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The Dual Lives of Rights: The Rhetoric and Practice of Rights in America

J. Harvie Wilkinson III†

INTRODUCTION

The nature of rights—whether moral, legal, natural, or otherwise—has a way of leaving everyone confused. On one thing, however, people seem to agree: rights have a unitary nature. If a right is an ideal, a statement of what ought to be, then the way in which it is actually implemented is irrelevant to its definition. If, on the other hand, a right is understood in more positivist terms as “nothing but a prediction” of how certain institutions will react if a particular person acts in a particular way,1 then the manner in which we talk about a right is only relevant to the extent that our words correlate with our deeds.

The reason there is so much confusion over rights is because everyone seems to misunderstand their fundamental composition. Just as human beings have two essential aspects, a physical body and an incorporeal soul, rights exist in two dimensions simultaneously, not one. The way we talk about a right and the way we put it into actual practice are flip sides of the same coin. It is these twin elements of rhetoric and practice that define a right, and neither one is ancillary to or derivative of the other.

† Circuit Judge, United States Court of Appeals for the Fourth Circuit.
1. See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 458 (1897).
Rights lead dual lives, much like Dr. Jekyll and Mr. Hyde. Perhaps the Jekyll is the right's luminous place in our rhetoric and the Hyde is the right as it exists on the streets. But unlike in the Robert Louis Stevenson novel, the two lives in this case are not only necessary, but salutary. In fact, we should applaud the right's schizophrenic character.

When it comes to rights, our rhetoric and our practices tug in opposing directions, the former toward absolute and infinite formulations and the latter toward qualification and compromise. In speech, we treat rights as absolutes, rocks of Gibraltar on which our laws and our freedoms are founded. But it is neither easy, nor even desirable, to translate the language of rights word-for-word into practice. Upholding and enforcing rights is a complicated matter that calls for sober judgment and attention to context. Although our words often suggest otherwise, we recognize that rights are, and of necessity must be, qualified.

Today, our understanding of rights is facing every military commander's greatest fear: a two-front war. On one side, a coalition of communitarians, pragmatists, and deconstructionists demands that our rhetoric be tamed so as to reflect our practices. Communitarians argue that our "rights talk" promotes an anti-cooperative spirit inconsistent with the pursuit of the common good. In this view, rights rhetoric leads toward self-obsession and away from social responsibility. Pragmatists argue that the lofty rhetoric of rights distorts rational social planning. Hyped rhetoric makes a clear calculus of social costs and benefits well-nigh impossible. Deconstructionists claim that our rhetorical attachment to absolute rights erects a façade of nonsensical legalisms to conceal the political power struggle lying behind every important social decision. The members of this coalition are united in their judgment that our rights rhetoric is overblown, and perniciously so. "For, in its simple American form, the language of rights is the language of no compromise," writes Professor Mary Ann Glendon. "The winner takes all and the loser has to get out of town." It is an impossible basis on which to sustain a healthy society.

A similarly wide range of critics attacks from the opposite direction. For them, the problem when it comes to individual rights is not that we say too much, but that we do too little. First Amendment absolutists see their rights violated in, for example, the use of the phrase "under God" as part of the Pledge of Allegiance. Sixth Amendment absolutists claim that any procedural defect in a person's conviction must lead to a new trial—even if the defect had no impact on the outcome of the case. Fifth Amendment absolutists claim that

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2. See Jack N. Rakove & Elizabeth Beaumont, Rights Talk in the Past Tense, 52 STAN. L. REV. 1865, 1865 (2000) (reviewing Richard A. Primus, The American Language of Rights (1999)) ("Rights have been a staple of Anglo-American law and politics since at least the seventeenth century.").

virtually any zoning restriction violates that amendment. And so on. These critics complain that the difficulty lies not in our rhetoric but in our failure to live up to it. As the American Civil Liberties Union ("ACLU") once put it, requiring high school students in after-school programs to submit to random drug testing would teach them that "the Constitution is a mere platitude, that no rights are inalienable, and that liberty is available only at the whim of state authorities."4

Both sentiments—that our rights in rhetoric are too absolute and that our rights in practice are too compromised—reveal a fundamental misunderstanding of what our rights are and how they function. Although the two camps differ over whether the solution is to tamp down the rhetoric or ramp up the practice of rights, they agree that rhetoric and practice must be forced into alignment. Absent a match, they argue that America is guilty of faithlessness, hypocrisy, and deception.

Both sides are wrong, and for the same reason. The rhetoric and the implementation of a right are independent aspects of the right itself. Neither rules the other. When it comes to rights, our words and our deeds serve different ends, both of which help maintain a vigorous body politic, and each of which reinforces the other. Because of the way rights function, it is necessary both to celebrate them in absolute terms and to practice them in qualified terms. The "hypocrisy" of strong talk and moderated implementation of rights is not really hypocrisy at all. It is how a system of individual rights should and must work.

The absolute language of rights helps protect rights from being obliterated by competing concerns. Rights rhetoric fosters a love of liberty that makes a system of individual rights effective. It promotes the recognition of the corresponding rights of others and of new areas of our common life that ought to be made more free. Above all, it helps to lift our national spirits, pointing out our highest aspirations and supplying the glue that bonds us as a people.

But absolute rhetoric aims to describe our actual practices in only the loosest sense. The way in which we put rights into practice entails making sensible adjustments to the lofty goals sketched out in speech. For one thing, rights often come into conflict with other rights. In such situations, absolutism is impossible. More fundamentally, rights impose obligations on others, and in many cases, those obligations are more than society can absorb. Competing social needs and goals, not to mention limitations of time and money, necessitate various qualifications on rights that we think of as absolute. The implementation of individual rights should not take its cues from rhetoric alone, without any concern for the dictates of prudence.

So why not applaud the dual lives of rights and hold them dear for what they are? The suggestion that we must dull our language to match the prudence of our actions, or that we must expect a realization of our ideals in actual

practice, is perilous. Such thinking reflects a kind of simplicity that is at least as harmful as the supposed vices of our bifurcated approach to rights themselves. The world into which both the critics of rights rhetoric and rights practice would deliver us is a far grimmer place, and what is more, it is a fantasy. Our rhetoric and our practices never will or should be brought into alignment.

Duality is nothing new in our law. Consider our understanding of the concept of sovereignty, which might be thought of as the equivalent of rights when held by governments, rather than by private citizens. The Framers were heavily influenced by the writings of Montesquieu, but on at least one issue, the meaning of sovereignty, they sought to improve on the work of their teacher. For where Montesquieu had seen sovereignty as a unitary, indivisible concept, James Madison and Alexander Hamilton imagined a more complex approach. They established a system of “dual sovereignty,” in which certain enumerated aspects of sovereign power were granted to the national government and the unenumerated residuum was granted to the various states composing the union. In order to accommodate the need to preserve the autonomy of states, the founders “split the atom” of sovereignty, and thereby unleashed a great force for the preservation of liberty and the enrichment of the nation. Rights embody a similar dualism that provides similar benefits. We do not damage rights by splitting them. As with sovereignty, practical exigencies have led us to different conceptions of rights in different contexts, resulting in an infinitely richer framework of laws.

I respect the fact that critics endlessly decry the gaps between rights rhetoric and practice. That is as it should be. The gap between rhetoric and practice is not always and everywhere a good thing. As a historical matter, far too many groups in our society have had little opportunity to participate in the American dream. The discrepancies between our talk of liberty and our mistreatment of minority groups merit all of the scorn we can direct toward them. But the danger is that the gross injustices and stark inequalities in centuries past will congeal into a perception that the gap between rhetoric and practice is an invariably indefensible state. In fact, it is a defensible state that

5. See Laurence Claus, Montesquieu's Mistakes and the True Meaning of Separation, 25 OXFORD J. LEGAL STUD. 419, 426 (2005) (“Montesquieu did not question the prevailing orthodoxy that ultimate sovereign power could not be divided without risking chaos.”).

6. See THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”); id., No. 26, at 168 (Alexander Hamilton) (“State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government” may serve not only as the “VOICE, but, if necessary, the ARM of their discontent.”); see generally Michael W. McConnell, Federalism: Evaluating the Founders’ Design, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, THE FOUNDERS’ DESIGN (1987) (discussing arguments supporting retention of state sovereignty)).

works to the benefit not only of the practical functioning of society but, most importantly, to the rights themselves. The fact that there was a historic gap of yawning proportions between declaration and actuality cannot become a permanent means of disabling the American psyche. We should not for one moment entertain the thought that in every context the gap can or should be closed, or that our failure to do so renders us a less worthy nation.

It is time that we embrace a complete understanding of rights, one that recognizes their duality in all its richness and complexity. To surrender our reverence for rights in the face of the limitations that circumstances may impose on them is to sacrifice too much. Likewise, to administer laws in a fashion identical to the way we talk about rights is an untenable goal that ultimately threatens the very principles that our rights are thought to embody and advance. The disconnect between the way we talk about rights and the way we implement them is no longer a peculiarity or idiosyncrasy in the life of our nation, much less an anachronism or a defect. It is a large part of the genius of this country. We should therefore try to understand in the clearest possible terms why the gap between speech and practice has been and will continue to be an example of our nation’s most admirable qualities.

This Article proceeds in two parts. Part I will examine the rhetoric of rights and the practice of rights in America. It will show how the vigorous and uncompromising language of rights in political speech and constitutional prescription, from the founding to the present, helps to shape our most important legal institutions. It will then examine the myriad ways in which rights are often limited when they are actually put into operation. Part II will defend the gap between rhetoric and practice against critics of many persuasions. So long as rights lead dual lives, the health of our polity will endure.

I

THE GAP BETWEEN RHETORIC AND PRACTICE

A. Absolute Rhetoric

Americans often speak as though rights are (or ought to be) “absolute”—in other words, unqualified, unrestricted, and without exception. Rather than acknowledging any pragmatic limitations to rights, American rhetoric celebrates them with idealistic language and broad, sweeping promises.

Indeed, Americans’ “penchant for absolute formulations” is pervasive. Absolutist rhetoric abounds in a wide variety of sources, including the founding documents, political speeches, legislative reports, judicial opinions, legal scholarship, and even the everyday conversations of activists and citizens.

So pervasive is the absolutist rhetoric of rights that scholars accept its existence as a given. In fact, the proposition is so firmly entrenched in the

8. See GLENDON, supra note 3, at xi.
conventional wisdom that commentators usually describe rights rhetoric as absolute only in passing, with the claim requiring little explication or support. What is more, scholars do not dispute the extensive reach of absolutist rhetoric, generally agreeing that Americans use absolute language when speaking about a great variety of rights, including First Amendment, equal protection, and due process rights, to name just a few.

Roughly speaking, American rights rhetoric contains two separate but related claims of absolutism: (1) that rights, however broadly defined in scope, may never be infringed, under any circumstances or for any reason; and (2) that violations of rights must be remedied to the fullest extent possible in every case.

