Chapter 9

Rights

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INTRODUCTION[1]

The importance of rights to the American legal system is hard to overestimate. Rights are the cornerstone of the American legal and political system, as well as of the identity of citizens. They are universally considered vital for promoting and protecting democracy, economic and social justice, and protecting individual autonomy and property. The public sphere in the United States can be described as an arena where groups and individuals discuss and fight over their rights. The language of rights permeates both public and private life and is one of the defining features of American culture.[2]

Although rights are an important part of every modern legal system, their status in the United States is distinctive. If we compare two related legal systems—in the United States and in the United Kingdom—the differences are striking.[3] In the USA, the role of rights has historically been much more important. The obvious

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[2] Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); Richard A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 2004).

[3] For example, Manfred Berg and Martin H. Geyer, eds., *Two Cultures of Rights: The Quest for Inclusion and Participation in Modern America and Germany* (Cambridge: German Historical Institute, Cambridge University Press, 2002); Tomasz Raburski, *Prawo podmiotów: Etyka—prawo—polityka* (Poznań: Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk, 2021); Mary A. Glendon, "Rights in Twentieth-Century Constitutions," *The University of Chicago Law Review* 59, no. 1 (1992); Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 145–70.

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difference is the centrality of the written constitution and the Bill of Rights in the United States. There is no comparable document in the UK and the British tradition of rights, reaching back to the Magna Carta (1215), took different institutional forms. Rights in the USA were more individualistic and much more expansive than those in the UK. The burden of the protection of rights falls on individuals and the court system and much less on the central institutions (such as the parliament in the UK). In consequence, the history of rights in the USA is the history of landmark cases.

COLONIAL ERA

After the English colonization of America, a complex mosaic of legal regimes arose. It consisted of English (sometimes Dutch, Scottish or French) and local laws, customs, charters, grants, and ordinances. Soon, the colonial legal order became very different from the original English one. This environment became the birthplace of a new tradition of rights.

It is often claimed that the American tradition of rights is of Lockean origin. This traditional view was challenged by contemporary historians of ideas, most notably John G. A. Pocock, who in his *The Machiavellian Moment* (1975) reconstructed the republican tradition on which American constitutionalism was built.[4] The tensions between these two intellectual strands have remained a latent driving force in the evolution of the American legal system.[5]

John Locke was a major figure in the modern tradition of natural rights (Grotius, Hobbes, Pufendorf). In his *Two Treatises of Government* (1689), Locke argued that people possess certain fundamental rights, like the right to life, liberty, and property, which exist prior to any particular government.[6] All people are naturally free and equal, and political authority, therefore, arises from the consent of the governed, who create governments in order to protect these rights and promote the common good. Several elements of his theory had a deep impact on the American legal tradition. His concept was very individualistic, emphasizing the importance of personal accountability and the protection of private property. Rights were a protective instrument in the hands of individuals against the government. Locke was also one of the authors of the draft of the Fundamental Constitutions of Carolina, later adopted by the Lords Proprietors of the Province of Carolina in 1669. The Constitu-

[4] John G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Isaac Kramnick, "Republican Revisionism Revisited," *The American Historical Review* 87, no. 3 (1982).

[5] Michael J. Sandel, "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues," *Fordham Law Review* 66, no. 1 (1997).

[6] John Locke, *Two Treatises of Government* (London: Cambridge University Press, 1967).

tions sought to combine the freedoms of English common law with the hierarchical structure of French feudalism to create a form of government that would protect the rights of the colonists while maintaining stability in the colony.

The common element of in works (both *Two Ttreatises* and *Fundamental Constitutions*) was his concept of property rights.[7] Locke argued that when a person combines their labor with the land or an object, they are entitled to the fruits of that labor. Locke suggested that if an individual took something from nature, transformed it, and used it to create a product, they should be able to claim it as their own. His concept of original appropriation (the transition from common to private ownership of land by the means of individual labor) was essential for the treatment of land on the new territories.[8]

For the American understanding of property rights, Lockean ideas competed with those presented by William Blackstone.[9] Blackstone's four volumes of *Commentaries On The Laws of England* (1765–1769) were the major source of jurisprudence in England and America during the late eighteenth century and early nineteenth century, and are still widely regarded as one of the most influential works of legal scholarship in the common law jurisprudence. It was the first systematic and comprehensive review of English law, and its practical importance was immense.[10]

Blackstone incorporated the concept of natural rights into the English legal system. According to Blackstone, there are three absolute natural rights: life (and personal security), liberty, and property. This triad of fundamental rights can be later traced in the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

Blackstone viewed property as the most significant of these three rights. While Locke tried to balance the institution of private property with other principles, for Blackstone the primacy of private property should have no exemptions. Private property rights must be given priority over any other kind of interest, including public interests. "So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community."[11] In consequence, for Americans, the right to property became the most important, even paradigmatic right, heavily influencing the evolution of the legal system.[12]

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[7] Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 21–22.

