S. 208, 215). Hence, . . . “however strong the state’s interest, it is by no means absolute to the exclusion or subordination of all other interests . . .” (406 U.S. 208, 215).

Today, the U.S. Supreme Court has yet seemingly moved once more in its understanding of the Free Exercise Clause of the First Amendment. In what has become known as the “Smith” test, the Court in Employment Division, Department of Human Resources of Oregon vs. Smith, reasoned that “the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious beliefs . . . ’” (494 U.S. 872, 877). However, returning to something very much akin to the “belief-action” test propounded in the Reynolds case in 1879, the Court asserted that no one, regardless of his respective beliefs, may be allowed “to become a law unto himself” and practice whatever it is he so desires (494 U.S. 872, 879). Such a notion “contradicts both constitutional tradition and common sense” (494 U.S. 872, 885). The usage of the drug peyote, as in this case, is illegal in the state of Oregon (494 U.S. 872, 890). Such usage of an illegal drug is more than a belief; it is a practice and, as such, “can be discerned by the courts” (494 U.S. 872, 890). “An individual’s religious beliefs [cannot] excuse him from compliance with an otherwise valid law prohibiting conduct

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96 While not directly alluded to above, the case of Wisconsin vs. Yoder specifically involved a state’s compulsory school attendance statute and its enforcement against an Amish community. The Court reasoned that since the Amish community is a separate community, one that is for the most part agrarian, the state could not unduly infringe by requiring its children to attend public schools beyond the eighth grade—the point at which most children have learned to read, write, and do basic arithmetic. As Chief Justice Warren Burger writes: “… an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests” (406 U.S. 222 (1972)).


98 The case itself, Employment Division, Department of Human Resources of Oregon vs. Smith, involved the Native American Church and its practice of using the drug peyote (494 U.S. 872 (1990)).
that the state is free to regulate" (494 U.S. 872, 878-879). Unfortunately, this is an “unavoidable consequences of democratic government . . . [whereby] judges [must] weigh the social importance of all laws against the centrality of all religious beliefs” (494 U.S. 872, 890). The decision reached in Employment Division, Department of Human Resources of Oregon vs. Smith really, for all intents and purposes, brings the U.S. Supreme Court full circle with respect to its earlier decision in Reynolds vs. United States, excepting of course that it is not the religion itself being put on trial, only the exercise of that religion. An individual still has a right to believe in whatever his beliefs entail; he just has to be aware that certain limitations may exist once he puts those beliefs into actual practice. In this respect, an individual’s right to liberty is clearly not “absolute,” an assertion that is certainly not new.

Conclusion

The resulting impact of the U.S. Supreme Court’s understanding of the First Amendment, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” has been to protect and preserve the individual’s inalienable right to liberty against any unnecessary encroachment of that liberty by the state. However, this has not, nor has it ever, meant that the state is forever forbidden from interfering with such liberty when it has been able to demonstrate a compelling public interest. An individual is free to exercise his own religion so long as it does not interfere with the customs, traditions, and legalities of society. An individual is also free to exercise his own religion so long as it does not interfere with the rights of his fellow man. Just the same, this does not mean that the state may arbitrarily impose its will on the
individual. There is a necessary divide between church and state. And has James Madison has written: “We must say that the will of the legislature is the only measure of their authority, and that, in the plentitude of this authority they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred” (Pfeffer, 1979, p. 17). Accordingly, any mixture of the two, as history has clearly foretold, leaves in its wake “superstition, bigotry, and persecution . . .” (p. 16). The individual should be able to freely exercise his own religion on the basis of “reason and conviction, . . . not force or violence” (p. 15). However, given America’s unique history, what has been required to accomplish this feat is a Court willing to in some cases “disestablish” religion from the public arena (e.g., prayer in public schools). In so doing, the Court has readily been able to further enhance the liberty of every individual, whereby no one is compelled to do what his own conscience may not allow. Personal conviction is as much a part of liberty as is free exercise of religion. Under the guise of the First Amendment, an individual has just as much right to not exercise a particular religion as he has in fact to exercise one. Individualism, through reasonable choice, is paramount.
CHAPTER V

THE INDIVIDUAL'S INALIENABLE RIGHT TO PROPERTY: AN ANALYSIS INTO THE U.S. SUPREME COURT'S UNDERSTANDING OF THE CONTRACT CLAUSE

Introduction

Without question, no other right is more central to classical liberalism, to individualism, than an individual's right to property. The right of ownership, or the right of possession, is absolutely key to any understanding of classical liberal thought, especially as espoused by the likes of John Locke. Man is born within a state of nature and anything to which he mixes his own labor is his and his alone (Morgan, 1992, pp. 745-749). Such adherence and respect for the right of the individual to hold and maintain property would have a tremendous influence upon many of the founding fathers. Indeed, as David O'Brien writes: “The Framers took to heart the teaching of the English philosopher John Locke . . . that property is a natural right . . . and its preservation one of the chief ends of government” (O’Brien, 2003, p. 223). James Madison, for instance, clearly believed that “government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, . . .” (Paul & Dickman, 1989, p. 12). The whole notion of property, or private property, was looked upon by the founding fathers as not only a source of dignity but also as a source of power (O’Brien, 2003, pp. 222-223). “[It is] property [that] gives life to industry,” Thomas Jefferson believed, “and enables us to gratify the most dignified
natural affections" (Paul & Dickman, 1989, p. 69). Property, in this regard, was essential for "establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty" (Ely, 1998, p. 3). Nonetheless, as with an individual's right to liberty, property was clearly not to be understood in "absolute" terms. Even Locke himself did not advocate an absolute right to property (Morgan, 1992, pp. 749-753). Accordingly, an individual was only entitled to as much property as he could effectively utilize and not leave to any notion of spoilage (pp. 749-753). Similarly, the founding fathers believed that the right to property carried with it some degree of personal responsibility (Ely, 1998, p. 33). The individual, for instance, was expected to "subordinate private interests to the pursuit of public welfare, . . . for the greater good of the whole" (p. 33). Even so, according to James Ely, Jr.: "A widely shared desire to acquire and enjoy property has long been one of the most distinctive features of American society. The founding generation [especially] stressed the significance of property ownership as a safeguard for political liberty against arbitrary government as well as the economic utility of private property" (Ely, 1998, p. xi). And really for all intents and purposes since, it has been the U.S. Supreme Court that has "mirror[ed] this attitude . . . [and] championed [the individual's] property rights against [governmental] interference" (p. xi).

The History Behind Property Rights

The issue of property has had a long history both within England as well as within the United States. Indeed, one could very stipulate that property has really been the primary linkage between the two, both historically and today. As Justice Joseph Bradley
once stated: "[The] people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from the English sovereigns at various periods of the nation’s history" (Siegan, 2001, p. 2). Among these rights have, of course, included man’s inalienable right to property. The preeminence that property has been given throughout America’s history can be attributed in large part to several primary English sources, including the Magna Charta of 1215 as well as the various commentaries on property written by such noted scholars as Lord Edward Coke and Sir William Blackstone (pp. 5-46). These sources in conjunction with the work of John Locke himself (i.e., classical liberalism) would have tremendous influence upon the founding fathers in their endeavors to create a lasting independent American nation-state (pp. 46-50). With property as one of its core, if not the core, the American state was set forth, according to James Madison, to be a “free system of commerce . . . [whereby] if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive . . .” (p. 82). As such, “government is [neither] just, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to . . . its citizens the free use of their faculties, and free choice of their occupations, which not only constitute their property . . but are the means of acquiring property . .” (p. 81).

English Heritage and Property Rights

The very premise of property rights within Anglo-American history can be traced to the Magna Charta of 1215. Much like the Declaration of Independence that was composed over 500 years later, the Magna Charta, or Great Charter, as it is sometimes called, is a list of grievances against King John, who from about 1205 until 1215 ruled largely by
decree and without any regard to the notion of “feudal law and custom” (Siegan, 2001, p. 6). Precipitated largely by a power struggle with Papal Rome, in which King John himself was excommunicated and then eventually deposed, the Magna Charta was the first attempt in English history to restrain the power of the monarchy by means of a written document (i.e., constitution) (p. 6). Upon the successful revolt of his own barons, who likewise had to struggle because of the King’s quarrel with Rome, King John was more or less forced to submit to their (i.e., the barons’) demands (p. 6). Of course, while the list of demands runs the gamut of possibilities, the ones that are directly pertinent for purposes here involve issues of property. Indeed, as Bernard Siegan writes:

The barons had many grievances against King John. They suffered from gross maladministration in his government and his courts. He had exacted the surrender of castles and otherwise made exorbitant financial demands upon every class. He hanged prisoners whom he seized in battle and he forced barons whom he suspected of treasonable inclinations to surrender their children to him as hostages. He also seized lands of the clergy (Siegan, 2001, pp. 6-7).

Rule under King John during this time was clearly one of arbitrary disregard for the rule of law. By ruthlessly seizing his own countrymen’s property, the King had shown ill repute for the rights and privileges of his own subjects. The Magna Charta, in this sense, would serve as not only a constraint on his own power but also on the power of his future successors as well.