I. Rights in Rhetoric

The expression of rights in absolute terms is part of a rich and welcome American tradition. The Bill of Rights, for example, describes numerous rights in absolute and unconditional language. The Eighth Amendment prohibits all "cruel and unusual punishments." The Sixth Amendment guarantees "the right to a speedy and public trial, by an impartial jury," the right to confront witnesses, and the assistance of counsel "[i]n all criminal prosecutions." And the First Amendment unequivocally states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." In fact, the few rights in the Bill of Rights that do admit of nuance—such as the Fourth Amendment’s protection only against “unreasonable” searches and seizures and the Eighth Amendment’s prohibition only of “excessive” bail and fines—seem exceptional in contrast to other unwavering pledges of absolute rights. Instead of


10. See supra note 9.

11. U.S. CONST. amend. VIII.

12. Id. amend. VI (emphasis added).

13. Id. amend. I (emphasis added).

14. Id. amend. IV.

15. Id. amend. VIII.
treat the absoluteness of rights merely as an unattainable aspiration, American rhetoric conveys a genuine hope that "all the guaranties [of] those [Founding Fathers]... be, not grudgingly, but fully and fairly maintained."16

Politicians, judges, scholars, and activists use the rhetoric in the Bill of Rights to advance theories of absolute rights.17 Perhaps most famous are those who favor an absolute interpretation of the First Amendment's free speech guarantee. Justice Hugo Black argued that the First Amendment's command that Congress shall make "no law" abridging speech meant, literally and absolutely, that Congress shall make "no law" abridging speech.18 According to Black, the Fourth Amendment's qualified language was evidence that the Founders knew how to qualify rights when they wanted to qualify rights—and their choice to draft the First Amendment in unqualified language therefore must have been deliberate: "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes,'"19 The absolute right to free speech, Black reasoned, meant that courts and legislatures were never empowered to refuse to enforce the right—even when the government's countervailing interests were particularly strong.20 Distinguished legal scholars have echoed this position.21 Professor Thomas Emerson insisted: "[E]xpression must be protected against government curtailment at all points, even where the results of expression may appear to be in conflict with other social interests."22 Today, bold proclamations of free speech ("I can say whatever I damn well please!") still reverberate in American rights rhetoric.

Property rights have also enjoyed a long prominence in American rhetoric, frequently celebrated as the most fundamental of the rights of

17. Cf. GLENDON, supra note 3, at 43 ("[T]he starkness of some of the language in the Bill of Rights has helped to legitimate intemperate arguments made by those who have a particular attachment to one of the rights framed in such terms.").
18. See Hugo L. Black & Edmond Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. REV. 549, 553 (1962) (remarks of Justice Hugo Black) ("The beginning of the First Amendment is that 'Congress shall make no law.' I understand that it is rather old-fashioned and shows a slight naivete to say that 'no law' means no law. It is one of the most amazing things about the ingenuity of the times that strong arguments are made, which almost convince me, that it is very foolish of me to think 'no law' means no law.") (internal citations omitted); see also Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law ... abridging' to mean no law abridging.") (omission in original). 
21. See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17 (1948) ("The phrase, 'Congress shall make no law ... abridging the freedom of speech,' is unqualified. It admits of no exceptions.") (omission in original). 
Proponents of theories of absolute property rights often appealed, not to any absolute language in the Bill of Rights, but to theories of natural law. Several classical liberal philosophers suggested that humans were born with certain natural rights that existed prior to and regardless of government. John Locke argued that one such "natural" right was a property right in one's self. As Locke put it, "[E]very Man has a property in his own person." This ownership interest in one's own personhood had a considerable reach. For example, by whittling a stick into a weapon, an individual acquired a property right in that weapon. Because that property right was inextricably tied up with the inherent dignity and liberty of the individual, it was granted the utmost protection against government encroachment; indeed, property rights could not be overridden for any reason, even for the benefit of society at large. The works of William Blackstone perhaps most clearly convey the primacy of the property right:

The third absolute right, [after life and liberty] inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land . . . . So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

The rhetoric of absolute property rights is a "hardy perennial" that has built upon its philosophical legacy and gained traction in modern rights discourse. It continues to manifest itself in both casual conversation ("It's mine and I can do ...")

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25. See id. at 19. Although their theories are not based on natural rights, utilitarians have made comparable arguments. See John Stuart Mill, On Liberty 81 (David Bromwich & George Kateb eds., 2003) (1921) (stating that an individual has an "absolute" right in what "merely concerns himself"). Modern libertarians also make similar absolutist claims. See, e.g., Robert Nozick, Anarchy, State, and Utopia 172 (1974) (endorsing "the classical liberals' notion of self-ownership" and arguing that taxation was morally impermissible insofar as it gave society a partial property right in another person and his labor).
26. Locke, supra note 24, at 19.
27. See id. at 19–20.
28. William Blackstone, 1 Commentaries *138–39 (emphasis added). Although Blackstone was English, his ideas about property were quite thoroughly incorporated into American law and welcomed into American rhetoric. See Glendon, supra note 3, at 23 ("Blackstone's Commentaries was the law book in the United States in the crucial years immediately preceding and following the American Revolution. . . . Blackstone's work was much more fully absorbed into legal thinking here [in America] than in England. . . .")
what I want with it!"

and in the legal community’s “relentless tendency to ‘propertize’ things”: “In America, when we want to protect something, we try to get it characterized as a right. . . . When we specially want to hold on to something (welfare benefits, a job), we try to get [it] characterized as a property right.”

In large part, this trend of “propertization” has been effective, evolving gradually to encompass intangibles, such as securities (including stocks, bonds, futures, and options) and ideas, appropriately known as “intellectual property” (including trademarks, patents, and copyrights). The Supreme Court, in *Goldberg v. Kelly*, even suggested that welfare benefits were the “new” property. And Justices who did not subscribe to the expansive contours of the property right endorsed by *Goldberg* have in other contexts sought to emphasize property’s absolute significance. In *Kelo v. City of New London*, Justice Thomas argued for more meaningful limits on the government’s power to appropriate private property under the Takings Clause. In doing so, he underscored “the Framers’ understanding that property is a natural, fundamental right.”

Like property rights, criminal justice protections also have soared in American rights rhetoric. Criminal justice was of special importance to America’s founders: “The Founders’ grave concern with protecting the accused against abuses by the government can be seen in the very structure of the Bill of Rights, in which four of the ten amendments are devoted to guaranteeing the criminally accused fair process and proceedings.” And it is, of course, every bit as important today. As noted, the Sixth Amendment guarantees “the Assistance of Counsel . . . [i]n all criminal prosecutions.” The language of the Amendment itself is absolute; it articulates no explicit limitations. Further, the Supreme Court, in *Gideon v. Wainwright*, recognized the right to counsel as “fundamental,” and since then, American rhetoric has hailed *Gideon’s* “promise of equal justice” as one of the most important in the criminal justice

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30. See, e.g., *GLENDON*, supra note 3, at 19; *Williams*, supra note 29, at 283.
32. *Id.*
33. See 397 U.S. 254, 262 n.8 (1970); see also Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 787 (1964) (“It is time to see that the ‘privilege’ or ‘gratuity’ concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership . . . . We must create a new property.”).
34. 545 U.S. 469 (2005).
35. The Fifth Amendment states: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
38. U.S. CONST. amend. VI (emphasis added).
Anthony Lewis famously explained his hope that one day, society would "bring to life the dream of Gideon v. Wainwright—the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment . . .".42

Today, absolutist rhetoric about rights has expanded significantly from its liberty, property, and criminal justice origins. Starting in the 1950s and picking up speed ever since, Americans have embraced an ever-increasing number of rights and have typically framed those rights in absolute terms.43 Thus, even though the context has changed dramatically from the days of America’s founding, and the focus on rights has been amplified, modern rhetoric remains substantially similar to its historical counterpart: it emphasizes absolute rights, which admit of no exceptions justifying their curtailment.

Both the right and the left of the political spectrum are prone to frame political controversies in terms of absolute rights. For example, both conservatives and liberals typically structure the abortion debate as one about absolute, albeit conflicting, rights.44 Those on the right speak of a child’s absolute right to life, which cannot yield lightly to countervailing interests.45 Conversely, the left speaks of a woman’s absolute right to choose, which trumps any interests of the fetus or of the government.46

Similarly, both liberals and conservatives often espouse an absolute interpretation of the right to equality. The Equal Protection Clause pledges absolutely that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.”47 Grounding their claims in this constitutional guarantee, Americans have generated almost limitless rhetoric concerning the right to

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41. See, e.g., A.M. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice ii (2004), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (“The right to counsel is one of the most sacred principles enshrined in our nation’s constitution. . .”).

42. ANTHONY LEWIS, GIDEON’S TRUMPET 205 (1964).

43. See GLENDON, supra note 3, at 1–17.


45. See, e.g., National Right to Life, What is the Pro-Life Response to Abortionists’ Claims?, http://www.nrlc.org/abortion/facts/abortionresponses.html (“Every mother is faced with profound decisions to make for herself and her child but these decisions can never include the right to kill her baby.”).

46. See, e.g., NARAL Pro-Choice America, Learn about NARAL Pro-Choice America, http://www.prochoiceamerica.org/about-us/learn-about-us/ (“If you’re like me, you believe in a culture of freedom and responsibility. You believe that women have the intelligence and thoughtfulness to make decisions about their health with their families, their physicians, and their faith. You believe that government and politicians should not interfere in our personal lives—and that people should be empowered to make the right decisions for themselves.”).

47. U.S. CONST. amend. XIV, § 1.
“absolute legal equality,”\textsuperscript{48} with the noble hope that the Equal Protection Clause can cure America of all discrimination, once and for all. Moreover, courts have often interpreted the Equal Protection Clause’s absolute language broadly. As early as 1880, the Supreme Court hailed the Clause as a panacea to a host of social ills:

[E]qual protection . . . should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.\textsuperscript{49}

Although both sides of the political spectrum embrace the right to equality, they disagree about what absolute equality should entail, as evidenced by the debate on affirmative action. Those on the left believe that affirmative action programs are necessary to achieve equality and eradicate discrimination,\textsuperscript{50} while those on the right believe that affirmative action programs are themselves a form of discrimination that perpetuates inequality.\textsuperscript{51} Despite the disagreement, liberal and conservative rhetoric tends to converge in its absoluteness: equality is always required. No exceptions.

In short, American rhetoric on free speech rights, property rights, criminal justice rights, abortion rights, equality rights, and many other rights is long on generality, short on specifics, full of promise, and sparse on qualification—in sum, very much an absolute matter.

2. Remedies in Rhetoric

While the bulk of rhetoric focuses on rights as absolute, the rhetoric is no less absolute when it comes to remedies. In the first instance, Americans preach that rights, however broadly defined, should not be infringed under any circumstances. But failing that, in the hopefully infrequent cases of infringement, Americans demand that rights violations be fully remedied, under all circumstances. Professor Lawrence Friedman argues that these “two clusters


\textsuperscript{49} Barbier v. Connolly, 113 U.S. 27, 31 (1885).

\textsuperscript{50} See, e.g., Access, Equity, and Diversity: American Association for Affirmative Action, http://affirmativeaction.org/about.html.

of expectations” together make up a crucial element of modern American legal culture.\textsuperscript{52} He writes:

The first [cluster of expectations] is what we can call a \textit{general expectation of justice}; the second is a \textit{general expectation of recompense}. The first, in brief, is the citizen’s expectation of fair treatment, everywhere and in every circumstance. . . . Justice is, or ought to be, available in all settings. . . . It is a pervasive expectation of fairness.

The second general expectation is . . . that somebody will pay for any and all calamities that happen to a person, provided only that it is not the victim’s “fault,” or at least not solely his fault. . . . It is, in part, what people really mean by fairness or justice.\textsuperscript{53}

Often, the language of rights and remedies is conflated, particularly when American rhetoric demands an absolute right to a remedy. Notwithstanding the linguistic confusion, however, the claims made are absolutist, demanding \textit{full} remediation for all violations.