[8] James Tully, "Rediscovering America: The *Two Treatises* and Aboriginal Rights" in *Locke's Philosophy: Content and Context*, ed. Graham A. J. Rogers (Oxford: Clarendon Press, 1994).

[9] William Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962).

[10] Michael Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900* (Dordrecht: Springer, 2016) 99–110; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 21–25.

[11] Blackstone, *Commentaries on the Laws of England*, 1: 139.

[12] Albert S. Miles, David L. Dagley, and Christina H. Yau, "Blackstone and His American Legacy," *Australia & New Zealand Journal of Law & Education* 5, no. 2 (2000).

Besides the philosophical and scholarly traditions of Europe, the idea and form of the American Constitution stemmed also from local grounds and experience. Colonies had their charters and governments, and these charters included various forms of property, voting, and taxation rights. In reality, colonists in America were second-class citizens compared to their British counterparts. They were subject to British taxation and British laws, but their civil and political rights were largely denied. Colonists were not allowed to participate in the political process, had no representation in the British Parliament, and their right to a fair trial was very limited. They were second-class citizens, treated as mere subjects by the Crown.

Two distinctive features of colonial political culture had profound consequences for the later developments of rights in America. First, colonies were semi-autonomous and were granted their rights by the Crown. In consequence, individuals were not the only rights-bearers. Rights were also held by colonies, companies, and other organizations.[13]

Second, the status and rights of inhabitants of the colonies differed significantly. Full rights were granted only to free white males. Many colonists signed indenture contracts before migration and their legal status was close to temporary slavery. These indentured servants were treated as property and lacked basic rights. Women, both free and enslaved, were largely excluded from legal and political rights. They had no property rights, could not vote, and were not allowed to hold public office. They were also barred from certain professions and could not participate in the legal system as a plaintiff or a defendant. Blacks, either free or enslaved, were denied all rights and were subject to both legal and extralegal forms of violence and discrimination. Native Americans were treated as outsiders, members of "foreign nations," and thus their rights were not recognized. These categories (free citizens, indented servants, slaves) were preserved in the legal system of the early United States and cast a long shadow over its social and political history. American constitutional history is a history of the emancipation of these groups by giving them access to full legal and civil rights.[14]

AMERICAN CONSTITUTION

The distinct American tradition of constitutional rights arose from three sources: English legal tradition, local political and legal practice, and the ideas of the Enlightenment.[15] These intellectual currents were not harmonious and collided in many aspects. At the time of the American War of Independence, these tensions were not

[13] Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 1st ed. (New York: Liveright Publishing Corporation, a Division of W.W. Norton & Company, 2018), 3–30.

[14] Norton J. Horvitz, "Rights," *Harvard Civil Rights—Civil Liberties Law Review* 23, no. 2 (1988).

[15] Primus, *The American Language of Rights*, 78–126; Waldron, *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, 13–21; Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 123–53.

fully visible nor verbalized. The moment of revelation came with the French Revolution, when three modern traditions of rights became apparent. We can judge and analyze the American constitution and the Bill of Rights from this later vantage point. The discourse of rights ("human rights" or "rights of man") of French philosophers and revolutionaries was tied closely to the ideas of universality, naturality, or inalienability. This discourse was more moral and political than legal and although French revolutionary constitutions declared the protection of many of these rights, these declarations were void, overblown rhetoric.

English tradition was, from the very beginning, much more reserved. The revolution was a great shock to British public opinion. Its protagonists were demonized and events were often framed in terms of a struggle between order and chaos. The phrase "human rights" was an easily recognizable marker of revolutionary discourse, foreign to English tradition and perilous to the social order. The English response to the revolutionary discourse of human rights came in two different forms.

Edmund Burke argued that the concept of human rights was ultimately a dangerous form of idealism. He argued that ideas of human rights were too abstract, vague, and destructive in practice. Burke's concept of rights connected them with historical privileges and liberties, acquired by Englishmen in the historical process, a result of a long struggle between the subjects and the Crown.[16]

In contrast with the French tradition of human rights, Burke insisted that rights were granted in a historical moment, and they embody the collected experience of past generations. Burke insisted that revolutionaries destroyed this chain of tradition and installed a new, abstract system of institutions, ignoring the complexities of society and human nature.

Another form of criticism was put forward by Jeremy Bentham in his *Anarchical Fallacies* (written around 1796).[17] Bentham's criticism of human rights (or more generally, natural rights) was based on utilitarian and early positivist grounds. He argued that the French declarations and constitutions made a promise that is vague, unrealistic and so far-fetched that no government can meet the standards demanded of them. As he famously stated: "Natural rights is simple nonsense: natural and imprescriptible rights (are) rhetorical nonsense—nonsense upon stilts."[18] For Bentham, human rights are an anarchical concept, undermining the existing government and the legal system. Rights are an important legal concept, but they should be treated as an integral part of the positive law. They should be based on the statutes given by the sovereign to protect certain interests of individuals.