There are several components, or chapters, of the Magna Charta of 1215 that are pertinent to the issue of property itself. Some of the more notable ones include the following:

12. No scutage or aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied
more than a reasonable aid.99

20. A freeman shall not be amerced for a slight offense, except in accordance with
the degree of the offense; and for a grave offense he shall be amerced in accordance with
the gravity of the offense, yet saving always his “contentment”; and a merchant in the
same way, saving his “merchandise”; and a villein shall be amerced in the same way,
saving his “wainage” if they have fallen into our mercy: and none of the aforesaid
immurements shall be imposed except by the oath of honest men of the neighborhood.

21. Earls and barons shall not be amerced except through their peers, and only in
accordance with the degree of the offense.

22. A clerk shall not be amerced in respect of his lay holding except after the
manner of the others aforesaid; further, he shall not be amerced in accordance with the
extent of his ecclesiastical benefice.

28. No constable or other bailiff of ours shall take corn or other provisions from
anyone without immediately tendering money therefore, unless he can have postpone­
ment thereof by permission of the seller.100

39. No freemen shall be taken or imprisoned or disseised or exiled or in any way
destroyed, nor will we go upon him or send upon him, except by the lawful judgment of
his peers or by the law of the land.101

40. To no one will we sell, to no one will we refuse or delay, right or justice.102

99 Chapter 12 is specifically referring to the notion of “no taxation without representation” (Siegan,
100 Chapter 28 is very similar to the modern concept of a “taking clause” (Siegan, 2001, p. 8).
101 Chapter 39 refers to due process of law issues, as in no person shall be denied life, liberty, or
property without due process of law (Siegan, 2001, p. 7).
102 Chapter 40 extends the whole notion of rule of law to be equally applicable on everyone (Siegan,
2001, p. 8).
52. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five and twenty barons of whom mention is made below in the clause for securing the peace. Moreover, for all those possessions, from which anyone has, without the lawful judgment of his peers, been dispossessed or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from the expedition, we will immediately grant full justice therein.

55. All fines made with us unjustly and against the law of the land, and all immurements, imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be done concerning them according to the decision of the five and twenty barons whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that if any one or more of the aforesaid five and twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five and twenty for this purpose only, and after having been sworn.

56. If we have dispossessed or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be
immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for the tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for the tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us and, laying the transgression before us, petition to have that transgression redressed without delay (www.cs.indiana.edu/statecraft/magna-carta.html).103

These components, or chapters, of the Magna Charta of 1215 have without question become lynchpins to the preservation of property rights throughout the Anglo-American world. In fact, subsequent amendments would only serve to strengthen the rights contained within them. In 1225, for instance, King Henry III substituted his own 38

103 It should be noted that the chapters included here out of the Magna Charta of 1215 are verbatim of the text used to gather them.
chapters for the original 63 of the Magna Charta (Siegan, 2001, pp. 10-12). Combining what was originally duplicated and strengthening what was already stated, the Magna Charta of 1225 is considered by most, including Edward Coke and William Blackstone, to be the “definitive version” of the original document, specifically as it pertains to due process of law issues (p. 10). In it, “the birthright of the people of England” has been preordained and established (p. 10). For example, the Magna Charta of 1225 enhances the protections already afforded by Chapter 39 of the original document, now to be referred to as Chapter 29 of the revised one. As formerly stated in Chapter 39: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him or send upon him, except by the lawful judgment of his peers or by the law of the land (www.cs.indiana.edu/statecraft/magna-carta.html). However, Chapter 29 of the revised document reads as follows:

No freemen shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right (Siegan, 2001, p. 10).

While the Magna Charta itself was subsequently amended again, during the time of King Edward III, it is the revisions made to Chapter 39 in 1225 (i.e., Chapter 29) that common law seemingly emulates (pp. 12-46). And with respect to the issue of property at common law, it is from this chapter that Coke and Blackstone link due process of law to property rights (pp. 12-46). As such, no individual may be denied his right to property without proper accord given to due process of law (pp. 12-46).

Colonial Experience With Property Rights

According to James Ely, Jr., “English common law provided the legal foundation
for property ownership in the colonies . . . [which was] from the very beginning . . . closely linked with economic rights” (Ely, 1998, p. 10). Indeed, “the colonialists venerated Magna Charta as part of their birthright as English subjects” and colonial judges applied it as such (pp. 13-14). With the plentiful availability of property throughout the American colony, just about anyone who worked hard enough could attain the status of ownership and economic well-being (p. 25). In fact, by some accounts, “most of the colonialists [already] owned land, and 80 percent of the population derived their living from agriculture” (p. 16). However, “the widespread ownership of land made the colonialists especially sensitive to any interference with their property” (p. 25). And when the British failed to take into consideration the sensitivity with which American colonialists regarded such property, their miscalculation inevitably set in motion the chain of events that would inevitably culminate with America’s independence (p. 25).

Much of the British government’s miscalculation of American proprietary interests stemmed to a large degree from its involvement in the French and Indian Wars, which lasted from about 1756 until 1763. Having accrued some 147 million pounds in national debt, the British were in dire need of new sources of income (Gruver, 1985, pp. 105-117). A couple means by which they could quickly attain such revenue included the streamlining of administration over colonial assets or the levying of new taxes over such assets (pp. 105-117). In either respect, the British were determined to make the American colonies “share more of the costs of administering and defending the empire” (p. 105). The Proclamation of 1763, for instance, sought to alleviate the need to maintain large military forces along the Western frontier of the American colonies by actually restricting colonialists from crossing over the Appalachians and settling onto Indian land (pp. 105-
106). However, with America's population growing even larger, such a move was only piecemeal at best (pp. 105-106). In fact, as George Washington himself would write: "Any person . . . who neglects the present opportunity of hunting out good lands, and in some measure marking and distinguishing them for his own will never regain it" (p. 105).

The British also imposed new taxes on the American colonies in an effort to help pay for colonial administration and defense (pp. 106-117). Beginning in 1764, the British government imposed a revised sugar duty (i.e., Sugar Act) on the American colonies (p. 106). The Act itself expanded the number of commodities covered by the tax, including sugar, and made the smuggling of such commodities perilous for those that attempted it (p. 106). Those that were caught and made defendants were seemingly denied due process by being "presumed guilty until proven innocent" (p. 106). The British government also imposed the Currency Act in 1764, which forbade the issuance of colonial paper currency (pp. 106-107). Such a move, however, placed the colonies under extreme hardship and eventual economic depression since most Americans lacked the necessary hard capital (i.e., gold) for which to purchase goods and trade (pp. 106-107). Even so, other new tax measures soon followed (pp. 107-117). In 1765, the British government imposed the Stamp Act, which required new fees (i.e., direct taxes) for such items as newspapers, almanacs, and liquor licenses (p. 107). The Quartering Act followed shortly thereafter, requiring colonial Americans to "accommodate" British soldiers by providing them with room and essential supplies (p. 107).

All of the British government's endeavors to recover much needed revenue were met with complete contempt and disdain on the part of the American colonialists. In some cases, the British were compelled to modify their taxing efforts, as in the case of the
Sugar Act which was revised to a single tax on sugar only; and in others, the British were forced to repeal their taxing efforts, as in the case of the Stamp Act (pp. 110-111). However, whatever leniency was temporarily displayed, other more contemptible acts soon followed (pp. 110-117). The Declaratory Act, passed shortly thereafter in 1766, allowed the British government to “make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever” (pp. 110-111). Just the same, a whole new round of taxes were also imposed — this time in the form of the Townshend Duties (pp. 111-112). The Townshend Duties, passed in 1767, placed taxes on all goods that the American colonialists could only import from Great Britain (e.g., tea) (pp. 111-112). Requiring that they too be paid in hard currency, the British government figured that the American colonialists would be forced to submit and eventually comply, given that they had no other real option (pp. 111-112). The Tea Act, passed in 1773, allowed for the “dumping” of East India Company tea on the American colonies in such a manner as to drive out all other competition and leave only British tea as a source of drink and as a tax (pp. 115-116). The final straw though came in the form of the Intolerable Acts, passed in 1774 (pp. 116-117). These Acts effectively ended self-government throughout the American colonies and transferred power to the British Monarch’s own royal governors (pp. 116-117). It was this action, according to Rebecca Gruver, that “brought the crisis between Great Britain and its [American] colonies to the point of no return” (p. 117).

**Constitutional Debate Over Property Rights**

The experiences that the American colonies underwent throughout the period
leading up to the Revolutionary War and shortly thereafter were of tremendous influence upon many of the founding fathers. Individuals such as Patrick Henry, Thomas Jefferson, Benjamin Franklin, James Otis, Jr., Samuel Adams, and many others, had all witnessed and openly protested the British government's perceived acts of arbitrary hostility toward the American colonies (Gruver, 1985, pp. 112-113). Thomas Jefferson's own *Declaration of Independence* detailed, to some extent, the American colonialists’ list of grievances against the Crown as they would in some way relate to property:

1. He has . . . quarter[ed] large bodies of armed troops among us;
2. He has . . . cut off our trade with all parts of the world;
3. He has . . . impos[ed] taxes on us without our consent; and
4. He has . . . depriv[ed] us in many cases, of the benefits of trial by jury . . . .