The “general expectation of recompense” has deep roots in American law. In \textit{Marbury v. Madison}, Chief Justice John Marshall famously stated the general rule and “very essence of civil liberty” that “where there is a legal right, there is also a legal remedy.”\textsuperscript{54} Renowned legal scholars have argued in favor of interpreting this “remedial imperative” literally, thereby permitting absolutely \textit{no} constitutional violations to go without correction or compensation.\textsuperscript{55} In American rhetoric, complete remediation is a “proposition commanding nearly universal assent.”\textsuperscript{56}

No remedy is more venerated in American rhetoric than the writ of habeas corpus, or the “Great Writ.” Of English origin, the writ was designed to ward against unlawful and indefinite imprisonment. It has long been revered as one of the most fundamental safeguards of individual liberty.\textsuperscript{57} English jurist A.V. Dicey proclaimed the writ “worth a hundred constitutional articles guaranteeing individual liberty,”\textsuperscript{58} and Alexander Hamilton described the writ as one of the “greater securities to liberty and republicanism than any [the Constitution] contains.”\textsuperscript{59}

\begin{footnotes}
\item[52.\textsuperscript{52}] See \textsc{lawrence m. friedman}, \textit{total justice} 43 (1985).
\item[53.\textsuperscript{53}] \textit{Id.}
\item[54.\textsuperscript{54}] 5 U.S. (1 Cranch) 137, 163 (1803) (internal quotations omitted).
\item[55.\textsuperscript{55}] See, e.g., Akhil Reed Amar, \textit{Of Sovereignty and Federalism}, 96 \textsc{yale l.j.} 1425, 1426–29 (1987).
\item[56.\textsuperscript{56}] Jeffries, \textit{supra} note 9, at 87.
\item[57.\textsuperscript{57}] See \textsc{william blackstone}, 3 \textit{commentaries} *129 (calling the writ “the most celebrated writ in the English law”); see also \textsc{william f. duker}, \textit{a constitutional history of habeas corpus} 3 (1980) (describing it as the “great writ of liberty”).
\item[58.\textsuperscript{58}] A.V. Dicey, \textit{introduction to the study of the law of the constitution} 195 (6th ed. 1902).
\item[59.\textsuperscript{59}] \textsc{the federalist}, \textit{supra} note 6, No. 84, at 511 (Alexander Hamilton).
\end{footnotes}
In American rhetoric, the writ of habeas corpus is acclaimed as an absolute remedy, capable of curing all rights violations. Notably, in *Fay v. Noia*, the Supreme Court honored the writ with broad language:

For [the writ’s] function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.\(^6\)

Even Justice Felix Frankfurter, one of rights absolutism’s most outspoken opponents, waxed poetic when it came to the Great Writ. The grandiose promise to treat the writ as the “basic safeguard of freedom in the Anglo-American world,” Justice Frankfurter reassured us, was “not the boasting of empty rhetoric.”\(^6\)\(^1\) In short, like the rhetoric of rights, the rhetoric of remedies rings of absolutism.

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In fact, our attachment to absolute rhetoric cannot be overstated. America was founded on the elevated rhetoric of the Declaration of Independence, which proudly asserts a non-exhaustive list of “unalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”\(^6\)\(^2\) And today, that dream of “unalienable” rights—realized “without constraint”—continues to resonate in American rhetoric.

But, as the reader suspects and as will be described shortly, rights live more than aspirational and rhetorical lives. They live practical lives as well—lives far less glamorous than rhetoric admits. Behind the rhetorical flourishes lurks a reality of qualified rights and limited remedies.

And yet, despite it all, the rhetoric persists. Even in America’s dark hours, her absolutist rhetoric is unyieldingly reverent. On the brink of the Civil War, President Lincoln remained confident in the stirring promises of the Declaration:

I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence... It was... something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time.\(^6\)\(^4\)


\(^{62}\) The Declaration of Independence para. 2 (U.S. 1776).


How do rights maintain this aspirational existence in the face of a starker reality? Given the practical reality of qualified rights, why does absolute rhetoric proceed apace? Certainly those who propagate absolutist rhetoric must know better. Accomplished individuals like Justice Hugo Black and William Blackstone were no intellectual slouches. They undoubtedly were aware of practical realities. In spite of these practical realities, however, they remained fully committed to absolutist rhetoric, preferring deliberate hyperbole over practical precision. In fact, in order to address the thornier practical issues plaguing their absolutist theories without abandoning their absolutist rhetoric, both resorted to fancy footwork.

Justice Black remained loyal to absolute free speech by cleverly distinguishing between speech and conduct. While the government could not abridge speech under any circumstances, the government could regulate conduct.  

65. For example, the government could limit a nonviolent protest at a jail, see Adderley v. Florida, 385 U.S. 39 (1966), or restrict the public display of a jacket bearing an offensive message, see Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (Black, J., joining in dissent) (“Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech.”).

66. See Emerson, supra note 22, at 17.

67. See Meiklejohn, supra note 21, at 18–19.

68. Boyce, supra note 29, at 227.


70. William Blackstone, 2 Commentaries *2.

71. See Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 13 (1985) (“Blackstone’s sweeping definition of the right of property overstated the case; indeed, he devoted the succeeding 518 pages of Book 2 of his Commentaries . . . to qualifying and specifying the exceptions to his definition.”); see also David B. Schorr, How Blackstone Became a Blackstonian, 10 Theoretical Inquiries L. 103, 107 (2009) (describing Blackstone’s “500-page survey of English property law” as containing “doctrines of a particular cast: at every turn, on every page, less-than-absolute property rights are explicated, delimited and qualified.”).
however, Blackstone is remembered less for his attention to the limitations on
the prerogatives of property ownership than for his "rhetoric of absolute
ing more extreme than Locke's" and for his "tones more hyperbolic
than even the Romanist authorities."72

Given the self-conscious decisions by such eminent lawyers to cling to
absolute rhetoric almost like a drowning man clings to his life preserver, it is
worthwhile to inquire whether there is at least some value to the rhetoric. In
fact, there is significant value. But first let us pay a visit to rights in their less
glamorous residence—the stubborn abode of practice.

B. Qualified Practice

Talk is one thing; practice something else. Although the rhetoric of rights
in our culture tends to be absolute, the practice in our courts is decidedly more
qualified. Courts do not define substantive rights in some pure, ideal, or
abstract sense. Instead, they define the contours of a right by taking into
account competing social interests: the safety of the community, the rights of
others, and the scarcity of resources, just to name a few. Likewise, when they
find rights violations, courts do not mechanically implement the Marbury ideal
of full remediation.73 To the contrary, they take competing social interests into
account at the remedial stage as well.74

Consequently, a sizable gap exists between our rhetoric and our practice.
This gap underscores the point that our rights lead dual lives—one in the lofty,
ethereal realm of rhetoric and the other in the gritty, messy world of practice.
This Part illustrates how rights live their second life.

1. Rights in Practice

Even a cursory glance at how courts have defined our most cherished
rights—like freedom of speech, free exercise of religion, equal protection, and
the right to counsel—demonstrates that a substantial gap exists between our
rhetoric and our practice. Of all the rights that one might expect to make the
transition from rhetoric to practice in unqualified terms, these four would likely
top the list. After all, the Constitution itself declares each of them in absolute
terms. The fact that we qualify even these, our most hallowed rights, illustrates
that it is essential for rights to lead dual lives in our political system.

73. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-retroactivity, and
74. See Paul Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 602 (1983) ("Some
costs obviously play a role in defining the content of the right itself. . . . [C]ompeting interests are
afforded a second veto at the remedy stage, after a violation of constitutional right is shown.").
a. Freedom of Speech

While frequently discussed in absolute terms, freedom of speech is more limited in practice. Indeed, the Supreme Court has explicitly "rejected an absolutist interpretation" of the right on more than one occasion. Rather than treating freedom of speech as an "unlimited license" to express oneself, the Court has narrowed the scope of the right by taking competing social interests into account. To illustrate the point, consider three limitations.

First, the First Amendment does not protect all forms of expression, although one would never guess it from the rhetoric. The Court has excluded some categories of speech from First Amendment protection altogether, reasoning that they "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Among these low-value categories are: incitement, fighting words, true threats, obscenity, and child pornography. And the Court considers other types of expression, such as commercial speech, to be covered by the First Amendment but entitled to less protection than speech at the amendment's core.

Second, the First Amendment does not insulate covered expression from all types of regulation. Such expression, to be sure, is generally protected from content-based regulations. But the Court often upholds laws that regulate the time, place, and manner of expression to preserve the government's interest in maintaining order.

75. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").
77. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech . . . is 'absolute[,]' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.").
80. Chaplinsky, 315 U.S. at 572.
burning a draft card), the Court frequently permits the government to regulate such conduct for reasons apart from the suppression of ideas.\(^87\)

Third, the First Amendment gives the government greater leeway to regulate speech when the government assumes particular roles. When acting as a property owner, for instance, the government may exclude certain classes of speakers from property that it chooses not to designate as a public forum.\(^88\) When acting as an educator, the government has broad latitude to regulate student speech\(^89\) because of the "special characteristics of the school environment."\(^90\) And when acting as an employer, the government may sometimes penalize its employees for disruptive speech because of its interest in efficiently providing services to the public.\(^91\)

As even this brief glance at the Court's doctrine reveals, the First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."\(^92\) That is, freedom of speech is a far more limited right than our rhetoric suggests.

\(b.\) Free Exercise of Religion

Like freedom of speech, free exercise of religion is in our national pantheon of rights. The Constitution references it in much the same absolute manner as it does freedom of speech.\(^93\) Yet, it too is highly qualified in practice. Few, when pressed, would deny that some limit on this right is necessary. Were the freedom to practice religion absolute, every person would be "a law unto himself,"\(^94\) and government would, for instance, be powerless to stop someone from conducting a human sacrifice for religious reasons.\(^95\) But where to draw the line between free exercise and society's interest in maintaining order is far more controversial. The Supreme Court and Congress have drawn different lines, but both explicitly acknowledge that the right must

\(^{87}\) United States v. O'Brien, 391 U.S. 367, 377 (1968) (subjecting such regulations to intermediate scrutiny).

\(^{88}\) Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 49 (1983) (allowing such exclusions as long as the government's action is reasonable and viewpoint neutral).


\(^{91}\) See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (providing no First Amendment protection for public employees who are disciplined in reaction to statements made "pursuant to their official duties"); Connick v. Myers, 461 U.S. 138, 147 (1983) (providing no First Amendment protections for public employees who are disciplined in reaction to statements made regarding personal, rather than public, matters).


\(^{93}\) U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ").

\(^{94}\) Reynolds v. United States, 98 U.S. 145, 167 (1878).

\(^{95}\) Id. at 166.
be limited in a society as pluralistic as ours.

Under the Supreme Court’s current interpretation of the First Amendment,96 the right to practice religion is highly qualified in practice. While the amendment provides robust protection for religious beliefs and opinions,97 it offers much less protection for religiously motivated actions. Of course, the First Amendment generally prohibits the government from targeting religious conduct for disfavor.98 But it does not exempt religious individuals from generally applicable laws that have a rational basis.99 If religious groups desire greater protection than this, the Court has said, it is up “to the political process.”100

Congress responded to this invitation by passing the Religious Freedom Restoration Act of 1993 (RFRA).101 The statute called on courts to strike “sensible balances between religious liberty and competing prior governmental interests”102 by requiring the federal and state governments to demonstrate that any substantial burden on religion, even from a generally applicable law, was the least restrictive means of advancing a compelling state interest.103 After the Supreme Court struck down RFRA as it applied to the states,104 Congress stepped in once more by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies the same test to, among other things, state zoning laws and prison regulations.105

96. From 1963 until 1990, the Supreme Court interpreted the Free Exercise Clause to bar government from burdening religious conduct unless its actions were justified by a “compelling state interest” not served by “alternative forms of regulation.” Sherbert v. Verner, 374 U.S. 398, 403, 407 (1963) (internal quotation omitted). The Court abandoned that test as applied to neutral laws of general applicability in Employment Division v. Smith, 494 U.S. 872, 879 (1990).

97. Smith, 494 U.S. at 877 (“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”).


99. Smith, 494 U.S. at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).”) (internal quotation omitted).

100. Id. at 890.


102. § 2000bb(a)(5) (emphasis added).