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[16] Jeremy Waldron, ed., *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man* (London, New York: Methuen, 1987), 77, 95.

[17] Jeremy Bentham, "Anarchical Fallacies," in *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, ed. Jeremy Waldron (London, New York: Methuen, 1987); Waldron, '*Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, 29–45.

[18] Bentham, "Anarchical Fallacies," 53.

Following Burke's and Bentham's criticism, the English legal system moved away from Blackstone's natural law jurisprudence and rights became a progressively less important concept of British constitutionalism. The American path was different, and their constitutionalism remained defined in the terms of rights. During the American War of Independence, they used the rhetoric of natural rights (incorporating elements from both the French tradition and the English doctrine of ancient rights of Englishmen, predating the powers of the English parliament) to challenge British rule.[19] In stark contrast to Great Britain, Blackstone's *Commentaries* remained influential and cited until this day.[20]

Americans established their stance in opposition to the British by incorporating French arguments but adapting them to their own legal and political experience. The most influential pamphlet on rights in revolutionary America, *The Rights of Man* (1791), authored by Thomas Paine (who took an active part in the revolutionary events in France), took aim at Burke's criticism of human rights.[21] The French idea of ahistorical, universal, God-given rights was used by the Americans as a justification for their refusal of British rule. The appeal to natural rights is a key part of the *Declaration of Independence*, and the need for their protection was the reason for establishing the Union.[22]

As a consequence of that, a third, distinct tradition of constitutional rights emerged. This was not apparent during the constitutional debate, because important features of this tradition would be formed later, in the next century with the establishment of judicial review.[23] With a judicial review, rights cease to be, as Bentham feared, mere political or moral declarations, undermining the social order and becoming one of the central legal institutions. Unlike the French idea of human rights, American constitutional rights lacked the abstract universalism of the former. On the contrary, many of these American rights seem, from a contemporary perspective, too specific (e.g., protection against housing soldiers in civilian homes).

Most of all, though, the American and French Constitutions had fundamentally different aims. While the latter was an instrument of radical transformation

[19] Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 124.

[20] Miles, Dagley, and Yau, "Blackstone and His American Legacy"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 24–25.

[21] Thomas Paine, *The Rights of Man* (London: Penguin Books, 1984); Craig Nelson, *Thomas Paine: Enlightenment, Revolution, and the Birth of Modern Nations* (New York: Viking, 2006).

[22] "We hold these truths to be self-evident, 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. 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." See also Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 130–36.

[23] On the earlier history of this institution, see Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 136–39.

of French society, the former was intended to promote internal peace and security. The same can be said of constitutional rights. The French rights were a revolutionary act, designed to dismantle the pre-existing social and political structures of the ancien régime. Conversely, American rights were intended to protect and preserve freedoms that were threatened by the British and could be endangered by the federal government in the future.

It is worth noting that the main text of the Constitution does not declare any rights and liberties. It is primarily a document regulating the form, scope, and goals of the government, based on the ideas of agrarian republicanism rather than a liberal concept of strong individualism.[24] This lack of rights in the main text of the constitution is even more evident when we compare it to other early constitutions: the French constitutions of 1791 and 1793, or to the Declaration of Independence (1776).

The original framers of the Constitution did not believe it was necessary to include a Bill of Rights in the text, because rights were already protected by the state constitutions. They believed that the powers granted to the federal government by the Constitution were sufficiently limited to prevent it from infringing on individual rights.[25] Contrary to this, anti-federalists claimed that a bill of rights should be an essential part of the constitution to protect citizens from the possibility of any abuse of power by the federal government or prevent the slippery slope of government encroachment on individual freedoms.

The public continued to demand a Bill of Rights during the ratification debate in the states, in many situations making ratification conditional on the assurance of a Bill of Rights. This demand came from a variety of sources, including state and local governments, popular newspapers, and political leaders. This demand was such a loud one that James Madison eventually proposed the Bill of Rights as an amendment to the Constitution. This was done to appease the public and ensure that the Constitution was ratified.

The main source of influence for the Bill of Rights was the Virginia Bill of Rights drafted by George Mason and adopted by the state of Virginia in 1776. This influential document also provided the model and the language for the other state constitutions and bills of rights that were adopted in the late eighteenth century.

The Bill of Rights is written in the form of ten amendments to the US Constitution. It explicitly guarantees the following rights:

1. freedom of religion, speech, press, assembly, and petition;
2. right to bear arms;
3. freedom from the quartering of soldiers;

[24] Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*; Kramnick, "Republican Revisionism Revisited"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 41–48.

[25] Glendon, "Rights in Twentieth-Century Constitutions," 525.

4. freedom from unreasonable search and seizure;
5. right to due process;
6. right to a speedy and public trial;
7. right to trial by jury;
8. freedom from cruel and unusual punishment.

The Ninth Amendment of the United States Constitution states that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The clause was intended to protect citizens from having their state-guaranteed rights taken away by the federal government.