These concerns in conjunction with the actions taken by the several states during and after the Revolutionary War would all eventually make their way into the American Constitution, in some form or another. The objective in all cases was to secure the very essence of property ownership, for without such insurance, liberty could not be expected to flourish and succeed (Ely, 1998, p. 43). According to James Ely, Jr., the founding fathers’ concern with the issue of property rights can be broken down into essentially four different categories:

1. Provisions that restrict the power of the national government vis-à-vis property rights;

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104 As a routine, many of the states during the economic downslide of the 1780s passed a whole host of laws designed to intervene between debtor and creditor (Ely, 1998, pp. 36-41). These laws oftentimes either forgave outstanding debts, allowed lengthy installments to be made on debts, or in some cases for creditors to accept valueless paper money as payment on debts (p. 37). The Shay’s Rebellion of 1786-87 is to a large degree the result of such state action and a primary reason why the founding fathers included the Contract Clause within the U.S. Constitution (p. 39).
2. Provisions that strengthen the power of the national government vis-à-vis property rights;

3. Provisions that restrict the power of state governments vis-à-vis property rights;

and


The first provision primarily pertains to issues involving bills of attainder, forfeiture of property for treason, preferential treatment of state ports, export taxes, and direct taxes (pp. 43-44). The second provision primarily pertains to protective tariffs, the Commerce Clause, copyrights and patents, and bankruptcy laws (pp. 44). The third provision primarily pertains to bans on import and export taxes, bills of attainder, issuances of legal tender, and impairment of contracts (pp. 44-45). Finally, the fourth and last provision primarily pertains to the issue of slavery itself (pp. 45-46).

Even so, with the implementation of all these provisions into the U.S. Constitution, “no language [exists] that broadly affirmed the right of property” (p. 46). Indeed, as James Ely, Jr., writes: “For all their devotion to property rights, the [founding fathers] were content to rely primarily on institutional and political arrangements to safeguard property owners” (p. 47). The key for them was separation of powers, checks and balances, as well as federalism (p. 47). If government was mired down in procedural complexity, there would be no way for it to infringe upon the rights of property owners (p. 47). Furthermore, the founding fathers believed that the new government would be primarily composed of property owners, much like themselves (p. 47). What better protection of property rights than to have a fellow property owner oversee them (p.
Still, for some, such guarantees were simply not enough. Fearing that the national government may someday use its power to encroach upon the rights of the states as well as their inhabitants, many, most all of whom were Anti-federalists, such as Thomas Jefferson, advocated that a bill of rights also be added to the final document (pp. 47-58). In lieu of property rights, James Madison, himself somewhat concerned in this particular ease, eventually accommodated (pp. 53-54). The final product, the Fifth Amendment to the U.S. Constitution: “No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation” (U.S. Constitution, Amend. 5). A statement very much reflective of the principles set forth early on within the Magna Charta as well as by classical liberalism.

The U.S. Supreme Court and the Contract Clause

The property rights that are contained within the U.S. Constitution are the responsibility of the U.S. Supreme Court to interpret and to apply meaning. However, it is in this same capacity, as James Ely, Jr. notes, that the Court “has produced more than its share of dramatic moments” (Ely, 1998, p. xi). As guardian and protector of the American Constitution, the U.S. Supreme Court has on occasion been rather staunch in its defense of property interests (O’Brien, 2003, p. 223). In fact, the Court has at times brought itself into direct conflict with the other branches of government over the issue of property. For example, from the very beginning of the U.S. Constitution until the mid-1930s, the U.S. Supreme Court readily “held that the government existed to protect life, property, and liberty” (Ely, 1998, p. 47).

105 The founding fathers also expected, in lieu of state voter requirements, that property would be a prerequisite to participation within government (Ely, 1998, p. 47).
liberty, and property, with property accorded the greatest protection” (Fisher, 1990, p. 464). During this timeframe, the Court “promoted an exceptionally narrow definition of property” which tended in most cases to curtail the ability of the state to regulate the more sinister side-effects of a market-based economy (p. 464). Time again, any economic regulation passed by the government, whether at the state level or national, was met with strict judicial scrutiny and, in nearly all cases, defiant judicial negation (pp. 464-477). The individual’s right to property was quite literally taken to heart by the U.S. Supreme Court and placed on a constitutional pedestal above all other interests, particularly those as represented by the government. Through broad interpretation of such clauses as the Contract Clause, the U.S. Supreme Court, whether for good or ill, has historically been able to preserve and promote American individualism, as represented by an individual’s inalienable right to property.

**Understanding the Language of the Contract Clause**

Interestingly, while it has been the Contract Clause that the U.S. Supreme Court has historically utilized for the purposes of furthering property rights and economic liberty, the founding fathers themselves spent very little time actually discussing it (Levy, 1988, pp. 124-136). In fact, according to Leonard Levy, “almost no one cared about the contract clause either at the Constitutional Convention or during the ratification controversy” (p. 124). The reasoning behind such indifference among the founding fathers is not easily explained, especially given the fact that it was states that routinely interfered with and impaired the obligation of contracts (pp. 124-125). Still, there were some, including James Madison himself, that were more forthright in their position and believed...
that "laws impairing the obligation of contracts [were] contrary to the first principles of
the social compact and to every principle of sound legislation" (Ely, 1997, p. xi). They
believed that a contract clause would serve as a "bulwark in favor of personal security
and private rights" (p. xi). Even so, such outspokenness was oftentimes muted by the lack
of passion on either side of the debate (Levy, 1988, p. 127). "Monumental indifference,
ill-considered judgment, and inconsistent approval" were common throughout (p. 127).
And with ratification by the Constitutional Convention on September 12, 1787, the
apathy and disregard that many had for the Contract Clause were passed along right into
the U.S. Constitution itself (p. 127). The final product, as written: "No state shall . . . pass
any law . . . impairing the obligation of contracts" (U.S. Constitution, Art. I, Sec. 10).

In due respect to the founding fathers, according to Benjamin Wright, "had the
[U.S.] Supreme Court adhered to [their] intentions, the Contract Clause would never have
attained a position of great legal or economic importance" (Levy, 1988, p. 130). In large
part, it has been the U.S. Supreme Court that has been primarily responsible for providing
most of the meaning to the Contract Clause. With so little precedent, other than maybe a
volatile history at the state level, and only a brief discussion at the Constitutional Con-
vention, the Court has had to infer much of what it has come to understand by the Clause
itself. First of all, the Contract Clause is only applicable to the various state governments
and not specifically to Congress. As John Marshall himself wrote:

The power of changing the relative situation of debtor and creditor, of interfering with
contracts . . . had been used to such an excess by the State Legislatures as to . . . destroy
all confidence between man and man. The mischief had become so great, so alarming, as
not only to impair commercial intercourse and threaten the existence of credit, but to sap
the morals of the people and destroy the sanctity of private faith. To guard against the
continuance of the evil was an object . . . and was one of the important benefits expected

Extending the language of the Contract Clause to Congress "would be going," in the
words of one founding father, Gouverneur Morris, "[simply] too far" (p. 126). And
second, the word "contract," according to Black's Law Dictionary, is defined as "an
agreement between two or more parties creating obligations that are enforceable or
otherwise recognizable at law" (Black, 2000, p. 259). With respect to the Contract
Clause itself, "the U.S. Constitution prohibit[s] states from passing a law that would
impair private contractual obligations (p. 266). What this entails is that the state simply
cannot intervene between two private parties, say a debtor and a creditor, and alter the
meaning or arrangement of an existing contract that is held between them (O'Brien,
2003, p. 224). To do so would in all likelihood be "impairing the obligation of contracts"
(U.S. Constitution, Art. I, Sec. 10). And this would, for all intents and purposes, be a vi­
olation of an individual's right to property (O'Brien, 2003, p. 224).

Principles Set Forth by the Contract Clause

With such a resoundingly uncertain historical premise from which to work, the
U.S. Supreme Court has had to, according to David O'Brien, "[lay] the basis in con­
stitutional law for the growth of American capitalism" (O'Brien, 2003, p. 223). As stated
in Article I, Section 10 of the U.S. Constitution: "No state shall . . . pass any law . . .
impairing the obligation of contracts" (U.S. Constitution, Art. I, Sec. 10). What many
have historically taken this to mean is that the state may not intervene in the private
property matters of the individual—that the "provision was ostensibly aimed at pre­
venting the states from reneging on private contracts . . ." (O'Brien, 2003, p. 224). Quite
clearly put, as James Madison himself wrote:

1. That is not a just government, nor is property secure under it, where the
property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the services of the rest.

2. That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

3. A just security to property is not afforded by that government under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; . . . (Fisher, 1990, p. 479).106

The first major case that the U.S. Supreme Court dealt with that involved the Contract Clause came in 1810, in the case of *Fletcher vs. Peck* (10 U.S. 87).107 Writing for the Court, Chief Justice John Marshall broadly construed the notion that a state may not only “impair the obligation of contracts” between that of private individuals but also between that of private individuals and itself—the state (O’Brien, 2003, p. 224). In this sense, the state is prohibited from “impairing the obligation” of both “private contracts” and also “public contracts” (p. 224). “If . . . grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself” (10 U.S. 87, 137)? The Court reasoned that it could not (10 U.S. 87, 137). The sanctity of

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107 *Fletcher vs. Peck*, 10 U.S. 87 (1810).
property itself is premised upon a perceived notion of trust, and that the individual may not be divested of his "estate" simply because one legislature disagrees with the ethics of an earlier one (10 U.S. 87, 130-139). No matter the circumstance or rationale, "the state . . . [is] constrained, either by general principles, which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of [an individual is] . . . legally impaired and rendered null and void . . ." (10 U.S. 87, 139).