103. § 2000bb-1.

104. City of Boerne, 521 U.S. at 536 (ruling that the statute exceeded Congress’s powers under Section Five of the Fourteenth Amendment). The Supreme Court has not ruled explicitly on whether the statute is constitutional as applied to the federal government, but it did apply the statute to a federal drug statute without raising any constitutional concerns. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006).

Although both RFRA and RLUIPA are more protective than the Court’s current free exercise doctrine, neither acts as an impenetrable shield against generally applicable laws that burden religion in practice. When applying RFRA, the Supreme Court has emphasized that the government may deny religious exemptions upon demonstrating that granting them would “seriously compromise” its ability to administer a law. And when interpreting RLUIPA, the Court has made clear that the statute does not “elevate accommodation of religious observances over [a prison] institution’s need to maintain order and safety.” So free exercise, like all rights, is highly qualified, whether it is protected by the Constitution or by statute.

c. Equal Protection

The Fourteenth Amendment’s promise of “equal protection of the laws” certainly has a ring of absolutism to it. In our political culture, this right is often touted in broad, grandiose rhetoric. In practice, however, equal protection is not an absolute right to equality in any sense of the word. Instead, it is a right that is qualified in at least three major ways.

First, equal protection, like most other constitutional rights, only applies to state action. Certainly, private actors can discriminate in invidious ways, but the Fourteenth Amendment itself offers individuals “no shield” against such acts. While some may decry this doctrine for providing too little protection to victims of discrimination, the Court has defended this “time-honored principle” as a necessary limit on the reach of federal power into the lives of individuals.

Second, equal protection only applies to intentionally discriminatory laws or acts, not to those that merely have disparate impacts. What is more,
intentional discrimination refers to actions taken "because of, not merely in spite of, [their] adverse effects upon an identifiable group."\textsuperscript{114} Like the state action doctrine, this limitation on equal protection has also been the subject of much criticism. But the Court has defended it as serving a valuable function: if disparate impacts were enough to trigger heightened judicial scrutiny, a whole host of important government programs might not survive.\textsuperscript{115}

Third, even when equal protection does apply, the government will often have a sufficient justification for treating individuals differently. The government could hardly operate if it were not permitted to classify individuals; something as simple and benign as setting a minimum age for obtaining a driver's license would be impermissible.\textsuperscript{116} So the relevant question is not whether the government can classify individuals, but whether it has strong enough reasons for making particular distinctions. The Court's three-tiered methodology for evaluating these reasons is familiar. For most social and economic classifications, the challenger bears the burden of showing that such classifications are not reasonably related to any legitimate goal.\textsuperscript{117} even if those goals were ones the legislature did not intend.\textsuperscript{118} For gender classifications, the government bears the burden of showing that the classification is substantially related to an important government objective.\textsuperscript{119} And for racial and national origin classifications, the government's burden is even higher: it must show that the classification is necessary to advance a compelling government


115. \textit{Davis}, 426 U.S. at 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").


interest. The important point here is that even when the highest level of scrutiny applies, there is no guarantee that a court will strike down the classification.

This three-tiered scheme of review reveals an equal protection right that only has as much force as courts decide to give it. The subjective calculus, which extends to which classifications are suspect, to which rights are fundamental, and to what level of scrutiny applies to them, is the apotheosis of “rights practicality.” Equal protection is thus a far more limited right in practice than its rhetoric suggests.

d. Right to Counsel

The Sixth Amendment guarantees a criminal defendant’s right “to have the Assistance of Counsel” in “all criminal prosecutions.” The Supreme Court has described this right as “fundamental,” and in popular culture, the right is often touted as an essential bulwark between the lowly individual and the powerful state. Despite such lofty rhetoric, however, the right to counsel is highly qualified in practice.

First, the right to counsel is limited by the seriousness of the sentence. A defendant is entitled to a lawyer for his defense only if he is actually sentenced to imprisonment. It is not enough that he is merely facing potential

120. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (“[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).


123. U.S. CONSt. amend. VI (emphasis added).


125. See generally LEWIS, supra note 42.

126. Other Sixth Amendment guarantees are similarly qualified in practice. For example, the Confrontation Clause, which grants a criminal defendant the right “to be confronted with the witnesses against him,” U.S. CONSt. amend. VI, is limited. See, e.g., Crawford v. Washington, 541 U.S. 36, 68 (2004) (not subjecting nontestimonial hearsay to the full demands of the Confrontation Clause); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (recognizing the “wide latitude” of trial judges to impose limits on cross-examination); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (explaining that the Confrontation Clause guarantees the opportunity for effective cross-examination but not effective cross examination itself).
imprisonment.127

Second, the right to counsel does not apply at all times. To begin with, the right does not attach at all until "the initiation of adversary judicial proceedings against the defendant."128 So an individual at a pre-indictment lineup, for example, has no right to counsel.129 And even after adversarial proceedings begin, a defendant is entitled to the assistance of counsel only at certain "crucial stages" of the prosecution.130 He does not, for instance, have the right to have counsel present when the government presents photos of him to witnesses outside of court.131

Third, the right to counsel is not the right to a perfect lawyer. A defendant is entitled to a reasonably competent lawyer, but not to a highly competent one.132 Moreover, given the high standard for proving ineffective assistance of counsel,133 a "reasonably competent" lawyer might not be that competent at all. Finally, while an indigent defendant is entitled to have government-funded counsel, he is not entitled to have the counsel of his choice,134 and he cannot insist on a particular level of funding for counsel's services.135

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Of course, there was a time when the Sixth Amendment did not require that counsel be provided to indigent criminal defendants in state courts at all.136 And there was also a time when equal protection meant "separate but equal."137 Such examples raise the possibility that future generations will find the present gap between rights rhetoric and rights practice unacceptably large, just as we have found the past's. But to conceive that possibility—as well as the

133. To prove ineffective assistance of counsel, the defendant must show both that: (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694.
134. United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.").
135. See Wheat v. United States, 486 U.S. 153, 159 (1988) ("[A] defendant may not insist on representation by an attorney he cannot afford . . ."); see also Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) ("The [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.").
136. Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding for the first time that states were required to provide counsel to defendants facing the possibility of death sentences).
137. Plessy v. Ferguson, 163 U.S. 537 (1896).
possibility that some future generation will conclude that we have carried rights too far—is not to deny the gap's essential presence in our system of law.

2. Remedies in Practice

Remedies for constitutional violations, like rights themselves, are also far more qualified in practice than in rhetoric. Chief Justice Marshall's famous declaration that "where there is a legal right, there is also a legal remedy" may remain our ideal, but it does not accurately describe our practice. In reality, courts often find rights violations yet do nothing to remedy them. Indeed, several of our doctrines—such as non-retroactivity, qualified immunity, and harmless error—are built on the recognition that the need to remedy violations is not absolute. Each of these doctrines is explored below.

a. Non-retroactivity

The doctrine of non-retroactivity in criminal cases illustrates that not all rights have remedies. When the Supreme Court identifies a previously unrecognized constitutional right for criminal defendants, it does not allow every defendant who may have suffered a violation of that right in the past to seek a remedy. While defendants whose cases are still pending on direct review may seek relief based on the new rule, habeas petitioners whose convictions became final before the Court announced the rule generally may not. In this manner, the doctrine of non-retroactivity precludes relief for constitutional violations based on nothing more than accidents of timing.

This doctrine limits relief more often than one might expect. While habeas petitioners are only barred from relying on "new" rules, the Court has defined "new" quite broadly. The category of new rules includes not only those that represent radical breaks with the past, but also any rule that "was not dictated by precedent existing at the time the defendant's conviction became final." Because few new decisions are so dictated, few are given retroactive effect in habeas cases.

139. Fallon & Meltzer, supra note 73, at 1778 (explaining that Marbury's "ideal is not always attained").
140. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").
141. Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").
143. See Butler v. McKellar, 494 U.S. 407, 415 (1990) (explaining that a rule can be "new" law despite the fact that the Court previously described it as being "controlled" by prior precedent).
What is more, Congress may have given the doctrine a slightly broader sweep in state habeas cases by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Prior to the AEDPA's enactment, the Court's decisions had recognized two narrow exceptions to the non-retroactivity rule: habeas petitioners could seek relief based on (1) new substantive rules protecting certain conduct or prohibiting certain punishments and (2) new "watershed rules of criminal procedure." But unlike those decisions, AEDPA does not explicitly recognize any exceptions from the non-retroactivity rule. While the Supreme Court has yet to address the significance of this omission, Congress may have intended to make those exceptions unavailable to state prisoners.

The doctrine of non-retroactivity reflects the idea that habeas review is not intended to remedy every violation of a constitutional right. This is so even when the difference between those who can receive the remedy and those who cannot is essentially arbitrary. Yet here again, rights practicality is not without rhyme or reason. In the Court's view, providing retroactive remedies without restriction would too greatly disrupt the finality of criminal judgments and the comity between the federal and state governments. The already lengthy process of litigation would be lengthier still.

This practical state of affairs, however, does not render our rhetoric about the Great Writ of habeas corpus empty. Instead, the purpose of habeas review is to ensure that state courts generally abide by then-existing constitutional law, the corpus of which is no small matter. Non-retroactivity, however, serves as a strong and salutary reminder that our practice does not always conform to the principle that every violation of a right must be effectively remediated.

144. 28 U.S.C. § 2254(d)(1) (2006). The statute allows federal courts to grant relief to habeas petitioners held under state court judgments if those judgments were "contrary" to "clearly established Federal law, as determined by the Supreme Court." In addition, it provides that federal courts should not grant relief if a state court applied clearly established law in a way that may have been incorrect but was not "unreasonable." Id.; see Williams v. Taylor, 529 U.S. 362, 409 (2000) ("[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."). By establishing this deferential standard of review, the statute ensures that some violations of then-existing rights will go unaddressed as well.


146. Although the issue was presented in a recent case, the Supreme Court resolved the case on narrower grounds and did not address it. Whorton, 549 U.S. at 409.

147. See Danforth v. Minnesota, 552 U.S. 264, 279 (2008) (noting that non-retroactivity is justified by "comity and respect for the finality of state convictions").

148. Sawyer v. Smith, 497 U.S. 227, 234 (1990) ("[T]he purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.").
b. Qualified Immunity

The doctrine of qualified immunity is also a prime example of incomplete remediation: an individual whose rights are violated may nonetheless be denied monetary compensation for that violation. Harlow v. Fitzgerald states the general rule of qualified immunity: “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^{149}\) The rationale for the rule is twofold. First, it balances the rights of individual citizens with society’s interest in “encouraging the vigorous exercise of official authority.”\(^{150}\) Second, the Court has suggested that the doctrine plays an important role in limiting frivolous litigation and its attendant burdens on litigants and courts alike.\(^{151}\)

Cases in which a right has been violated but no remedy is granted—in other words, cases in which the defendant violated a right that was not clearly established—are quite common.\(^{152}\) They are common, in part, because courts have made it relatively difficult to demonstrate that a right was “clearly established.” For example, although qualified immunity is an affirmative defense, many circuits have held that once a defendant shows that he was a government official acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the right was clearly established at the time of the violation.\(^{153}\)

Moreover, the standard for showing that a right was clearly established is fairly stringent. The Court in Saucier v. Katz explained the basic rule: “[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct

\(^{149}\) 457 U.S. 800, 818 (1982).

\(^{150}\) See id. at 807 (citation omitted); see also Pearson v. Callahan, 129 S.Ct. 808, 815 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).

\(^{151}\) See Harlow, 457 U.S. at 818 (“Reliance on the objective reasonableness of an official’s conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”).