As evidenced by this list, the selection of rights is highly unusual. Some rights found here are unique among constitutions, for example, the right to bear arms, freedom from unreasonable searches and seizures, or freedom from cruel and unusual punishments. On the other hand, many rights considered a standard for modern constitutionalism are not mentioned here, for example, the right to privacy. Many rights were introduced by later amendments. However, the concept of social and economic rights never became widely accepted in the United States, and these rights were not incorporated into the Constitution, in stark contrast to other modern constitutions.[26] In 1944, President Franklin D. Roosevelt put forward a proposal for the Second Bill of Rights. He intended to add a series of economic rights to the existing Bill of Rights, such as the right to a job, the right to education, the right to social security, and the right to health care. The Second Bill of Rights was never enacted, leaving it an unsuccessful project.

States were considered the primal political communities, while the Union was supposed to be secondary, derivative, and limited in its scope. This understanding was reflected in the Tenth Amendment, which states that "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." In consequence, the federal government was considered rather a threat to individual rights, as opposed to the states, which were their protectors. In 1794, state power was further strengthened by the Eleventh Amendment, which granted states sovereign immunity.

The further evolution of the American system led to a reinterpretation of the Ninth Amendment (often referred to as the "unenumerated rights" amendment).[27] On its basis, the Supreme Court has inferred many new constitutional rights, beyond those explicitly listed in the Constitution, most notably, the right to vote, the right to privacy, the right to marry, or the right to travel. The right to vote was not specifically addressed in the Constitution of the United States. It was only after the Civil War that the Fifteenth Amendment to the Constitution was ratified, which

[26] Glendon, "Rights in Twentieth-Century Constitutions," 1992.

[27] Ronald Dworkin, "Unenumerated Rights. Whether and How Roe Should Be Overruled," *The University of Chicago Law Review* 59, no. 1 (1992).

granted voting rights to African-American men. In 1920, the Nineteenth Amendment expanded the voting rights to women.

One of the most significant advancements in the realm of constitutional rights during the era of the Civil War was the implementation of the Thirteenth and Fourteenth Amendments. These amendments drastically altered the legal landscape of the United States by abolishing slavery and ensuring equal protection of the law to all citizens, respectively. Exceptionally influential was the equal protection clause, a legal basis for numerous rights-related Supreme Court decisions.

At the end of the eighteenth century, the American concept of rights did not differ much from the European legal traditions. Rights granted by the federal constitution were more political declarations than effective instruments. This changed at the beginning of the nineteenth century, with the invention of judicial review.

NINETEENTH-CENTURY DEVELOPMENTS

The institution of judicial review was not invented in the United States; rather, it was derived from the English common law system. However, within the legal and political context of the newly born United States, it was refined and enhanced, becoming the cornerstone of the American system of constitutional government. This led to the creation of an exceptional American tradition of rights.

The institution of judicial review was created as the result of the *Marbury v. Medison* case. *Marbury v. Madison* was a landmark Supreme Court decision from the year 1803.[28] The legal dispute was initiated by William Marbury, who had been appointed by President John Adams as a Justice of the Peace in the District of Columbia. Marbury demanded that Secretary of State James Madison deliver to him his official commission. Madison refused and Marbury brought a lawsuit against him in the Supreme Court.

The case reached the Supreme Court, where Chief Justice John Marshall delivered the opinion of the court. In this opinion, he declared that Madison's refusal to deliver Marbury's commission was unconstitutional and that the Court had the power to declare executive actions unconstitutional. This was the first time that a court had asserted the power of judicial review—the power to declare a law unconstitutional. This decision established a precedent that has been affirmed throughout the history of the United States: the Supreme Court is the ultimate arbiter of the Constitution and is the highest authority for interpreting the law.

This power became essential for protecting the rights of citizens, and it has been used to strike down laws that violate the rights of individuals. It must be emphasized that with *Marbury v. Madison* case, the American judiciary became a power-

[28] *William Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. 137 (1803).

ful mechanism which turned constitutional rights into effective instruments in the hands of individuals, states, and organizations.

For the first half of the nineteenth century, judicial review was applied not for the protection of individual rights, but for the resolution of disputes between different branches of government. This was known as the "judicial control of administrative action," and it was seen as a way to ensure that government officials acted within the scope of their authority. This type of judicial review was used to ensure that the executive and legislative branches carried out their responsibilities in accordance with the Constitution and laws of the United States. This type of judicial review was not used to protect the rights of individuals, but to ensure that the government acted within the scope of its authority.

The Abolitionist Movement was primarily concerned with the status of African-Americans and the institution of slavery, and sought to achieve its goals through the use of both legislative and political means. The language of rights and the judicial machinery aimed at protecting them were primarily utilized by defenders of slavery. The argument for the protection of property rights was used to counter the call for the abolition of slavery. Slavery was seen as a form of property, and thus slaveowners argued that they had a right to own slaves and that their property rights should be respected.