The expansive position taken by the U.S. Supreme Court in the Fletcher case was further underscored in 1819, in the case of Trustees of Dartmouth College vs. Woodward (17 U.S. 518). Upon reviewing the constitutionality as to whether or not a state (i.e., New Hampshire) may in fact alter a corporate charter (i.e., a contract) that was originally negotiated and granted by another public entity (i.e., English Crown), the Court reasoned, again through Chief Justice John Marshall, that it (i.e., the state) could not—"that this is a contract, the obligation of which cannot be Impaired without violating the Constitution of the United States" (17 U.S. 518, 650). Viewing the corporate charter, in this case, as "an artificial, immortal being," the Court seemingly elevated, to some degree, the very status of the organization to constitutional heights (17 U.S. 518, 642). Meaning, it bestowed upon the corporate charter a sense of being, likewise protected by the U.S. Constitution (17 U.S. 518, 642-654). The original parties to the corporate charter itself may have long since passed, but their interests "collectively" live on in its present image and purpose (17 U.S. 518, 642-643). Accordingly, "the corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves . . . , had they been.

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immortal” (17 U.S. 518, 642). The corporation is a “living” trust of their own ideals and wishes (17 U.S. 518, 642-654). To alter such a trust now would in effect be “impairing the obligation of contract” as originally stipulated to by all of the former parties or trustees of the same corporate charter (17 U.S. 518, 642-654). And this very notion, the Court concluded, was “repugnant to the Constitution of the United States (17 U.S. 518, 654).

And finally, in yet another decision, some 20 years later, the U.S. Supreme Court further expanded upon its understanding of the Contract Clause by also incorporating a “public virtue” component in it (36 U.S. 420). Backing away from its earlier more rigid construction of privacy rights, the Court, through Chief Justice Roger Taney, asserted that whenever there is “any ambiguity in the terms of [a] contract, [between a company of adventurers and the public], [it] must operate . . . in favor of the public (36 U.S. 429, 544). For, “the object and end of all government is to promote the happiness and prosperity of the community by which it is established, . . .” (36 U.S. 429, 547). Ideally, if any government is of recognizable value to its own community, then it will “accomplish the ends of its creation, and the functions it was designed to perform,” instead of transferring them “to the hands of privileged corporations” (36 U.S. 429, 548). In this particular case, the state of Massachusetts was performing its designated function by accommodating the needs of a “free, active, and enterprising” country with the addition of a new bridge over the Charles River (36 U.S. 429, 547). The fact that the state had negotiated the building of a similar bridge some 70 years earlier, as a privately operated toll service, is of no real concern (36 U.S. 429, 547-548). The life and times of a country must assuredly be expected to change. As such, “while the rights of private

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property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation (36 U.S. 429, 548).

Considerations Beyond the Contract Clause

The adoption of the Fourteenth Amendment in 1868 is, according to several legal scholars—including David O’Brien, among them—the primary reason why the U.S. Supreme Court began the process of relaxing its interpretation of the Contract Clause after the Charles River Bridge case in 1837 (O’Brien, 2003, pp. 254-255). Indeed, “the Fourteenth Amendment . . . provided the Court with a new basis for protecting economic rights” (p. 254). As Section One of the Fourteenth Amendment states: “No state shall make or enforce any law which shall abridge the privileges and 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 (U.S. Constitution, Amend. 14, Sec. 1). Broadly construing such language as “privileges and immunities” as well as “due process of law,” the Court was able, over a period of about 50 years, to “read” into the U.S. Constitution, or as some might prefer, to infer from it, an individual’s right to “liberty of contract.”

While there are in fact several legal antecedents or precursors to the actual creation of a “liberty of contract,” it is really not until the case of Allgey vs. Louisiana in 1897 that the U.S. Supreme Court openly acknowledged its existence as a fundamental right contained within the U.S. Constitution (165 U.S. 578). Prompted in large part by

110 Allgey vs. Louisiana, 165 U.S. 578 (1897).
the rapid industrialization of the United States, the Court, through Justice Rufus Peckham, asserted:

The 'liberty' mentioned in [the Fourteenth Amendment means not only the right of the citizens 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 (165 U.S. 578, 589).

The statement put forth by the Court, to a large extent, really only reiterated the positions taken within the dissenting opinions of two earlier cases. In Butchers’ Benevolent Association vs. Crescent City Livestock Landing and Slaughterhouse Co., for instance, Justice Joseph Bradley stipulated that "a law which prohibits . . . citizens from adopting lawful employment . . . does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property" (83 U.S. 36, 122). Justice Stephen Fields likewise agreed in his own dissent within the case of Munn vs. Illinois (94 U.S. 113, 136-154). As stated: "No reason can be assigned to justify legislation interfering with the legitimate profits of [a] business, that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful" (94 U.S. 113, 154).

The U.S. Supreme Court further underscored its position on the substantive existence of a right to "liberty of contract" in the case of Lochner vs. New York (198 U.S. 45). Writing for the Court, Justice Rufus Peckham aptly stated that "there is no reasonable ground for interfering with the liberty of person or the right to free contract" (198

111 Butchers’ Benevolent Association vs. Crescent City Livestock Landing and Slaughterhouse Co., 83 U.S. 36 (1873).
112 Munn vs. Illinois, 94 U.S. 113 (1877).
U.S. 45, 57). In response to the state of New York’s decision to effectively limit the number of hours per week that a person may potentially work in a bakery to sixty, the Court reasoned that such a restriction “necessarily interferes with the right of contract between the employer and employee” (198 U.S. 45, 53). And under the guise of the decision set forth in Allgeyer vs. Louisiana, “no state can deprive any person of life, liberty, or property without due process of law (198 U.S. 45, 53). The same logic was also set forth by the U.S. Supreme Court in the case of Adkins vs. Children’s Hospital (261 U.S. 525). This time, Congress had adopted a minimum wage law for women and children who maintained employment within the District of Columbia (261 U.S. 525, 539-543). Writing for the Majority, Justice George Sutherland reaffirmed the Court’s earlier stance that “the right to contract about one’s affairs is a part of the liberty of the individual” (261 U.S. 525, 545). “To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members” (261 U.S. 525, 561).

However, just as the U.S. Supreme Court had been strongly influenced early on by the rapid onslaught of industrialization in 1897, it was just as much influenced by the lack of industrialization in 1937. With the Great Depression in full swing, the U.S. Supreme Court, whether by internal reevaluation or external political pressure, reversed its own course of action, in the case of West Coast Hotel Co. vs. Parrish, on the existence of a right to “liberty of contract” as set forth in such cases as Adkins (300 U.S. 379). In

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114 Adkins vs. Children’s Hospital, 261 U.S. 525 (1923).
115 West Coast Hotel Co. vs. Parrish, 300 U.S. 379 (1937).
fact, writing for the Majority, Chief Justice Charles Evans Hughes succinctly stated that "our conclusion is that the case of Adkins vs. Children’s Hospital, supra, should be, and it is, overruled" (300 U.S. 379, 400). Why? "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law" (300 U.S. 379, 391). Hence, "... the Constitution does not recognize an absolute and uncontrollable liberty," as seemingly implied by earlier Courts (300 U.S. 379, 391). When necessary, the very essence of liberty must on occasion be reevaluated and re-adjusted in conjunction with what is going on within the social atmosphere (300 U.S. 379, 391-392). Without question, it is within the prerogative of the state to ensure that the “health, safety, morals, and welfare of the people” are preserved and protected at all times (300 U.S. 379, 391). So long as a state’s regulation is reasonable and does not unduly deprive an individual of his due process rights, the U.S. Constitution does not prohibit such action (300 U.S. 379, 391-392). Clearly, as in this case, there are circumstances, such as the Great Depression itself, where the “bargaining power” of the working class is left “relatively defenseless” and, as a result, is in dire need of proper governmental relief (300 U.S. 379, 399).