\(^{152}\) Until recently, courts were required to determine whether the defendant violated the victim’s constitutional right before deciding whether the violated right was clearly established. See Saucier v. Katz, 533 U.S. 194, 201 (2001). Therefore, in the past, it was clear when, despite a rights violation, the victim was not entitled to compensation. Now, however, this order is not mandatory, and a court is permitted to use its discretion in deciding which issue to address first. See Pearson, 129 S.Ct. at 813, 818. In these cases, it is possible that a court would deny a remedy (by finding the right not clearly established) without making clear that the victim did, in fact, suffer a violation of her rights.

\(^{153}\) See, e.g., Gardenhire v. Schubert, 205 F.3d 303, 311 (6th Cir. 2000); Pierce v. Smith, 117 F.3d 866, 872 (5th Cir. 1997); Magdziak v. Byrd, 96 F.3d 1045, 1047 (7th Cir. 1996); Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991).
was unlawful in the situation he confronted.\textsuperscript{154} Generally, to make this showing, the plaintiff must present "a consensus of cases of persuasive authority," which make the "contours of the right . . . sufficiently clear" when examining the right in a "particularized" sense.\textsuperscript{155} Usually, although not necessarily, these cases must be from the relevant jurisdiction.\textsuperscript{156} In addition, although it is not necessary for a plaintiff to point to prior case law with facts identical to those in his case,\textsuperscript{157} courts nonetheless require that facts be similar enough that a reasonable official would have something akin to "fair warning" that he was violating a right.\textsuperscript{158} And because a court can find that an officer acted reasonably even if government officials of reasonable competence could disagree,\textsuperscript{159} qualified immunity's reach is far, protecting "all but the plainly incompetent or those who knowingly violate the law."\textsuperscript{160}

Finally, \textit{Harlow} indicated that even if the plaintiff can show that the right was clearly established, a defendant may nonetheless escape liability in certain "extraordinary circumstances."\textsuperscript{161} Although this exception is rarely applied, some courts have held that a plaintiff is not entitled to money damages, despite the violation of a clearly established right, when the defendant relied on the advice of counsel or on a presumptively constitutional statute, for example.\textsuperscript{162}

Thus, the doctrine of qualified immunity stands in stark contrast to \textit{Marbury}'s promise.\textsuperscript{163} In an ideal world, we would wish things as Chief Justice Marshall expressed them. In the real world, however, a remedy for the violation of every right, whether clearly established or newly minted, would presuppose either the presence of perfect clarity in law or the absence of any judgmental component in the executive function. But the fact that rights and remedies may get grubby in practice does not mean they should be other than luminous in theory. Without Marshall's guidance, the erosion of remedies would accelerate. As we shall see, even compromised ideals help us not to lose our way.

\begin{itemize}
\item \textsuperscript{154} \textit{533 U.S.} at 202.
\item \textsuperscript{155} \textit{Wilson v. Layne}, 526 U.S. 603, 617 (1999).
\item \textsuperscript{156} \textit{Anderson v. Creighton}, 483 U.S. 635, 640 (1987).
\item \textsuperscript{157} \textit{Compare Wilson}, 526 U.S. at 617 ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident . . ., nor have they identified a consensus of cases of persuasive authority. . . ."), \textit{with United States v. Lanier}, 520 U.S. 259, 269 (1997) ("[Disparate decisions in various circuits] may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.").
\item \textsuperscript{158} \textit{See} \textit{Hope v. Pelzer}, 536 U.S. 730, 741 (2002).
\item \textsuperscript{159} \textit{See Lanier}, 520 U.S. at 269–72.
\item \textsuperscript{160} \textit{See} \textit{Malley v. Briggs}, 475 U.S. 335, 341 (1986).
\item \textsuperscript{161} \textit{Id}.
\item \textsuperscript{162} \textit{457 U.S.} at 819.
\item \textsuperscript{163} \textit{See, e.g.}, \textit{Kay v. Bemis}, 500 F.3d 1214, 1221 n.6 (10th Cir. 2007) (reliance on statute, regulation, or official policy); \textit{Sueiro Vázquez v. Torregrosa de la Rosa}, 494 F.3d 227, 235–36 (1st Cir. 2007) (reliance on advice of counsel).
\item \textsuperscript{164} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 163 (1803).
\end{itemize}
c. Harmless Error

Like non-retroactivity and qualified immunity, the doctrine of harmless error for constitutional violations also illustrates the disconnect between remedies in rhetoric and in practice. According to this doctrine, constitutional errors at trial are not grounds for reversal on direct appeal if they were "harmless beyond a reasonable doubt." And in habeas cases, such errors are not grounds for reversal unless they "had [a] substantial and injurious effect or influence in determining the jury's verdict." Unlike in AEDPA or qualified immunity cases, under harmless error doctrine, courts are to deny relief for even the clearest of constitutional violations. If, for instance, a trial court allowed the introduction of an involuntary confession against the defendant's objection, an appellate court would deny relief if it deemed the introduction harmless under the applicable standard.

Harmless error doctrine rests on the basic concept that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." It may rest even more upon recognition of the complexity of the modern criminal justice system. No devotee of those rights that are the rock of our identity takes lightly their violation. But can we afford to remedy each and every mistake? Given the number of constitutional rules of criminal procedure, trial errors are, in the Court's view, "virtually inevitable." It would simply be too costly for a society with limited resources to grant new trials based on such errors when there is little or no likelihood that outcomes would change. The Court thus struck a compromise by requiring the government as the party at fault not only to bear the burden of proof but also, on direct appeal at least, to meet a standard of proof beyond a reasonable doubt. But in doing so, the Court left a clear gap between the procedural rights it recognizes and the remedies it provides.

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Whatever tales of absolutism we may be telling ourselves in our rhetoric about rights, our practices reveal quite a different story. The implementation of rights is qualified in numerous ways: by what a right covers; by what sorts of protections it affords; by who can assert it and whom it can be asserted against; and by myriad procedural rules governing its vindication, to name just a few. Only by looking into a funhouse mirror can it be said that our practices are a clear reflection of the rhetoric of rights.

165. Chapman v. California, 386 U.S. 18, 24 (1967). The Court also recognizes a limited category of "structural" errors that are not subject to harmless error analysis because they infect the entire trial process. Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991) (discussing this category).
167. Fulminante, 499 U.S. at 310 (holding that the admission of involuntary confessions was subject to harmless error analysis).
169. Id.
II

ACCEPTING AND APPRECIATING THE DUALITY OF RIGHTS

So what should we make of this gap between the rhetoric and practice of rights? If our rhetoric is meant to describe our practices, it is failing miserably. If our practices are supposed to mirror our rhetoric, we have fallen quite short as a nation. Fortunately, however, neither view captures what a right is and what it does. This Part will defend both our rhetorical and our practical treatment of rights. Our differing approaches are not only separately justifiable, but actually harmonious with one another. The gap between our language and our practice is not only beneficial but essential to a political culture conceived in liberty.

What is presented here is not an argument for judicial doubletalk in which judges direct one message to the general public and another to a more targeted audience connected to the particular situation before it. The judiciary has neither the authority nor the ability to manipulate society in the fashion of an all-knowing philosopher king. Rather, what is suggested is that the gap between rhetoric and practice is indigenous on a personal level to us all—we aspire to live lives more perfect than is possible in an imperfect world.

It is part of the human condition to hope, not for a tolerable life of mediocrity, but for a rewarding life of great purpose. We dream of being better than we are. But first we must struggle with the copy machine, clean the coffee pot, and answer the phone. Rights at bottom are no different than the humans whom they serve. And the gap between rights in rhetoric and rights in practice is no more a cause for despair on a national level than in our daily lives.

A. Why We Must Express Rights Absolutely

1. The Critics of Absolutist Rhetoric

The exaggerated rhetoric of individual rights has been assailed from many quarters. A number of critics, coming from both the political right and left, advance a point of view that has been termed communitarian, meaning that they place a greater emphasis on collective, social demands than on the autonomy of the individual. Communitarians have argued that the uncompromising language of individual rights is wearing a hole through the

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170. My argument should therefore be sharply distinguished from those of Professor Jonathan Barnett, who has argued that courts ought to consider directing a message of absolutism to the general public while at the same time sending “more subtle indications” of a cost-conscious willingness “to bend principles” to narrower audiences connected with the particular situations before them. See Jonathan M. Barnett, Rights, Costs, and the Incommensurability Problem, 86 Va. L. Rev. 1303, 1331 (2000) (book review).

171. Cf. Learned Hand, The Bill of Rights 73 (1958) (“For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”).
fibers that bind our society together. In the words of Mary Ann Glendon, "Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground." Absoluteness, she writes, "is an illusion, and hardly a harmless one," for when we assert our rights, even our most basic claims to life, liberty, and property, in absolute form, we are "expressing infinite and impossible desires—to be completely free, to possess things totally, to be captains of our fate, and masters of our souls." Our rights talk gives a false account of what we are, she tells us. It causes us to misunderstand our own nature and to cast aside the prerequisites of a flourishing, harmonious society.

Meanwhile, critics like Professors Stephen Holmes and Cass Sunstein agree that our rights rhetoric leads us astray, but they focus more on the costs to deliberation and rational social planning than on minimizing insularity and social friction. Imagining that rights are immune to cost considerations, they write, "has reinforced a widespread misunderstanding of their social function or purpose." The Holmes-Sunstein critique draws upon the rejection of classical legal formalism that arose with legal modernists in the United States in the 1930s. That tradition rejects categorical styles of legal reasoning in favor of a less mechanical "sociological jurisprudence." Judges are to be experts in public policy, thereby rationally (and even scientifically) formulating the most sensible approach to each issue that comes before them.

Rights rhetoric does not sit comfortably with such an approach. In Holmes and Sunstein's view, courts will "reason more intelligently and transparently if they candidly acknowledge the way costs affect the scope, intensity, and consistency of rights enforcement." Their critique combines a faith in bureaucratic management and utilitarian modes of thinking with a collectivist mentality that is in many respects similar to that of communitarian thought.

172. See Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 YALE L.J. 1860, 1862 (1987) (noting "a charge from the right that rights promote conflict rather than community and . . . a claim from the left that rights reinforce individualism at the expense of community").


174. Id. at 45.

175. For further discussion of these themes, see Michael J. Sandel, Liberalism and the Limits of Justice (2d ed. 1998).

176. See Stephen Holmes & Cass R. Sunstein, The Cost of Rights 97 (1999) ("Rights are familiarly described as inviolable, preemptory, and conclusive. But these are plainly rhetorical flourishes.").

177. Id. at 98.


179. See Holmes & Sunstein, supra note 176, at 98.

180. Sometimes referred to as "neorepublican." See, e.g., Rakove & Beaumont, supra note 2, at 1877.
It emphasizes the costs that the enforcement of every right imposes, and worries about, in the words of economist Michael Mandler, "the power of rights to make uncompromising claims on resources." In that sense, it is also aligned with significant aspects of the law and economics movement. Economists have considerable difficulty knowing what to do with rights and other "incommensurables," and Mandler may have been guilty of considerable understatement when he conceded that "[r]ights talk makes economists uncomfortable." The final criticism of the rhetoric of rights is perhaps the most provocative. Scholars and activists aligned with the Critical Legal Studies movement ("CLS") reject rights talk as false, not simply because it isn't true, but because it never could be. Like the Legal Realists who preceded them, those associated with CLS argue that the rhetoric of rights is a smokescreen that conceals the incessant power struggles between different factions in society beneath the haze of its seeming objectivity. In reality, the framework of rights analysis is sufficiently pliable to rationalize a variety of different outcomes in a given case. The rhetoric of absolute rights simply does not tell us how important disputes should be resolved. At best, it is unhelpful and distracting. At worst, it is a vehicle through which injustice is willfully perpetrated by those seeking to protect their own kind through a stirring, but vacuous, rhetoric. These commentators—communitarians, pragmatists, and CLS adherents—see the rhetoric of rights as artificial, misleading, and ultimately destructive of the ends that political society properly serves. Our rights rhetoric should be brought into line with our practices, they tell us, and we should stop lying to ourselves about the inviolability of our rights and of the rights of others. In their view, the unrelenting language of rights is an impediment to justice.