The debate about the states' rights, conducted for most of the nineteenth century and centering on the interpretation of the Tenth Amendment, was mainly driven by the Southern states, which wanted to preserve the right to keep slaves. In 1857, the Supreme Court ruled in the Dred Scott decision that slaves were not citizens and that Congress could not prohibit slavery in the states. This decision sparked a public outcry and led to the Civil War. In the *Plessy v. Ferguson* case of 1896, the Supreme Court relied on the language of rights to uphold the practice of racial segregation. The Court held that the "separate but equal" doctrine did not violate the Equal Protection Clause of the Fourteenth Amendment because the law did not deny anyone their rights.

In conclusion, contrary to popular belief, rights in the nineteenth century did not have an emancipatory effect on American society but were seen more as a way to maintain the status quo.[29] It was not until the women's and labor movements in the second part of the 19th century that rights (e.g., right to vote, to own a property, to access higher education for women) became a vehicle of change and emancipation. The emergence of civil rights as a central and incentive legal concept in the public sphere occurred during the twentieth century, and the most graphic example of this change is the civil rights movement of the 1960s and 1970s.

[29] Primus, *The American Language of Rights*, 174–75; Horvitz, "Rights."

HOHFELDIAN ANALYSIS

Until the early twentieth century, the conceptual aspect of legal rights remained underdeveloped. This contrasted with the European continental jurisprudence, which had a long tradition of detailed analysis of legal concepts. Compared to the thorough works of Ihering or Windscheid, American scholarly works remained superficial, unsystematic, and casuist. However, this changed with the publication of Wesley Newcomb Hohfeld's seminal work, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, which provided a systematic framework for understanding legal rights.[30] By providing a systematic framework for understanding legal rights, Hohfeld's work revolutionized the field of jurisprudence and has been cited by courts and legal scholars ever since.[31]

Hohfeld's work was based on the juxtaposition of jural opposites and jural correlatives, which were conceptualized as pairs of mutually exclusive concepts that together comprise our understanding of rights. He argued that legal rights could be broken down into four such pairs:

Right (Claim-right)	Privilege (Liberty)[32]	Power	Immunity
Duty	No-Right	Liability	Disability

1. Right (Claim-right, or right in a strict sense) is a legally enforceable claim that one has to realize some benefit or be free from some burden.
2. Duty (a negative correlative of a claim-right) is a legally enforceable obligation to do or refrain from doing something.
3. Privilege/Liberty is a lack of a duty to abstain from the action.
4. No-right (a negative correlative of liberty) is the absence of a legal right and means that the person has no right to infringe on the sphere of someone else's liberty.
5. Power is a legally enforceable right to impose some burden or confer some benefit on another, or to change somebody's legal relations.
6. Liability (a negative correlative of power) is a legally enforceable obligation to suffer some burden or to forego some benefit.
7. Immunity is a legally enforceable right to be free from somebody's else power.

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[30] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale: Yale University Press, 1920).

[31] Primus, *The American Language of Rights*, 34–38.

[32] Hohfeld used the term "privilege," but modern scholars prefer replacing it with "liberty." Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*; Heidi M. Hurd and Michael S. Moore, "The Hohfeldian Analysis of Rights," *The American Journal of Jurispru*dence 63, no. 2 (2018).

8. Disability (a negative correlative of immunity) means that the other actor has no power in the sphere of immunity.

According to Hohfeldian analysis, legal rights can be either active or passive. Active rights give the holder of the right the power to do something, while passive rights give the holder the right to not do something or the right to be free from interference. Additionally, there are mere correlates of rights, such as duties correlating to the right of another person to do something, or a liability correlating to the right to receive compensation for damages. Hohfeld argued that rights and privileges should always be allocated to an individual person, while duties and obligations need to be fulfilled by an individual person towards another person.

The Hohfeldian analysis of rights does not rely on rigid, formal definitions, but instead is more focused on the use of language in everyday life. His analytical approach focused on the relations between these concepts, which he argued let us better understand the complexities of the legal order. Hohfeldian analysis of rights became the dominant framework for American legal scholars. As American culture and scholarship have gained increasing global significance, it has also become known in other countries, even those from the circle of continental legal cultures.

TWENTIETH CENTURY

The twentieth century marked a new era in the history of constitutional rights.[33] Their character shifted from a conservative to a more progressive stance, and judicial review became a widely used mechanism for the protection of these rights. It was also a period of increased judicial activism and the establishment of more expansive interpretations of the Constitution, as well as a time of intensive civil rights legislation and the emergence of international human rights law.

The scope of rights extended to encompass new groups: women, people of color, LGBTQ. This expansion was the result of a variety of factors, including court rulings, legislation, and social movements (e.g., the civil rights movement of the 1950s and 1960s).[34] The scale of changes that took place will become clear if we look at two landmark cases that opened the twentieth century: *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905).[35] In the case of *Plessy v. Ferguson*, the Supreme Court established the constitutionality of racial segregation laws, deciding that "separate but equal" facilities would be allowed, and not violate the Fourteenth Amendment rights. The decision set a precedent for the Jim Crow laws, state and local laws that

[33] Primus, *The American Language of Rights*, 180–82; Sandel, "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues."