Conclusion

Interestingly, in a footnote to a case involving the constitutionality of the Filled Milk Act of 1923, Justice Harlan Stone asserted:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth ... (304 U.S. 144, 152-153).116

And really, since then, the Court has predominantly focused its attention on the wider, more diverse social issues of civil liberties and civil rights. Does this mean that the U.S. Supreme Court has reneged on its earlier perceived duties to uphold the individual's inalienable right to property? Not necessarily. One might very well stipulate that the Court, in its heyday, may have possibly taken the protection of property a little too far. While the U.S. Constitution is certainly general enough to be adapted to the times in which it exists, it was not, in the words of Justice Oliver Wendell Holmes, Jr., "intended to embody a particular economic theory ... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar ... ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States" (198 U.S. 45, 75-76). Still, the U.S. Supreme Court stands guardian to the various protections outlined within the American Constitution. The inalienable right of property is as relevant today as it was to the founding fathers and to earlier episodes of the American Supreme Court (e.g., due process clause and takings clause). While it is true that the Court has shifted its focus more so towards those principles that specifically pertain to issues of life and liberty, the protections that are afforded to property are still very much a part of the U.S. Constitution. The only real difference is in terms of their substantive content. The Court has, in this regard, been reluctant to imply or infer any additional rights out of them (e.g., liberty of contract). As Justice Hugo Black once stated in the case of Ferguson vs. Skrupa, "it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation" (372 U.S. 726, 729).\footnote{Ferguson vs. Skrupa, 372 U.S. 726 (1963).} Of course, one might very well amend his statement...
by including, "as such legislation pertains to the issues encircling economic regulations."
Because, as far as civil liberties and civil rights are concerned, the Court has readily in-
corporated substantive due process (e.g., right to privacy).
CHAPTER VI

CONCLUSION

Introduction

The U.S. Supreme Court has been willing to preserve and protect an ideal that was to a large degree originally brought into fruition by classical liberalism and that was later fully accepted by America’s founding fathers. The ideal is individualism, and the principles that underscore and enhance it are the individual’s inalienable rights. Through man’s inalienable right to life, liberty, and property, he has been able to propound upon his own sense of individualism, free from any undue or unnecessary outside influence, particularly as represented, for instance, by the likes of the state. The very essence of an individual’s right to life carries with it a sense of procedural due process—that the state itself may not infringe upon an individual’s “life” without some adherence to due process of law. The individual has a constitutional right, for example, against unlawful searches and seizures. This is a right guaranteed to the individual by the Fourth Amendment of the U.S. Constitution. In order for law enforcement to properly search the individual’s person, house, papers, or effects, they must have probable cause and a search warrant. There are, of course, notable exceptions to this requirement, but the point is that the state, as represented here by law enforcement, must adhere to proper procedure or due process. The state cannot arbitrarily violate an individual’s “right to life” by encroaching upon his own “person, house, papers, or effects” without reasonable cause and without proper writ.
Similarly, the state cannot arbitrarily infringe upon the individual’s right to liberty, his freedom to do whatever it is that he wishes so long as it does not infringe upon the rights of others. The individual has a constitutional right, for example, to the free exercise of his own particular religion and to be free from any notion of an “established” or state-sponsored religion. What this entails is that the individual may freely exercise his own religion without any undue governmental coercion or influence. The key to this statement though is that such “free exercise” is only protected in terms of religious beliefs or values. Once these beliefs or values move into the realm of action or conduct, the state may be compelled to restrict them. And finally, the state cannot arbitrarily encroach upon the individual’s right to property, at least without some consideration for due process. The individual clearly has a constitutional right, for example, to freely engage in whatever contract he wishes knowing that the sanctity of his proprietary interests within that contract will be upheld by the legal system. Again, though, as with the two preceding issues of concern, such a right is not absolute; the state may intervene when it can demonstrate a compelling interest to do so. Adherence to due process of law remains a necessary prerequisite even in the presence of a compelling interest.

The objective of course now is to evaluate just how well the U.S. Supreme Court has been able to use these particular issue areas of concern, within searches and seizures, freedom of religion, and contracts, to perpetuate the various tenets of classical liberalism—that is, to perpetuate those values that pertain principally to American individualism, being life, liberty, and property. This requires returning to several of the questions posed at the outset of this research endeavor for analysis and evaluation. First of all, what makes the U.S. Supreme Court institutionally suited for such a task, to being a pivotal
player in protecting and expanding upon American individualism? Moreover, how do such cases within searches and seizures, freedom of religion, and contacts actually enable the U.S. Supreme Court to protect and expand upon American individualism? And finally, what is the resulting effect of the U.S. Supreme Court's actions within these particular areas of concern, within these particular areas of the law, on American society as a whole? Do the Court's actions in effect preserve and promote individualistic tendencies? These questions go to the very heart of this research endeavor and must be evaluated to determine the plausibility of the hypothesis stated at the outset—that the U.S. Supreme Court has seemingly perpetuated, in some of its more fundamental constitutional decisions, an underlying predisposition toward those normative ideals that pertain primarily to classical liberalism—that is, toward those normative ideals that pertain specifically to the value of individualism.

The U.S. Supreme Court: The Right Institution?

First of all, what makes the U.S. Supreme Court the most appropriate, or well-suited institution to actually endeavor the task of protecting and expanding upon American individualism? There is little doubt that the Court occupies an unusual, maybe even paradoxical position within American representative democracy (Ball, 1987, pp. 5-16).\(^{118}\)

\(^{118}\) As Howard Ball writes: “The paradox lies [in the fact that] the political system is democratic, yet a non-elected, lifetime appointed set of jurists are normatively and constitutionally committed to preserving and maximizing the contours of the democratic system. The federal court system is an oligarchic institution functioning within a democratic environment” (Ball, 1987, pp. 9-10). The insulation of the U.S. Supreme Court from direct public accountability, one might add, makes it the most suitable institution for protecting individual liberties. In this respect, the Court can safely act as a countermajoritarian institution without having to face direct majoritarian pressures. The elected branches of government, meaning the Congress and the President, cannot act in such a manner since their very existence is dependent upon majoritarian support.
Of the three institutions of American national government, including the executive and legislative branches, the judiciary is the only one that is not directly accountable to the American people. Unlike the President which is selected by popular vote in tandem with the electoral college and the Congress which is selected by popular vote, the U.S. Supreme Court is selected by a nomination-confirmation process. According to the U.S. Constitution, “[the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court,” who “shall hold their offices during good behavior” (U.S. Const., Art. II, Sec. 2; U.S. Const. Art. III, Sec. 2). The founding fathers and, in particular, Alexander Hamilton chose this method for selecting U.S. Supreme Court justices in large part because they felt it would “secure a steady, upright and impartial administration of the laws” (Wills, 1982, p. 393). The general belief was that consistency and stability in the law was absolutely essential to the preservation of a well-ordered society (p. 393). More importantly, though, the founding fathers also chose this method for selecting Court justices because it would enable them, meaning the justices, to more adequately “... guard the Constitution and the rights of individuals . . .” (p. 397). It really is in this respect that the U.S. Supreme Court is not only institutionally suited to be a protector of individual rights but also to be a proponent of American individualism.

Without question, the founding fathers were very much enamored but quite fearful of the notion that the majority might be able to use its numbers as a source of strength to tyrannize over the minority. As James Madison writes in Federalist 10: “... the public

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119 It should be noted that U.S. senators were at one time selected by state legislatures. This selection method was changed to a popular vote, however, with the ratification of the Sixteenth Amendment.
good is disregarded... too often... by the superior force of an interested and overbear­ing majority" (Wills, 1982, pp. 42-43). Accordingly, “... the majority ... must be rendered... unable to concert and carry into effect schemes of oppression” (p. 46). The U.S. Supreme Court, as an independent tribunal, is just one of the means by which the majority's potentially overwhelming power may be checked and if need be curtailed (p. 397). Indeed, as Alexander Hamilton remarks in Federalist 78: “the independence of the judges is equally requisite to guard the... rights of individuals from the effects of those ill humors which the arts of designing men,... sometimes disseminate among the people themselves...” (p. 397). The Court, in this regard, is an essential component of the elaborate system of separation of powers and check and balances that Madison himself often alludes to and praises. It is part of the whole notion that somehow “ambition must be made to counteract ambition” (p. 262). Clearly, as Madison notes in Federalist 47, “were the power of judging joined with the legislative [or executive], the life and liberty of the subject would be exposed to arbitrary control,...” (p. 246).

Even so, the question still looms: Why the judiciary? Why was so much trust put in it to protect individual rights and not the executive or legislative branches of government? What was it about the U.S. Supreme Court, for many of the founding fathers anyway, that made it the most suitable branch to undertake the role of protecting the rights of the individual? Apart from its semi-independent (i.e., semi-isolated) status within American government, which certainly does help in this regard, the Court is, according to Howard Ball, a prime example of a countermajoritarian institution (Ball, 1987, pp. 1-11). Unlike the President or Congress, which are majoritarian institutions in composure, meaning that they are designed to be accountable to a majority of their own
respective constituencies at any one time, the Court is not. The U.S. Supreme Court's duty is to protect the rights of the individual, the minority, against the potential tyranny of the majority. It can accomplish this feat in large part because it is an independent tribunal. It does not need to answer to the public's scrutiny every two, four, or six years. Justices are appointed for what the Constitution refers to as "good behavior" (U.S. Constitution, Art. III, Sec. 1). In most cases, what this means is that they are there for life, or at least close to it. Their independence and lack of public accountability makes them the best institution to stand against the wave of majoritarian pressures—to protect "the most basic of all of our freedoms," the Bill of Rights (Abraham, 1991, p. 89). Unlike the President and the Congress, which are directly accountable, the U.S. Supreme Court does not, in most circumstances, need to immediately bow to the demands of an anxious public. It may, one might very well say, bide its time.

The U.S. Supreme Court: Guardian of Individual Rights?