2. The Overlooked Virtues of Rights Rhetoric

Are these claims correct? Can it really be that the Declaration of Independence is an unfortunate fraud in need of correction? Must we proclaim that the sort of natural rights it describes are, as the utilitarian philosopher Jeremy Bentham once put it, "rhetorical nonsense, nonsense upon stilts?"
That the First Amendment is a colossal humbug, the Fourteenth a bogus waste of ink and paper? These questions practically answer themselves, but the harder question is “why?” Why, if we are unwilling to convert our words into deeds to the fullest possible extent, is it acceptable, much less desirable, to carry on as if we were? For a number of reasons, many of which we intuitively, if imperfectly, understand, it is vital that we insist on the rhetoric of absolutism in the articulation of our rights.

First, and perhaps most importantly, our rights rhetoric is a critical part of our shared life as a nation. Contrary to what communitarian critics like Professor Glendon suppose, our rights talk is not wearing away at the fabric of our country. Quite the opposite. Rights rhetoric is the unifying language of America. It is a communitarian good. The undiluted language of liberty provides the threads from which we weave our national identity. It does this by signposting our most important values and beliefs and telling each of us what we as a nation are about.

Thus, simplicity, and even hyperbole, is necessary in order to identify those core principles our cherished rights protect. Indeed, while each particular right that a person possesses may be thought to exalt values special to itself—the First Amendment, for example, embodies an enthusiasm for freedom of conscience and expression—every one of our rights reaffirms our belief in the equal political dignity of each individual, which is the fundamental principle of American life. Individual rights are a reminder, in the form of an institution, of the principle of self-sovereignty that is the starting point in our understanding of the basis for a just political society. By conceiving of rights as absolute, we reaffirm the unqualified political worth of every person, just by virtue of his being a person.\[186\] The purified language of rights makes it easier not only to distill but also to transmit these essential ideals of citizenship and to agree amongst ourselves upon what they are—no easy feat in a nation of some 300 million. It creates a lingua franca of legal relationships, one that lends itself to the development of a coherent unifying theory of what America is and of what it means to be an American.

Holmes and Sunstein tell us it is destructive to think of rights as “floating above time and place, or as absolute in character.”\[187\] Rather, they say: “[i]t is more realistic and more productive to define rights as individual powers deriving from membership in, or affiliation with, a political community, and as selective investments of scarce collective resources, made to achieve common aims and to resolve what are generally perceived to be urgent common

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\[187\] See Holmes & Sunstein, supra note 176, at 123.
problems.”

But to evoke Justice John Paul Stevens, “few of us would march our sons and daughters off to war to preserve the citizen’s” individual powers deriving from membership in, or affiliation with, a political community. Nor would we do so to protect individual powers deriving from society’s selective investments of scarce collective resources, made to achieve common aims and to resolve what are generally perceived to be urgent common problems. Freedom is who we are, and the absolutist rhetoric of rights is what makes us that way. It is a tempting, but dangerous, illusion to think that this country can survive without political poetry.

A nation needs her myths. This is no less true for a liberal democracy, founded on rationalist Enlightenment ideals, than for the more ancient civilizations of the Old World or the Far East. But our myths are not of the Romulus and Remus variety. Because we are a nation begotten in part by human reason, our myths celebrate the principles upon which our government is founded and the virtues needed to sustain such a government. At their most childlike, they tell us of George Washington and the cherry tree and Abraham Lincoln writing the Gettysburg Address on the back of an envelope. Those stories are not literally true, but are nonetheless succinct illustrations of certain undoubted verities: Washington’s character, Lincoln’s simplicity. More to the point, they tell us what we must know if we are to continue to expend our spiritual energies in the great experiment in human liberty launched more than two and a quarter centuries ago. “[M]en act not simply in response to some kind of objective reality,” historian Gordon Wood notes, “but to the meaning they give to that reality.”

Along with pioneers and cowboys, immigrants and activists, generals and foot soldiers, our talk about rights is part of the American story. Its truth lies not in its literal descriptiveness, but in its role in continually re instructing us in the self-evident propositions articulated by the Framers of our government, which assuredly are true. “The prominence of rights in the American imagination,” write Jack Rakove and Elizabeth Beaumont, “stems from their force as tools of moral and political suasion rather than from their abstract exquisiteness or ontological truth.” At the end of John Ford’s masterpiece, The Man Who Shot Liberty Valance, the newspaper editor in a frontier town succinctly captures America’s need for a narrative of democratic virtues that proceeds in human terms. “When the legend becomes fact,” he tells us, “print

188. Id.
189. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (holding that ordinances prohibiting concentration of “adult” movie theaters and bookstores do not violate the First Amendment) (“But few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”).
191. See Rakove & Beaumont, supra note 2, at 1866.
This is not to say that we should take liberties with facts when talking about rights. A nation that takes certain self-evident truths as its foundation cannot tolerate a program of deliberate deception. Rather, our pronouncements about rights must be viewed in the broader context of the ideas that animate our government. The legend of absolute rights is true because it attests to the inviolability of the larger principle that every citizen living under our flag is of equal value in the eyes of the law. We are not a society of castes or kings. Our rhetoric communicates this principle, and in doing so, it makes us freer. As our freedom is strengthened, our absolutist rhetoric becomes an ever more accurate statement not only of what we believe but of what we do. Thus, while it is true that rights may be compromised in practice, those compromises cannot be the last word on the subject of freedom. Of course, legal absolutes must from time to time give way in the face of certain exigencies. Such capitulations are not fatal to liberty, however, so long as liberty as a principle remains inviolate. The expression counts every bit as much as the action, and if the expression remains undefiled, the nation's belief in liberty can remain intact.

Every nation has a character, and if we are prevented from developing and expressing ours through the tropes of freedom and liberty, other themes, far less appealing, will inevitably come to replace them. Talk of inalienable rights was the breath that brought this nation to life and has sustained her for more than two centuries. It is hard to imagine a more misguided enterprise than that of shedding the vocabulary of unfettered freedom that has so long defined us as a people.

The second reason why absolute rights rhetoric cannot be so easily dispensed with is that it prevents the inevitable compromises that take place in the administration of our rights from destroying the rights themselves. The danger is this: once a right is consciously and explicitly subjected to infringement in situations where such infringements are considered necessary, the right risks losing whatever additional weight it is supposed to have. For one thing, it is difficult to assess what the value of a right is in the first place. For another, a proud acknowledgement that a right may be set aside in the face of competing considerations has a way of eroding the right's value entirely after enough exceptions have been made. Professor Charles Black, considering the question of absolutes and balancing in the 1960s, argued that although talk of absolute rights could never be taken entirely literally, it was still a valuable

192. THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962) (statement of Mr. Scott, Editor of the Shinbone Star).

193. Cf. Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 857 (1999) ("The right/remedy distinction in constitutional law serves to maintain the illusion that rights are defined by courts through a mystical process of identifying 'pure' constitutional values without regard to the sorts of functional, fact-specific policy concerns that are relegated to the remedial sphere.").
rhetorical device. To illustrate, he provided a hypothetical comparison of two fathers:

One says, "My children have an absolute right to my presence and help." The other says, "Few personal problems call for so much delicate balancing as the process of deciding, from day to day, just how much my children are to have of my presence and help, as against other claims on my time and energy." The first man, if pressed, would have to admit that he could not be with his children all the time, or help them in every imaginable way, and even that it might not be a good thing if he could. He would admit, moreover—as a logical consequence of this practical admission—that he must first define his rather vague terms, before he can make out the contours of his obligation to his children, and that this definitional process can involve some pretty delicate balancing. The second man, these admissions made, would of course have to say, "All right, you may call your obligation 'absolute' if you like, since in defining it you go through the same sort of balancing process as I do when I weigh my obligations to my children against competing claims." Nothing is left at issue. But which one would you bet on for being at home the most evenings, when the hour rolls around for the bedtime ritual?  

Professor Black's example shows how overstatement can, paradoxically, produce a more "accurate" result than a coldly rational reckoning of costs and benefits. Moreover, it may be that expression of a right in absolute terms reduces not only the likelihood that courts will fail to vindicate the right, but also the likelihood that the right will be violated in the first place. In that sense, it is a more cost-effective enforcement strategy than a straightforward acknowledgement of cost-benefit balancing.

Professor Black's observations were prompted by the emphatic absolutism of Justice Hugo Black, who consistently denounced attempts to subject the First Amendment's freedom of speech guarantee to an explicit balancing against competing social interests. Much ink was spilled over the position that Justice Black espoused, but there can be little doubt that its effect has been to bolster judicial protection of the First Amendment significantly, not just in Justice Black's own day, but decades into the future.


195. Holmes and Sunstein do acknowledge this insight. See HOLMES & SUNSTEIN, supra note 176, at 102–03 ("Perhaps a (misleading) emphasis on the absolute character of free speech will stiffen the spine of citizens when the pressure for (unjustified) censorship is especially great.").


197. See id. at 1330–31.

198. See supra notes 18–22 and accompanying text.
Consider Chief Justice John Roberts’s opinion in *FEC v. Wisconsin Right to Life*.

Chief Justice Roberts admitted that the Supreme Court had long ago rejected an “absolutist interpretation” of the First Amendment. Nonetheless, he argued, the text of the Amendment itself was a reminder of the importance of its guarantee. While existing precedent had established that a particular sort of expression is not protected by the First Amendment, the Amendment’s firm language persuaded Chief Justice Roberts that the exception should be construed narrowly. “[W]e give the benefit of the doubt to speech, not censorship,” he explained. “The First Amendment’s command that ‘Congress shall make no law . . . abridging the freedom of speech’ demands at least that.”

The text and tone of the First Amendment helped to ensure that it was accorded the special weight it deserves, rather than being treated as simply another interest to be thrown into the hopper of what is an endless and uncomfortably political weighing act. In short, while rights rhetoric provides rights practice only an imperfect suit of armor, it is a suit of armor nonetheless.

The third reason why the absolute rhetoric of rights is valuable is because it helps to stimulate the kind of enthusiasm among rights holders for their rights that is necessary for rights to work properly. For one thing, it shores up our confidence that we may rely upon our rights and exercise them. Rights, after all, are meant to establish more than nominal freedom. A free people must not only be free; it must feel free. Totalitarian governments often proclaim expansive liberties, but those who live beneath their rule know better than to expect to be able to claim them. Absolutist rhetoric dispels the suggestion that our rights are simply a matter of administrative discretion or grace.

Our rights talk also helps ensure that we are vigilant guardians of our freedoms. It has been said that rights are “a species of moral property, belonging to the rights holder.” In a sense, legal rights are laws that are owned by particular citizens, rather than the government, since it is the citizen, rather than a government prosecutor, who seeks to enforce any given right. However, whereas a government prosecutor has plenty of incentives—public

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200. *Id.* at 482.
201. *Id.* (ellipsis in the original).
202. This metaphor is taken from Professor Frederick Schauer. “Wearing a suit of armor would protect me against arrows, knives, blackjacks, fists, and small bullets, and thus it is plain that wearing a suit of armor provides me with a degree of protection I would not otherwise have had,” he writes. “But that suit of armor does not protect me against large bore ammunition, bombs, or artillery fire and is as a result less than totally protective.” Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993). The protection a right affords may not be impregnable, but it must be significant if the right is to have meaning.
duty, paychecks, promotions, and so forth—to uphold public laws, private individuals are not always remunerated for their efforts. Absolutist rhetoric helps make up for this deficit, not only by reassuring rights holders that they will indeed reap the benefits of their rights, but also by fostering an independent love of rights for their own sake. The inspiring language of rights makes us zealous defenders of our rights, even when we do not perceive any material benefit that will result from their assertion.