[34] Gwendolyn M. Leachman, "From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda," *University of California, Davis Law Review 1668* 47 (2014).

[35] *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905).

enforced racial segregation in the United States, and which would remain in effect until the 1950s and 1960s. *Plessy v. Ferguson* would be overturned in 1954 by the Supreme Court's decision in *Brown v. Board of Education*.

In the *Lochner v. New York* case, the Supreme Court held that a New York labor law limiting the hours that bakery employees could work violated the freedom of contract, which was protected by the Fourteenth Amendment. The decision set a precedent that decreased the power of the government to regulate the economy, creating an era of laissez-faire economics, in which the interests of business owners and employers were favored over those of workers and consumers.[36] Many laws regulating working conditions, such as minimum wages and maximum hours, were struck down, as were laws prohibiting child labor and establishing safety standards in the workplace.

The New Deal policies of the 1930s marked a major shift in the legal framework around rights in the US. The policies sought to strengthen economic security and promote economic growth by introducing a range of social programs to help those in need. These programs included the Social Security Act (1937), which provided a pension system for retirees, and the National Labor Relations Act (1935), which gave workers the right to bargain collectively.

The Lochner era ended with the *West Coast Hotel Co. v. Parrish* case (1937), in which the US Supreme Court upheld the constitutionality of Washington state's minimum wage law for women.[37] The Court held that the Washington minimum wage law was a valid exercise of the state's police power to protect the health, safety, and welfare of its citizens and was a legitimate use of the state's power to protect the public. The Court also held that the law was not an arbitrary interference with freedom of contract, as the Court viewed the law as a reasonable regulation of an essential aspect of the state's labor market. This decision marked the end of an era in which the court had consistently sided with businesses and employers over the rights of workers and employees, opening the door for future protection of labor rights.[38]

An important step forward in the history of civil rights was the *United States v. Carolene Product Co.* case (1938).[39] The case established that it was a legitimate exercise of Congress' power to regulate interstate commerce and to protect public health, and that economic regulations were presumptively constitutional. The ruling is of great importance, not only for its contribution to the future development of consumer rights in the 1960s but also for the most famous footnote in American constitutional law.[40] Footnote four recognizes that legislation aimed at "discrete and

[36] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 160–230.

[37] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[38] Glendon, "Rights in Twentieth-Century Constitutions"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 26–32.

[39] *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

[40] Horvitz, "Rights," 396.

insular minorities" can be an exception to the usual presumption of constitutionality and can be subject to a higher standard of judicial review. This statement had a profound influence on the future development of civil rights, the interpretation of the Equal Protection Clause, and judicial review in general, marking a shift from a legal emphasis on property rights to other individual rights.

The most important period of change in the civil rights development was the Warren Court Era (1953–1969). During this period, the Supreme Court issued several landmark rulings that significantly advanced the cause of civil rights. The American court rulings are often described as either conservative or progressive. The Warren Court is widely recognized as the most progressive Supreme Court in American history. Subsequent chief justices tended to be increasingly conservative, resulting in the reversal of some of the decisions of the Warren Court.[41]

The rulings of the Warren Court had such a deep impact on the legal system that it can be accurately referred to as a constitutional revolution. It is widely regarded as a landmark of judicial activism, representing a shift of power from the legislative branch to the judiciary. The Supreme Court took a more active role in deciding the outcomes of political battles, and increasingly served as a venue for the resolution of important political issues. It can be said that the contemporary concept of rights and the role they play in the American public sphere were defined in the Warren Court era.

The Warren Court was particularly interested in issues related to racial segregation, voting, criminal procedure and justice, free speech, and privacy. In a series of decisions, the Warren Court ended the "separate but equal" doctrine and addressed the problem of racial inequality in America.

The Supreme Court heard several cases that challenged the legality of racial segregation, and these cases had a lasting impact on civil rights in the US. The most significant case was *Brown v. Board of Education* (1954), challenging racial segregation in public schools. This decision overturned the "separate but equal" doctrine of *Plessy v. Ferguson*, and effectively ended legal school segregation.[42] In *Heart of Atlanta Motel v. United States* (1964), the freedom from racial discrimination was expanded to all public accommodation.[43] Finally, in *Loving v. Virginia* (1967), the Supreme Court declared that laws prohibiting interracial marriage were unconstitutional.[44] The Warren Court also issued decisions that limited the power of the police to conduct searches and seizures and that protected free speech and the right to due process of law.

The Supreme Court's actions were in accordance with the Civil Rights Movement and the Civil Rights Act of 1964. The federal statute, proposed by President

[41] David Luban, "The Warren Court and the Concept of a Right," *Harvard Civil Rights—Civil Liberties Law Review* 34 (1999).