Accepting that the U.S. Supreme Court is the most appropriate institution for such a task, in what manner has it actually used its unique position within the American system of government to protect and expand upon American individualism? Whether it be economic rights or civil liberties and civil rights, the U.S. Supreme Court has shown a keen predisposition throughout its history for protecting the rights of the individual vis-à-vis the state. Through its unusual position within American government, the Court has not only been able to serve as the final interpreter of American constitutional law, it has also been able to serve as the final guardian of American individual rights. The Bill of Rights was added to the U.S. Constitution to protect the rights of the individual against
the potentially overwhelming power of the state. Indeed, this was one of the last, but by far most significant demands placed on the Federalists by the likes of such individuals as Thomas Jefferson (i.e., an Anti-federalist). A bill of rights was perceived as absolutely essential to the ratification of the U.S. Constitution. And in the final hour, the preservation of the individuals' rights was paramount to all other considerations. As a semi-independent, countermajoritarian institution, the U.S. Supreme Court has demonstrated time again its duty and obligation to uphold the individual values placed in the U.S. Constitution by the founding fathers. Classical liberal in origin, the individual's inalienable rights to life, liberty, and property are central components of the Bill of Rights and are the responsibility of the Court to "preserve and maximize" (Ball, 1987, pp. 9-10). How has the U.S. Supreme Court undertaken such a task? It has done so, in the words of Chief Justice John Marshall, by "emphatically... saying] what the law is" (5 U.S. 137, 177). It is in this regard that the Court has been able to preserve and promote American individualism. By upholding and expanding upon the rights of the individual to life, liberty, and property, the U.S. Supreme Court has contributed to the individualistic tendencies that exist within American society. Nowhere is this more apparent than in the Court's understanding of searches and seizures, freedom of religion, and contracts. All three areas of concern are very much pertinent to the issues of life, liberty, and property, and all are contributing elements to American individualism.

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120 This is not to convey any notion that the Federalists were opposed to individual rights; only that they did not believe an actual bill of rights was needed in the U.S. Constitution. Their argument was premised upon the belief that the national government could only do what was delegated to it by the Constitution. If no such power existed which would enable the national government to restrict speech, for example, then why was a bill of rights even needed? To the Federalists, the addition of individual rights was contradictory to the whole notion of delegated national power. The national government can not do what it in fact lacks the power to do. . . .

121 Marbury vs. Madison, 5 U.S. 137 (1803).
Right to Life: Searches and Seizures

According to the Fourth Amendment of the U.S. Constitution, "the right of the people to be secure in their homes, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. Constitution, Amend. 4). An individual’s protection against unreasonable searches and seizures goes right to the heart of that individual’s inalienable right to life. Procedural due process is key to its understanding as well as its enforcement. The U.S. Supreme Court, through such landmark decisions as Boyd vs. United States, Olmstead vs. United States, and Katz vs. United States, has been able to procedurally protect the individual’s right to life, his right to a “reasonable expectation of privacy,” against any undue governmental encroachment (389 U.S. 347, 360). In this respect, the Court has been able to differentiate between the “public sphere” of an individual’s own existence and the “private sphere.” There are clearly certain areas of an individual’s life that government should not be, and if it must, through some sort of compelling state interest, there are constitutionally established procedural guidelines that it must adhere to and respect. First of all, the government must have probable cause, or a reasonable belief, that something has gone awry, it must know what that something is, and it must have some idea where that something might be found. In this sense, the individual’s right to life is protected against arbitrary and potentially overzealous governmental action. As Justice Potter Stewart once wrote: “Wherever a man

may be, he is entitled to know that he will remain free from unreasonable searches and
searches" (389 U.S. 347, 359). This is certainly a strong indication that the U.S. Supreme
Court holds the rights of the individual as preeminent to those of society and the state.

The U.S. Supreme Court has even gone so far as to substantively incorporate, in
an effort to ensure the sanctity of an individual’s right to life against unreasonable
searches and seizures, a punishment-type mechanism into the U.S. Constitution against
the state, via the Fourth and Fourteenth Amendments. First devised in 1914 to only be
applicable to the national government and then later in 1961 amended to be applicable to
the state governments, the exclusionary rule is the arch-de-tromp protection of an indi­

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vidual’s right to life. How else could any judiciary, at whatever level, ensure that an
individual’s protection against unreasonable searches and seizures be respected if there
was no other inherent device to punish the state when it opts to violate such a protection?
The loss of any evidence gathered as a result of an improper search and seizure is
absolutely pivotal to the enforcement of an individual’s right to life. There really is no
other recourse for punitive action, so to speak, than to let “the criminal go free because
the constable has blundered” (367 U.S. 643, 659). Why should the constable be allowed
to keep fruits of a bad search? Would this not just be rewarding him for a job poorly
done? Historically, this is how the U.S. Supreme Court has perceived the necessity of
incorporating an exclusionary rule into the Fourth and Fourteenth Amendments of the
U.S. Constitution. As Justice Felix Frankfurter wrote in 1949: “The security of one’s
privacy against arbitrary intrusion by the police . . . is basic to a free society” (338 U.S.


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Clearly, in this regard, the exclusionary rule serves as a essential barrier against police misconduct and as a strong proponent of an individual’s right to life, his own protection against unreasonable searches and seizures. “For there is but one alternative to the rule of exclusion,” in the words of Justice Frank Murphy, “[and] that is no sanction at all” (338 U.S. 25, 41). The exclusionary rule is a key component to the promotion of American individualism.

Right to Liberty: Freedom of Religion

According to the First Amendment of the U.S. Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Constitution, Amend. 1). An individual’s protection against the imposition of a state religion and his own right to freely exercise his own religion goes to the heart of that individual’s inalienable right to liberty. On one side of the issue, the state is prohibited from imposing a particular religion upon the individual, and on the other side of the issue, the state is prevented from interfering with the individual’s liberty to exercise a religious belief. One denies the state the power to “establish” a religion; the other allows the individual the right to “exercise” a religion. Again, both perspectives are essential to an individual’s inalienable right to liberty—to be free to do whatever he wills, so long as it does not infringe upon the rights of others. The U.S. Supreme Court has taken the stance of more recent, at least since the early 1960s, that because of the close relationship that has existed in American history between religion and state, some sense of “disestablishment of religion” must take place between the two. What this has entailed, in most

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cases, is the removal of religious observances (i.e., prayer) from public institutions, primarily of which have included public schools. Whether it be a state-written prayer, a personal prayer, or a moment of silence, the Court has found all to be in violation of the Establishment Clause. Its rationale has been that it is “not within the power of government to invade the citadel [of an individual’s heart], whether its purpose or effect be to aid or oppose, to advance or retard” (374 U.S. 203, 226). Accordingly, religion is a private matter and should be left to the individual’s own choosing. “Just as the right to speak and the right to refrain from speaking are complementary components . . . of individual freedom . . ., so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority” (472 U.S. 38, 52).

The Establishment Clause, of course, is only one side of the issue; the other side includes the Exercise Clause. While the former clause primarily involves the government and its direct relationship with religion, the latter clause pertains primarily to the individual and his own religion. As such, in lieu of an individual’s inalienable right to liberty, he is constitutionally guaranteed the right to freely exercise his own religion, again though, so long as such exercise does not infringe upon the rights of others. Just as it is stipulated to in classical liberalism, no right is ever absolute. However, the U.S. Supreme Court has demonstrated throughout that it is really the state that must evince a compelling interest to restrict such a liberty. As written by Chief Justice Warren Burger, “the

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126 Reynolds vs. United States, 98 U.S. 145 (1879); Sherbert vs. Verner, 374 U.S. 398 (1963); Wisconsin vs. Yoder, 406 U.S. 208 (1972); and Employment Division, Department of Human Resources of
essence of all that has been said and written on the subject is that only those [state] interests of the highest order . . . can overbalance legitimate claims to the [individual's] free exercise of religion" (406 U.S. 208, 215). The assumption is that the individual may freely exercise his own religion until such time when the state can demonstrate a compelling reason otherwise. Typically, it is the component of "free exercise" that involves the "practice of a religion" that normally falls under this type of scrutiny. "The legislative powers of the government," Thomas Jefferson wrote, "reach actions only and not opinion" (O'Brien, 2003, pp. 665-667). An individual may freely believe whatever he wishes, but his carrying out of those beliefs into actions is something the state may rightfully regulate and control. Again, though, the burden of proof is on the part of the state. The individual's right to liberty is still paramount.