Fourth, strong rights language promotes the recognition of new areas of freedom, both in the identification of new sorts of rights and in the extension of existing rights to other people. In practice, we may not be able to realize the absolute character we imagine rights to have, but practice is not unaffected by speech. Absolutist understandings of the First Amendment led to the protection of new forms of expression and to the protection of religious groups who might once have been considered outside the domain of the Constitution’s guarantees of religious freedom.²⁰⁵

Perhaps the best example of the ability of absolute rhetoric to expand the frontiers of freedom is the way in which the uncompromising language of rights in our constitutive documents and organic laws led to the overthrow of government-sponsored oppression of racial minorities, first with the abolition of slavery and later with the dismantling of Jim Crow laws. In his Pulitzer Prize-winning book, The Metaphysical Club, Louis Menand tells of the pre-World War II emergence of pragmatic philosophy, which treats every question as a matter of degree and context and denies the existence of absolute truths.²⁰⁶ Pragmatism, however, was far too watery a soup to sustain our nation’s moral appetite through that great war, and it could not provide a vocabulary adequate to criticize the atrocities perpetrated by the Third Reich. Indeed, as Menand explains, the jargon of pragmatism and the attitude it inspires simply are not of the sort that would produce the achievements of which we are today most justifiably proud as a nation. “Martin Luther King, Jr. was not a pragmatist, a relativist, or a pluralist,” Menand writes, “and it is a question whether the movement he led could have accomplished what it did if its inspirations had come from [John] Dewey and [Oliver Wendell] Holmes.”²⁰⁷

²⁰⁵ Compare County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 590 (1989) (“Perhaps in the early days of the Republic [the words used in the First Amendment] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”’), with JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 594 (1851) (The “real object” of the First Amendment “was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects. . . .”). See Steven G. Gey, More or Less Bunk: The Establishment Clause Answers that History Doesn’t Provide, 2004 B.Y.U. L. REV. 1617, 1624 (2004) (“Modern paens to religious ecumenicalism notwithstanding, this country has a long and sordid history of viewing some faiths as ‘more equal’ than others.”).


²⁰⁷ Id. at 441 (“The great movement to secure civil liberties in the United States during
The rhetoric of rights enables us to chart a blueprint that allows future generations to recognize freedoms that we are unprepared to recognize today, even though we know we should. Deploying the language of absolutism can in many ways be a conscious strategy to preserve a purer vision of justice for a more courageous posterity. The language of inalienable rights marks the slavery compromises in the Constitution as compromises—noxious departures from the spirit of the document that must be rectified as soon as possible. Without such concessions, there would have been no United States; without a clear recognition that these were concessions, there could be no argument for their abandonment.

It must be said that not every new freedom that might be proposed is worthy of recognition, and not every qualification of our rights constitutes a blemish upon them. Liberty must not be confused with license, and no right is so absolute that it can escape its own definitional limits. But this nation’s greatness arises from the character of her people, and that in turn is a product of the freedom that her people have enjoyed. Our rights rhetoric has helped ensure that our freedom continues to grow, rather than contract, and that we become ever more mindful that we are each equal members in dignity of our political society.

B. Why We Must Qualify Rights in Practice

If the language of rights is indispensable, perhaps it is our practices that are in need of reform. That, at any rate, is the position that a number of critics

the Cold War arose out of a religious community, black Southern Baptists, and it was founded on the belief that every individual has an inalienable right to those freedoms by virtue of being human—precisely the individualism that [Oliver Wendell] Holmes and [John] Dewey felt they needed to discredit.

208. See Henry Wiencek, Yale and the Price of Slavery, N.Y. TIMES, Aug. 18, 2001, at A15 ("If the founders had such misgivings over slavery, how is it that they allowed slavery to continue? The answer is not that they didn’t know any better, but that they kept slavery so the Southern states would join the union. It was a transaction, a deal, just like the deal that put the national capital on the Potomac in exchange for the federal assumption of states’ debts. . .").

209. Abraham Lincoln strenuously denied that the reference to “all men” being created equal in the Declaration of Independence was meant to exclude slaves. He assailed such a notion for “having a tendency to dehumanize the negro, to take away from him the right of ever striving to be a man.” POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 344 (1895). The founders laid the groundwork, he said, to put slavery on the course of “ultimate extinction.” Id. at 270. He continued:

It is not true that our fathers, as Judge [Stephen] Douglas assumes, made this government part slave and part free. Understand the sense in which he puts it. He assumes that slavery is a rightful thing within itself,—was introduced by the framers of the Constitution. The exact truth is, that they found the institution existing among us, and they left it as they found it. But in making the government they left this institution with many clear marks of disapprobation upon it.

Id. at 347; see also HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 265 (2000) (attributing to Lincoln the view that because of the power of the federal government to arrest the spread of slavery, the Constitution’s compromise on the issue of slavery was ultimately “in the interest of the slaves themselves.”).
have taken. In various ways, and in various contexts, they argue that America’s failure lies in her practical compromises. Our national heritage carries the stains of our manifold hypocrisies, they suggest, and the path to redemption lies in discarding our tawdry compromises in favor of the full promise of our rhetoric. Like the critics of rights rhetoric, the critics of rights practices come from both the political left and the political right. Some of the critics are shrill; others thoughtful. Some are on the fringes; others are the very definition of respectability. Although they may not be inclined to make common cause, the critics are united by their condemnation of the United States, a stance grounded in disappointment over the gap between our words and our actions when it comes to individual rights. These critics overlook, however, the many practical reasons that justify and necessitate rights compromises.

I. The Critics of Rights Practices

Taking their cues from the rhetoric of rights, critics argue that our rights practices must match the expansive promise of our rhetoric. In an article entitled *Hubris and Hypocrisy*, for example, Professor Anne-Marie Slaughter writes that she shares the concerns of the European students she teaches at Harvard Law School, who question how American talk of democracy and equal opportunity can be squared with, among other things, “the refusal of American taxpayers to pay for decent schools or health care for vast numbers of American citizens.”

She goes on to argue that America has betrayed her democratic ideals by failing to consult sufficiently with other nations on matters of foreign policy. Other critics have claimed that lack of public support for more robust measures to combat illegal housing discrimination demonstrates that America is “fundamentally hypocritical and self-deceiving” on issues of race.

The critics of our rights practices are inclined to define rights not only as negative prohibitions on the state, but also as positive entitlements. They likewise ignore the values displaced by the vindication of the rights they favor. Thus, the ACLU fights to keep children in public schools from being exposed to fellow students at prayer on First Amendment grounds. The same organization defends the rights of adults to sell child pornography and of


211. *Id.*


children to advocate drug use. Whether child welfare will suffer is not the relevant question to them. It is indefensible, the organization claims, to strip children or adults of constitutional protections. Whatever the context, any perceived dilution of rights is dutifully decried as hypocrisy. Professor Peter Singer is among the many who have denounced the lesser protection that rights may be given in the context of national security concerns. In the eyes of the world, he states, the United States will seem guilty of "the deepest hypocrisy" for detaining several hundred prisoners at Guantanamo Bay without offering them the procedural rights of run-of-the-mill criminal defendants.  

Critics have not limited their fire to compromises in the definition of rights and limitations upon their substantive reach. They have also complained about limitations on the ability of individuals to seek recompense for rights violations. Professor Akhil Amar has asserted that the rights set forth in the U.S. Constitution not only establish what the government may and may not do, but also embody a principle of full remediation. Whenever the government violates an individual right, he says, it is required to "undo the violation by ensuring that victims are made whole."  

Many critics of compromise go much further, extrapolating from existing rights to support what can charitably be described as novel claims. Some have argued that the right to privacy established in Roe v. Wade may entail the right to engage in prostitution. "If Roe v. Wade gave women the right to privacy and the right to do with her body as she chooses, why isn't prostitution legal?" asked one litigant who challenged the constitutionality of Florida's anti-prostitution laws. The ACLU shared her view. Others have argued that the Thirteenth Amendment's prohibition on slavery and involuntary servitude makes the imposition of income taxes unconstitutional; that the Second Amendment confers a sweeping right to own weapons; that virtually any

215. See Brief of Respondent, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278) (filed by the ACLU Foundation, among others).  
217. Amar, supra note 55, at 1427.  
221. As the Florida ACLU, which supported her case, put it, "The right to privacy should afford an individual the right to exploit their body for monetary gain. . . . Football players do it, boxers do it. Why can't a prostitute?" Id.  
222. See, e.g., LaRue v. United States, 959 F. Supp. 957, 959 (C.D. Ill. 1997) (finding plaintiffs' claim that income taxes violate the Thirteenth Amendment "absurd").  
223. See, e.g., Roy Lucas, From Patsone & Miller to Silveira v. Lockyer: To Keep and Bear Arms, 26 T. JEFFERSON L. REV. 257, 275, 293 (2004) (stating that "[t]here is a fundamental Second Amendment right to keep and bear arms, expressed by the Founders in relatively absolute
manner of zoning restriction violates the Due Process and the Takings Clauses of the Fifth Amendment;\textsuperscript{224} and so on. Still others take a less libertarian tack and claim that the government should be required to incur the expense when people exercise various constitutional rights, such as the right to obtain an abortion.\textsuperscript{225}

2. The Underestimated Virtues of Rights Practices

Some of the aforementioned positions are extreme. Others provide the subject of thoughtful and legitimate debate. All share the common core of dismay at the fact that there is a gap between rhetoric and practice when it comes to individual rights. The gap is used as proof that America has failed to live up to her own proclaimed ideals. As we have seen in Part II.A., the rhetoric of rights is a priceless part of our national heritage that we must take care to preserve. But attempting to pump up the implementation of rights until the gap disappears is no solution either. The absolute character of rights in our rhetoric neither can nor should be replicated in practice. Rights cannot be compelled to lead a single life.

The first set of limitations on closing the gap between rights rhetoric and practice is intensely practical. While any single one of the limitations would be significant on its own, together they are formidable. As a threshold matter, every right must be limited by the terms of its own definition. Thus, for example, the prohibition on laws “abridging the freedom of speech” does not reach beyond laws that relate in some way to “speech.” Many laws arguably affect speech in some remote fashion,\textsuperscript{226} and it is simply implausible to imagine that the First Amendment nullifies all such laws. To take a simple example, a person cannot expect to be immune from a speeding ticket simply by citing the First Amendment, without claiming that his conduct was somehow expressive. Even if there were an expressive component to the driver’s speeding—if, say, he claimed that the reason he was driving so fast was to protest what he sees as an unjust speed limit or if obeying the speed limit meant he would have been late to speak at a political rally—he would still be stuck paying the ticket.\textsuperscript{227}

Furthermore, the need to circumscribe the reach of individual rights is made difficult by the complexities of interpretation. Where the terms of the terms” and criticizing decision to allow mandatory registration of sawed-off shotguns in \textit{United States v. Miller}, 307 U.S. 174 (1939)).

\textsuperscript{224} See, e.g., \textit{Harding v. County of Door}, 870 F.2d 430, 432 (7th Cir. 1989) (“We conclude by reminding potential litigants that the federal courts are ordinarily not vehicles to review zoning board decisions.”).


\textsuperscript{227} This example is taken from Jed Rubenfeld, \textit{The First Amendment’s Purpose}, 53 \textit{STAN. L. Rev.} 767, 772 (2001).
right are only vaguely spelled out, there is much discretion available to those charged with its enforcement. What is a reasonable construction of the right in the eyes of one interpreter may be an evisceration of the right in the eyes of another. This argumentative nature of rights, almost endless in its variations, poses problems of enforcement, especially with respect to retrospective enforcement. And it is unrealistic to think that the meaning of such capacious terms as speech, liberty, property, or equality, which make up much of the core rhetoric of rights, will either now or in the future be amenable to complete consensus.