[42] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[43] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[44] *Loving v. Virginia*, 388 U.S. 1 (1967).

John F. Kennedy and pushed forward by President Lyndon B. Johnson, prohibited discrimination on the basis of race, color, religion, sex, or national origin. The Act barred unequal application of voter registration requirements, as well as racial segregation in schools, employment, and public accommodations. Additionally, the Civil Rights Act provided the legal framework for the federal enforcement of the constitutional right to vote, as well as the enforcement of desegregation in public places and public institutions.

During this period the term "politics of rights" was coined, and the civil rights movement became highly professionalized (or, as some activists say, "highjacked by the lawyers").[45] Besides traditional forms of social and political action, they used strategic litigation, a chiefly legal strategy, in which a meticulously chosen lawsuit was used as a means of achieving social or political change, by setting a precedent or raising public awareness of the issue of civil rights. The politics of rights has since become a major part of American political discourse, adopted by both liberal and conservative activists.[46]

The second most significant decision of this period was decided by the Burger Court (1969–1986), but it was prepared by the previous decisions in the Warren Court era. *Roe v. Wade* (1973) did not stem from a direct interpretation of any of the amendments to the Constitution but was a result of a precedent set in the *Griswold v. Connecticut* (1965) case, whereby a right to privacy was established.[47] In this case, the Supreme Court struck down a Connecticut law that prohibited the use of contraceptives, even by married couples. The Court ruled that the law violated the constitutionally protected right to privacy, which was implied by the First, Third, Fourth, and Fifth Amendments of the Constitution. the court used the famous "penumbra" metaphor, stating that "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." The penumbra metaphor, in addition to the concept of unenumerated rights, resulted in a considerable expansion of the discourse of rights in the legal and political sphere.[48] The language of rights has become the most important moral and political language in the United States.

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[45] Sandra R. Levitsky, "To Lead with Law. Reassessing the Influence of Legal Advocacy Organizations in Social Movements." in *Cause Lawyers and Social Movement*, eds. Austin Sarat and Stuart A. Scheingold (Stanford: Stanford University Press, 2006).

[46] Stuart A. Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change* (Ann Arbor: The University of Michigan Press, 2004); Thomas Hilbink, "The Right's Revolution?: Conservatism and the Meaning of Rights in Modern America," *Studies in Law, Politics and Society* 48 (2009); John P. Heinz, Anthony Paik, and Ann Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance," *Law & Society Review* 37, no. 1 (2003); Leachman, "From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda."

[47] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[48] Luban, "The Warren Court and the Concept of a Right."

The *Roe v. Wade* decision (1973), which established a constitutional right to abortion in the United States, was a direct result of the *Griswold v. Connecticut* case. This right to privacy, established in this case was extended in *Roe v. Wade* to include a woman's right to choose to have an abortion. The Court ruled that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The standard narrative taught for decades in American legal schools was that those two legal cases (*Roe v. Wade*, *Brown v. Board of Education*) were the cornerstone of the contemporary American constitutional order. They both represented major changes in the way the law was interpreted and how the courts approached constitutional issues. However, this account has been challenged, as detailed and more systematic studies showed that their direct impact was less important, and they were only part of a wider shift in the legal and political landscape.[49]

Over the next few decades, the development of rights was further advanced, although Supreme Court rulings became increasingly conservative.[50] Rights discourse was no longer just a tool of liberal politics, as conservative groups also began to employ it to assert their claims in the public sphere.[51] Conservatives sought to protect such rights as the right to own firearms, the right to bear arms, freedom of speech, and religious freedoms. The anti-abortion movement developed, opposing the *Roe v. Wade* decision. The movement was successful in passing several state and federal laws restricting access to abortion, including the Partial-Birth Abortion Ban Act of 2003 and the Unborn Victims of Violence Act of 2004. In 2022, the Supreme Court overturned *Roe v. Wade* and upheld a series of state laws that severely restricted the right to abortion. As a consequence of the *Dobbs v. Jackson Women's Health Organization* decision, the right of privacy established in *Griswold v. Connecticut* case was opened to further scrutiny.[52]

American society has become highly polarized and rights became the main instrument of political struggle. The culture wars of the late twentieth and early twenty-first centuries have been largely characterized by the use of rights language. This can be seen in the debates over issues such as abortion, same-sex marriage, and the role of religion in public life, all of which featured a variety of actors using rights language to support their respective positions.[53] In those political struggles,

[49] Gerald N. Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1991); Gerald N. Rosenberg, "Much Ado About Nothing? The Emptiness of Rights' Claims in the Twenty-First Century United States," *Studies in Law, Politics and Society* 48, no. 1 (2009); Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, XIX.

[50] Luban, "The Warren Court and the Concept of a Right," 8.

[51] Hilbink, "The Right's Revolution?: Conservatism and the Meaning of Rights in Modern America"; Heinz, Paik, and Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance."