Right to Property: The Contract Clause

According to Article I of the U.S. Constitution, "no state shall . . . pass any law . . . impairing the obligation of contracts" (U.S. Constitution, Art. I, Sec. 10). Likewise, according to the Fifth and Fourteenth Amendments of the U.S. Constitution, "[no person shall] be deprived of life, liberty, or property, without due process of law (U.S. Constitution, Amend. 5; U.S. Constitution, Amend. 14, Sec. 1). Just as life and liberty are inalienable rights of the individual, so too is property. In fact, an individual's inalienable right to property is really, for all intents and purposes, the end all and be all of classical liberal thought. John Locke, James Madison, Thomas Jefferson, among others, all placed particular emphasis on the need for property to be preserved and respected. Similarly,

throughout its history, the U.S. Supreme Court has been just as strong of an advocate of an individual’s right to hold and possess property. Some of the first cases that the Court dealt with were used to underscore the centrality of property rights within American society. Broadly construing such facets of the U.S. Constitution as the Contract Clause, for instance, the U.S. Supreme Court was not only able to infer an “obligation of contract” between individuals but also an “obligation of contract” between private individuals and the state (10 U.S. 87). This was absolutely pivotal to the preservation of an individual’s property rights since it forbade the state from unduly encroaching upon them. And in a free society very much attuned to the values of laissez-faire economics, minimal state interference was considered not only a virtue but an absolute necessity. The U.S. Supreme Court, in 1819, even went so far as to grant “individual status” to corporate charters (17 U.S. 518). Perceiving a corporate charter as “an artificial, immortal being,” the Court was able to elevate such organizations to the status of an individual with certain inalienable rights, and thus bring them under the protection of the U.S. Constitution (17 U.S. 518, 642). Here, not only are the rights of an individual guaranteed with respect to his own proprietary interests within a given contract, the rights of a corporate entity are similarly guaranteed, as if they are one and the same.

With the onslaught of American industrialization during the latter part of the 19th century, the U.S. Supreme Court went even further in its protection of the individual’s right to property by substantively incorporating a “liberty of contract” into the scheme of things, as a constitutionally protected individual right. Again, broadly construing such

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127 Fletcher vs. Peck, 10 U.S. 87 (1810).
129 Butchers' Benevolent Association vs. Crescent City Livestock Landing and Slaughterhouse Co., 83 U.S. 36 (1873); Munn vs. Illinois, 94 U.S. 113 (1877); Allgeyer vs. Louisiana, 165 U.S. 578 (1897);
language as "privileges and immunities" and "due process of law," the Court was able to infer the existence of a "contract" between employer and employee. What this entailed was that the state could not infringe upon such a "contract" without actually violating the "liberty" that existed between the two parties that were a part of the contract. The assumption, of course, was that both sides approached the "contract" from an equal stance, whereby each party freely contracted with the other and was under no undue pressure. Under such a scenario, Justice Rufus Peckham wrote: "There is no reasonable ground for interfering with the liberty of person or the right to free contract" (198 U.S. 45, 57). Therefore, any state-sanctioned regulation or restriction, whether it be minimum wages or maximum hours, was perceived as "[un]necessary[ly] interfer[ing] with the right of contract between employer and employee" (198 U.S. 45, 53). Assuredly, "no state [may] deprive any person of life, liberty, or property without due process of law" (198 U.S. 45, 53). Such thinking on the part of the U.S. Supreme Court would reign supreme until the Great Depression during the 1930s. Even then, though, the Court was reluctant to move away from its earlier stance on the existence of a "liberty of contract" between employer and employee. Only with the continuation of the Great Depression and a determined executive branch of government did the U.S. Supreme Court finally yield in its belief that the state possessed no such regulatory power to interfere in the "liberty of contract" that existed between employer and employee (300 U.S. 379). Writing for the Court, Chief Justice Charles Evans Hughes aptly stated: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without

Lochner vs. New York, 198 U.S. 45 (1905); and Adkins vs. Children's Hospital, 261 U.S. 525 (1923). 130 West Coast Hotel Co. vs. Parrish, 300 U.S. 379 (1937).
due process of law" (300 U.S. 379, 391). When reasonable prudence dictates, such as with an economic depression, the state may intervene and provide relief to those that lack "bargaining power" and are left "relatively defenseless" (300 U.S. 379, 399). This does not, however, mean that the state may trample upon the individual’s right to property. Due process of law still prevails and is constitutionally protected.

The U.S. Supreme Court: Proponent of American Individualism?

Finally, what has been the resulting effect of the U.S. Supreme Court’s endeavor to protect the rights of the individual, his right to life, liberty, and property, against the state? Really, it has been through the protection of individual rights, whether they be in the form of life, liberty, or property, that the U.S. Supreme Court has been able to promote and expand upon American individualism. The analysis of such issues as searches and seizures, freedom of religion, and contracts clearly demonstrates that the U.S. Supreme Court has been an ardent protector of individual rights and, as a result, a strong proponent of American individualism. By protecting the individual’s right to life, liberty, and property, the Court has been able to play a pivotal role in fostering the founding fathers’ admiration and appreciation for the individualistic virtues of classical liberalism. Throughout the landmark cases that have been analyzed, the U.S. Supreme Court has readily identified the rights of the individual as paramount to those of society and the state. One might very well say that, at least within these three areas of legal concern, the virtues of individualism are alive and well! Americans, as individuals, have a right to be safe and secure in their own homes, houses, papers, and effects without undue governmental interference. Just the same, Americans, as individuals, have a right
to freely engage in whatever religion they wish to exercise, so long as it does not infringe upon the rights of others. And finally, above all, Americans, as individuals, have a right to the acquisition and possession of property and that such property may not been deprived to them without due process of law.

Classical liberalism early on advocated the existence of certain inalienable rights of man to life, liberty, and property; the founding fathers later accepted these very same rights of man as a basis of American government; and the U.S. Supreme Court has continued to promote these same rights of man as a principle of American culture and creed. The principles of an individual's life, liberty, and property are just as important today to American economic, political, and social thought as they were during the founding period. While there is no statistical proof to demonstrate the accuracy of such a statement, it is still probably quite safe to assume that most Americans today, as individuals, know about the existence of at least some of their rights. They may not know the history behind them, they may not even know the exact phraseology of them, but they do know that they are guaranteed certain rights against the state. The whole notion that "I have rights" is just as significant today to any American as it was to those who advocated them during the revolutionary period. Ask any American about what a police officer needs to search his or her home or car? And then ask of him or her what would happen if the police officer did not conduct such a search in a proper manner? The exclusionary rule is not even part of the U.S. Constitution; it was put there by the U.S. Supreme Court; and yet, most Americans are aware of its existence. The same is, in many respects, also true of religion and property. Most Americans probably do not even know what the First Amendment contains, but many of them are at least aware that there is something about
“separation of church and state” within it, although the exact phrase itself does not actually exist. And property. Well, safe to say that Americans know all too well about property. All one needs to do is allude to the so-called “American dream.” What is it? Well, many would say that it is a house with a two-car garage, a picket fence, and a backyard. A picture very indicative of the value attached to property within America’s culture and creed. By the fact that the U.S. Supreme Court is guardian and protector of the U.S. Constitution, it has played a significant role in perpetuating such beliefs and values within American economic, political, and social thought.

The U.S. Supreme Court: Considerations for Further Research

Certainly, while the existence of individualistic tendencies has been seemingly demonstrated in the selected areas of searches and seizures, freedom of religion, and contracts, might the same also be said of other similar rights contained within the U.S. Constitution? In other words, can further research into other related areas of concern yield similar results? The short and simple answer is: “Yes.” While the analysis conducted here does not utilize a statistical model, it has at least been rigorous enough in its application of qualitative methods to apply to other related areas of concern. The issue areas that were selected for this endeavor were chosen in large part because they have been reflective of specific historical American experiences. Whether it be searches and seizures, freedom of religion, or contracts, all have evolved out of some historical occurrence which spawned an apparent need, on the part of the founding fathers, for their inclusion into the U.S. Constitution. The same may also be said of other rights and
For instance, what about the individual's protection against "cruel and unusual" punishments, or the individual's "freedom of speech," or the individual's right to "just compensation" (i.e., upon the state's seizure of his own property)? These are certainly all "life, liberty, and property" issues. Does the U.S. Supreme Court similarly treat them in such a manner as to preserve and protect American individualism? While the analysis that follows is simply too brief to yield any conclusive results, it does at least indicate that further research within this area is warranted and that similar positive results are highly probable. Given what has already been demonstrated within the areas of searches and seizures, freedom of religion, and contracts, such results would only enhance the plausibility of the hypothesis of this research endeavor—that there is a strong connection between the U.S. Supreme Court and the preservation and promotion of American individualism.

Right to Life: Cruel and Unusual Punishment

According to the Eighth Amendment of the U.S. Constitution, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (U.S. Constitution, Amend. 8). The fundamental basis for the Eighth Amendment is the whole notion that the state cannot use excessiveness to exact revenge or to force confession—that such motivations on the part of the state are in clear violation of an individual's procedural right to life. While the first parts of the Eighth Amendment, dealing with excessive bail and excessive fines, are certainly important to an individual's
due process rights, it is the latter part of the Amendment, dealing specifically with cruel and unusual punishments, that is of primary interest here. The principles born out of the language of the Eighth Amendment's protection against cruel and unusual punishments bear witness to the importance of an individual's "right to life" within the American system of legal jurisprudence. Nowhere else in American constitutional law are an individual's procedural due process rights any more important than they are with respect to that person's own protection against the overwhelming power of the state to inflict punishment upon him. Indeed, it is in this realm that an individual's "right to life" can truly come down to a literal understanding of the phrase itself. In this regard, what has been the U.S. Supreme Court's perspective on an individual's right to life as it specifically pertains to the issue of capital punishment?

Interestingly, just as the U.S. Supreme Court has been willing to provide for the procedural protection of an individual's right to life against unreasonable searches and seizures, the Court has also been willing to extend similar procedural protection of an individual's right to life against cruel and unusual punishments. For instance, in the case of Furman vs. Georgia, the U.S. Supreme Court ruled that while capital punishment is not itself an unconstitutional practice, the procedures by which it is executed may be . . . (408 U.S. 238, 238-242).^{132} Clearly, as the Court stated in the case of Lockett vs. Ohio, other "mitigating factors," such as a defendant's prior history, must be allowed to come into play when an individual's own life is in jeopardy (438 U.S. 586, 604-609).^{133} As Chief Justice Warren Burger writes: "When the choice is between life and death, [any]

\[\text{Footnotes:}\]

^{132} Furman vs. Georgia, 408 U.S. 238 (1972).
risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments" (438 U.S. 586, 605). More recent U.S. Supreme Court decisions have only further enhanced the whole notion of individualized sentencing, as it specifically relates to the death penalty. In *Thompson vs. Oklahoma*, the Court ruled that a minor may not be executed who at the time of the murder was at the age of fifteen or younger (487 U.S. 815).  

Right to Liberty: Freedom of Speech

According to the First Amendment of the U.S. Constitution, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances” (U.S. Constitution, Amend. 1). All of these guarantees, as set forth within the U.S. Constitution, are similarly related to an individual’s inalienable right to liberty. At the same time, though, none of them are by any sense of the word “absolute” in breadth. No individual, for instance, has any more right to slander a fellow being than a newspaper has to libel him. Just the same, no individual or group of individuals may show up at a court’s doorstep to demonstrate a recent ruling without some form of prior notification. The individual has an inalienable right to whatever liberty he wishes to express, but only so long as the expression of that liberty does not infringe upon the rights of others or does not lead to any form of offensive conduct? In this regard, what has been the U.S. Supreme Court’s perspective on an individual’s right to liberty as it specifically pertains to the issue of speech?

As with its treatment of the religion clauses to the First Amendment of the Constitution, the U.S. Supreme Court has shown similar respect to the issue of speech. An individual may freely engage in whatever speech (i.e., personal expression) he so desires, so long as that speech itself does not incite unacceptable conduct. For instance, an individual may freely burn an American flag as a symbolic gesture of protest against the political establishment, but that same individual must also take care that such actions do not incite violence (488 U.S. 884).\footnote{Texas vs. Johnson, 488 U.S. 884 (1989).} Lighting "Old Glory" up in front of a veterans' hall may not be the smartest move to make. The timing of the speech is, in many respects, absolutely pivotal to its acceptability and overall constitutionality. At one time, condemning the American government at a time of war constituted a "clear and present danger" to the very fabric of public order (249 U.S. 47).\footnote{Schenck vs. United States, 249 U.S. 47 (1919).} However, in later years, advocating the violent overthrow of the American government would only constitute a "bad tendency" effect (268 U.S. 652).\footnote{Gitlow vs. New York, 268 U.S. 652 (1925).} Even pornography has come under the protection of the First Amendment, as interpreted by the U.S. Supreme Court, so long of course that it is acceptable by "community" standards and does not include minors (413 U.S. 5 and 495 U.S. 103).\footnote{Miller vs. California, 413 U.S. 5 (1973); and Osborne vs. Ohio, 495 U.S. 103 (1990).}

Right to Property: The Takings Clause

According to the Fifth Amendment of the U.S. Constitution, "no person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (U.S. Constitution, Amend. 5).
The Fourteenth Amendment underscores this protection by further adding that "no state shall [likewise] . . . deprive any person of life, liberty, or property, without due process of law" (U.S. Constitution, Amend. 14, Sec. 1). The Takings Clause, sometimes also referred to as eminent domain, allows the government the "power to take private property for public purposes, subject to the just compensation of the owners" (O'Brien, 2003, p. 286). Under certain circumstances, for instance, the state may have to purchase private property for the purpose of running an interstate highway through it. This is a fairly clearcut and straightforward example of a situation involving the government's power of eminent domain, and one that has readily been applied since the creation of America's interstate highway system back in the 1950s. However, the issue becomes blurrier when the government has not actually invoked the Takings Clause, but the effects of its actions would seemingly appear otherwise. In this regard, what has been the U.S. Supreme Court's perspective on an individual's right to property as it specifically pertains to the issue of eminent domain?

To determine whether or not eminent domain is at issue, the U.S. Supreme Court must effectively pose three simple questions: (1) What has in fact been taken; (2) Does it have a public use; and (3) Have the owners been justly compensated? In Pennsylvania Coal Co. vs. Mahon, the Court ruled that in order for private property to be considered as taken, the owner must demonstrate that he has in fact suffered a nearly complete loss to the use of his property (260 U.S. 393). In terms of public use, the Court has reasoned, as set forth in Hawaii Housing Authority vs. Midkiff, that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has
never held a compensated taking to be proscribed by the Public Use Clause” (467 U.S. 229, 241).\textsuperscript{140} Clearly, private property may be taken so long as a “legitimate public purpose” is demonstrated within the confines of the state’s power (467 U.S. 229, 245). In terms of just compensation, the Court has simply stipulated that a “fair market value” be appraised (169 U.S. 557, 557-576).\textsuperscript{141} As stated in the case of \textit{Backus vs. Fort Street Union Depot Co.,} “all that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Constitution” (169 U.S. 557, 569).

Conclusion

In the end, the research and analysis conducted here demonstrates that the U.S. Supreme Court has historically played a pivotal role in promoting the various tenets of classical liberalism, as represented by the individual’s inalienable right to life, liberty, and property. What one should come away from this analysis with is an understanding that the U.S. Supreme Court has remained consistent in its treatment of individual freedoms and liberties. And to a large extent, this holds true regardless of the Court’s ideological composition, whether that be liberal or conservative. The landmark cases that have been selected for this endeavor cover, for the most part, the entire history of the U.S. Supreme Court’s existence in American government. No particular Court has been selected for analysis and scrutiny. Of course, different Courts have focused their attention

\textsuperscript{140} \textit{Hawaii Housing Authority vs. Midkiff}, 467 U.S. 229 (1984).

\textsuperscript{141} \textit{Backus vs. Fort Street Union Depot Co.}, 169 U.S. 557 (1898).
and time on different issues, but they have all still remained consistent in placing particular deference upon the rights of the individual. In some cases, the U.S. Supreme Court has mired itself in controversy, particularly when it has substantively incorporated additional rights into the U.S. Constitution. The addition of "liberty of contract" to the Constitution, for instance, eventually brought the Court into confrontation with its fellow branches of government, particularly the presidency. Just the same, although not specifically alluded to here in any detail, the addition of a "right to privacy" to the Constitution has had similar controversial results. The U.S. Supreme Court is truly an unusual institution within the American system of government. By the fact that it is not directly accountable to the American people, to the pressures of their majoritarian tendencies, has made it the "right institution" for protecting and preserving the individual's right to life, liberty, and property. No other institution within American government could have done what the U.S. Supreme Court has accomplished with respect to individual rights over its 200 plus years of existence. While numerous judicial scholars have chosen to depict the U.S. Supreme Court as an institution of unusual paradox, it is this very same institution that has been the strongest proponent of those classical liberal beliefs and values that form the foundation of American government. The U.S. Supreme Court, in this regard, has remained steadfast in its protection and promotion of American individualism. It has, in the words of Justice Harlan Stone, ensured that such ideals are "preserved at all costs" (310 U.S. 586, 606-607).142

While numerous studies have been conducted on the U.S. Supreme Court, most of them have either sought to determine a proper role for the Court within American

democracy, or have sought to find ways of explaining the Court’s power. This research endeavor has been altogether different in that its primary objective has been to determine if in fact a true linkage exists between the Court’s interpretation of the Constitution and the founding fathers’ admiration and respect for classical liberal principles (i.e., individualism). Clearly, the demonstration of such a connection adds a whole new dimension to the study of judicial politics. Of course, one might just as well say that the U.S. Supreme Court is only adhering to original intent. This is indeed very true; the Court is adhering to original intent. But the whole notion of original intent is oftentimes an illusive concept that is to a large degree subject to one’s own interpretation. The connection here is altogether different; it is between the U.S. Supreme Court and a particular political philosophy that many of the founding fathers accepted as part of their own set of beliefs and values. The respect and admiration for the rights of the individual that classical liberalism promotes remains central throughout the Court’s history, regardless of whether or not original intent is at issue or not. If rights and liberties are involved (i.e., life, liberty, and property), then it is safe to assume that the individual is at the focal point of the U.S. Supreme Court’s attention—that he is preeminent to all other considerations. Ideally, the research and analysis conducted here is only the beginning. Further study is strongly recommended to determine if such a relationship holds true in other constitutional areas of concern. The brief allusion at the end to cruel and unusual punishments, freedom of speech, and eminent domain is certainly fodder for more in-depth research and analysis. Moreover, while the analysis conducted here has been more qualitative in nature, the demonstration of such a relationship between the U.S. Supreme Court and American individualism is certainly open to quantitative (i.e., statistical) analysis. Indeed,
some form of quantitative analysis is strongly recommended to further test the hypothesis of this research endeavor—to further enhance and underscore its conclusions. The first step into a relatively new area of judicial politics has been taken; it is now time for further refinement of that step and for further exploration into others.
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