[52] *Dobbs v. Jackson Women's Health Organization*, 19-1392, 597 U.S. (2022).

[53] Heinz, Paik, Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance."

rights have been used to both validate and delegitimize a range of social and political views.

One can observe that the rights struggles were hard to resolve because rights are antagonistic. The claims of one group clash with counterclaims from another group.[54] The abortion debate is a clear example of how rights can be used to justify opposing positions.

On the theoretical level, this can be observed in Ronald Dworkin's influential theory of rights, which rose to prominence in the 1970s.[55] In his theory, rights are trumps: they are stronger than any other arguments, especially arguments from interests, utilitarian reasons or collective goods. However, the problem that arises here is how to resolve disputes between two parties when they have different rights. In consequence, making rights the central concept of the public sphere fuels disputes and leads to greater polarization. Furthermore, the focus on rights has generated a situation where there is less emphasis on other aspects of the public sphere, such as public interest. This has had a detrimental effect on the public sphere, as it can lead to a situation where there is little room for nuanced debate and dialog.[56] The contrast between American theories of rights and the theory of Robert Alexy, a prominent figure in European constitutionalism, is especially evident. In Alexy's theory, rights are not trumps, but *prima facie* arguments that are balanced with other legal principles and interests.[57]

Another noteworthy development in the American legal system has been the growing importance of the rights of corporations as civil rights.[58] In the United States, the concept of group rights was regarded with great disdain and mistrust, with the exception of the rights of corporations. This reluctance to recognize group rights was partially rooted in the nation's history of individualism, which has largely shaped the nation's legal framework. In the last decades of the twentieth century, American corporations became treated as citizens, to a degree unprecedented in any other legal system.[59] In the case *Santa Clara County v. Southern Pacific Railroad Company* (1886), the Supreme Court established the "personhood" of corporations, granting them all the rights and protections of individuals under the Fourteenth Amendment.[60] As the consequence, the equal protection clause (including protection against discrimination or unequal treatment) started to be applied to corporations. This ruling has been used to argue for a wide range of rights for corpora-

[54] Glendon, "Rights in Twentieth-Century Constitutions," x.

[55] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); Primus, *The American Language of Rights*, 11–24.

[56] Glendon, *Rights Talk: The Impoverishment of Political Discourse*.

[57] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010).

[58] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*.

[59] Horvitz, "Rights," 398–400; Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*.

[60] *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

tions, including the right to free speech and the right to freedom of religion. The most recent example is the 2010 *Citizens United v. FEC* case, in which the Supreme Court ruled that the First Amendment prohibited the government from restricting political expenditures by corporations and unions.[61] The Court reasoned that political spending is equivalent to speech, and therefore should receive the same level of protection.[62]

CONCLUSIONS

This article explored the development and role of rights in the American legal system. Rights are not only an important legal concept but are also fundamental to the whole American public sphere. Several features make the American tradition of rights distinct. In the period following the American Revolution, the institutional mechanism making rights operative legal institutions, and not merely moral or political statements, was developed. Judicial review has allowed individuals to effectively raise claims based on their constitutional rights. The American legal and political system has increasingly revolved around the conflicting rights of individuals. This institutional framework of rights has had a significant impact on other liberal democracies.

In consequence, in the United States, legal discourse centers on constitutional rights, whereas human rights do not possess the same legal significance as in other countries. Human rights are mainly discussed in academic circles, rather than in courts.[63]

The other distinct feature of the American legal system is that constitutional rights are viewed as a mechanism for limiting government power. This is in contrast to Europe, where constitutional rights are seen as principles or program norms that governments must protect and uphold to the highest degree. Furthermore, conflicts between individuals, including natural persons and corporations, are rarely viewed as a rights-based constitutional issue.[64]

The history of American rights is complex and composed of numerous conflicting themes. For a long period, the concept of rights as a means of emancipation has been dominant. However, in recent decades, the tension between the various demands of different interest groups has become increasingly visible. The challenges and debates that have occurred in the past continue to shape the current legal and social landscape of the United States.

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[61] *Citizens United, Appellant v. Federal Election Commission*, 558 U.S. 310 (2010).

[62] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 324–76.

[63] Glendon, "Rights in Twentieth-Century Constitutions."

[64] Glendon, "Rights in Twentieth-Century Constitutions," 525–26. There is no institution similar to the *Drittwirkung* of rights found in most of the European legal systems. Bartosz Skwara, "W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka," *Przegląd Sejmowy* 1 (2017).

Summary: This article explores how rights have shaped America's legal system and political culture, from colonial times to today. It begins with a look at how rights first emerged in colonial America and then examines the American Constitution as a key legal document. Then the nineteenth-century development of rights discourse is discussed, including the emergence of judicial review. Moving to the twentieth century, it describes the analytical framework of Wesley N. Hohfeld, and how the politics of rights have evolved in the second half of the century. Finally, it reflects on the role of rights in today's American public sphere.

Keywords: rights, culture, history of law, law and politics

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