Beyond these threshold interpretive difficulties, there are a number of reasons why rights should and often must be qualified in practice. First, it is often impossible to completely vindicate rights. For example, numerous commentators point out that money damages, while necessary, are a poor substitute to a plaintiff suffering from paralysis. To take another example, the Supreme Court held that the execution of any person under the age of eighteen violated the Eighth Amendment's prohibition against "cruel and unusual punishments." But it is impossible to provide a remedy to juveniles who had been put to death prior to the Court's ruling. This is an extreme example of a ubiquitous principle. Tragically, we cannot give back years of freedom to someone wrongly convicted and imprisoned. We can try to prevent the repetition of a wrong, but we have yet to invent a time machine that will enable us to travel backward and prevent past violations of rights from occurring.

I do not mean to be unfeeling in acknowledging that no society on earth has been or will be seamless in its perfection. Rather, we live in a broken and inescapably fallen world, where remediation of every single violation of every single individual right is literally impossible. Moreover, we cannot render the exercise of rights completely costless. A person may be free under our Constitution to render a controversial opinion, but, alas, the law cannot render him free from all consequences.

A criminal defendant has a Fifth Amendment right not to be forced to testify against himself. A prosecutor cannot comment upon a defendant's choice not to testify, but that does not mean that a jury

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228. See Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L.J. 535, 569 (1995) ("It is no easier to return the plaintiff's negligently crushed left arm than it is to return him to oblivion. Tort damages are only 'compensatory' to the extent that they award monetary remedies to someone who has suffered a wrong."); Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 787 (1987) (arguing that the "‘make whole’ principle on which compensation for tort injuries is founded is a ‘manifestly unachievable goal’"); see also Cowe ex rel. Cowe v. Forum Group, Inc., 575 N.E.2d 630, 634 (Ind. 1991) (discussing "the impossibility of calculating compensatory damages to restore a birth defective child to the position he would have occupied if not for the defendant’s negligence").


will not draw inferences from the defendant's silence. It is hard to imagine how it could be otherwise. Instructing the jury not to take the defendant's refusal to testify into account would probably just draw the jury's attention to that fact, rather than direct it away. Or to take another example, if the Supreme Court makes a mistake in its interpretation of the Constitution, there is nothing further that can be done, at least in the case at hand.\textsuperscript{231} Our laws are made, enforced, and interpreted by human beings, and since we cannot remake human nature, we cannot close the gap between rights in rhetoric and rights in practice. A system where the exercise of rights carries no penalty and where the violation of rights brings total remediation does not exist, at least not in this galaxy. So it is no black mark upon America that rights in our country lead their separate lives.

Second, in many cases, our rights may be implicated only nominally. Child pornography as a category receives no First Amendment protection because, at least in part, the Court says that the "value" of such expressions "is exceedingly modest, if not \textit{de minimis}."\textsuperscript{232} The further concept of a rights violation not serious enough to be recognized (to be deemed harmless or the like) is a concession to the inevitability of error. In both cases, the initial rights are thought to be formulated too broadly, and courts recognize an implied exception in situations where our sense of liberty or justice is not measurably undermined. These principles are not uncontroversial, but surely the debate over the \textit{de minimis} principle must be one of degree and not of kind. Only in rhetoric are rights properly pure; in practice, the perfect assuredly becomes the enemy of the good.

Third, absolute rights must necessarily give way when in practice they come into conflict with one another. As noted above, the common law of property imagined that every property owner enjoyed a "sole and despotic dominion . . . in total exclusion of the right of any other individual in the universe."\textsuperscript{233} At the same time, an owner's rights were qualified by the maxim "\textit{sic utere tuo, ut alienum non laedas}"—so use what is yours as not to harm that of others.\textsuperscript{234} Rights inevitably bump up against one another, and absolutist rhetoric does not provide a means to reconcile the disputes. Thus, the right to life of an unborn child comes up against a woman's right to control her reproductive autonomy.\textsuperscript{235} The right of a shopping center owner to control his

\textsuperscript{231.} See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("We are not final because we are infallible, but we are infallible only because we are final.").


\textsuperscript{233.} WILLIAM BLACKSTONE, 2 COMMENTARIES, \textit{supra} note 70, at *2; see \textit{supra} notes 71--73 and accompanying text.


premises runs into the right of protesters to engage in free speech.236 Rights to
the accommodation of religious practices clash with the Establishment
Clause.237 The right to a fair trial comes up against the freedom of the press.238
And so on. In a country of over 300 million people, it is ludicrous to pretend
that people or their rights exist as islands. We might articulate a principle that,
as Professor Zechariah Chafee once put it, "Your right to swing your arms ends
just where the other man's nose begins,"239 but in a great many cases, it is
difficult to tell which is the nose and which is the swinging arm. At any rate,
every putatively absolute right is subject to limitation when confronted with an
opposing right of similar magnitude.

Fourth, rights are often overridden because they come up not only against
other rights but also against competing social interests. The most obvious of
those interests is the basic state police power to protect the health, welfare,
safety, and morals of the people.240 Those interests assuredly limit the exercise
of rights, but it is to assert such interests that the government exists. And there
are other examples. The right to be free from racial discrimination has been
held to be subject to the government's ability to demonstrate a compelling state
interest, such as remediation of past discrimination.241 It would have been
hopelessly extravagant for the Warren Court, in formulating the Miranda
doctrine,242 to have declared that "every confessed criminal then in custody had
to be set free" if he had not been read his Miranda rights at the time of his
arrest.243 Instead, the Court's ruling had prospective application only because,
from the standpoint of societal safety, any other result would have been
intolerable.244 Balancing rights against interests entails special dangers of
judicial subjectivity, but the venerable metaphor of the scales of justice reminds
us that this exercise is nothing new. Over a century ago, Justice John Marshall

and Establishment Clauses of the First Amendment "are frequently in tension" but that "there is
room for play in the joints between them.") (internal quotations omitted).
239. Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 957
(1919).
240. See Village of Euclid v. Amler Realty Co., 272 U.S. 365, 392 (1926) (noting a
municipality's power to promote the "health, morals, safety and general welfare of the
community").
opinions might have suggested that "remedying past discrimination is the only permissible
justification for race-based governmental action").
243. See Jeffries, supra note 9, at 98.
244. See id. at 98-99 (discussing application of since-abandoned non-retroactivity doctrine
and opining that the ruling would not have been issued if it were required to have retroactive
effect). Miranda was explicitly held to have purely prospective relief in Johnson v. New Jersey,
384 U.S. 719, 732 (1966). The Supreme Court noted that a contrary decision "would require the
retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with
previously announced constitutional standards." Id. at 731.
Harlan, in an opinion upholding a mandatory vaccination program, stated what should have been obvious when he noted that every person is subject to manifold restraints for the common good: "Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy."\textsuperscript{245}

Fifth, and perhaps most importantly, principles like federalism and the separation of powers limit the enforcement of rights. Rights practicality reflects above all the dispersal of authority within our constitutional system. Rights are not defined absolutely by one branch of one government for all time. They are instead hammered out by the three branches of dual sovereigns at many different times. And oh, how they vary. To the extent that state or local authorities, rather than the federal government, are given the power to define and enforce individual rights, rights will vary from place to place. A marriage valid in one state, for instance, might not be valid in another.\textsuperscript{246} Rights also vary over time. The separation of powers in our Constitution, and in particular, the exclusive grant of legislative power to Congress, ensures that rights are generally subject to legislative modification. Our democratic values presuppose that the art of compromise on many subjects, including rights, is often best practiced by representative bodies, whose diverse and accountable nature cannot be replicated in the courts. Not only can the legislative branch alter the rights it creates by statute, but it can also change the operation of the courts that enforce individual rights, by altering their jurisdiction, rules of procedure and evidence, the remedies available to them, and so forth. This is not, of course, to say that rights compromises should escape judicial review. But even within the federal judiciary, differences of opinion among different circuits often result in what are in effect different rules pertaining to rights in different parts of the country.

The Constitution also limits judicial enforcement of rights.\textsuperscript{247} The list of countervailing interests to the exercise of rights runs on and on. The need for judgmental latitude in executive action,\textsuperscript{248} the need to conserve scarce public

\textsuperscript{245} Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

\textsuperscript{246} See Chambers v. Ormiston, 935 A.2d. 956 (R.I. 2007) (holding that a Rhode Island family court's authority to divorce married couples does not extend to same-sex marriages conducted in Massachusetts); Restatement (Second) of Conflict of Laws § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."); see also Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921, 946 (1998) (discussing extent of interstate recognition of marriages alleged to violate local policies respecting mental capacity, polygamy, incest, and, at one time, miscegenation).

\textsuperscript{247} The Constitution may restrict the jurisdiction of a court to hear a claim. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The doctrine of sovereign immunity limits suits against states in both federal and state courts. See Alden v. Maine, 527 U.S. 706 (1999); Edelman v. Jordan, 415 U.S. 651 (1974). Other provisions, such as the Due Process Clause, prevent adjudication of a plaintiff's claim if jurisdiction over the defendant's person cannot be obtained. See Pennoyer v. Neff, 95 U.S. 714 (1877).

\textsuperscript{248} See Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982) (reasoning that public officials
resources, and the need to proceed with some promptness toward a decision are all reasons why rights are curtailed. In qualifying rights, the American legal system embodies a sturdy and durable practicality that is every bit as valuable to society as the aspirational force of rights rhetoric. The dual dimensions of rights are complementary, and both are here to stay.

C. The Dual Lives of Rights

Think, for a moment, of a navigator attempting to find his way through wild and unknown country to a far-off destination. To complete his journey, the navigator needs two things: a compass and a map. Each of them is an indispensable part of his quest—precisely because each is different from the other. The compass is the starting point, for it lets the navigator know which way his destination lies. But the navigator cannot proceed as the crow flies; there may be mountains and rivers in his way. So while the compass needle points north toward his eventual destination, his map tells him he must first march east to a valley or a bridge. The compass alone is inadequate, but so is the chart, for without the compass, the navigator is literally disoriented and the map can do him no good.

Similarly, rhetoric and practice are complementary and reinforcing aspects of rights. Like the compass and the map, each has a crucial function to perform, and each depends on the other for its ability to perform it. Rights are both a statement of where we are going and an account of where we are. The strong rhetoric of rights is necessary for us to be able to tolerate the compromises that the implementation of rights inevitably entails. Without it, there could be no rights, for the practices of balancing would eviscerate the rights themselves. It is no accident that the modern Supreme Court’s foremost advocate of balancing, Justice Felix Frankfurter, demonstrated particular reluctance to uphold individual rights in cases dealing with freedom of speech, freedom of should be shielded from liability for rights violations that are not clearly established, even where malice is alleged, because inquiries into subjective good faith can be “peculiarly disruptive of effective government”).

249. See Alden, 527 U.S. at 709 (arguing that the doctrine of state sovereign immunity protects states from suits that “may threaten their financial integrity” and whose satisfaction may necessitate “the most sensitive and political of judgments” regarding “access to the public fisc”).

250. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (stating that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”); see also Mathews v. Eldridge, 424 U.S. 319 (1976) (balancing risk of erroneous deprivation of right against cost of implementing more protective procedures for Due Process purposes).

251. See Dennis v. United States, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring in the judgment) (upholding conviction of communist party organizers and rejecting absolutist approach to the First Amendment because “[s]uch literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future.”).
religion,\textsuperscript{252} and school desegregation.\textsuperscript{253} The enterprise of balancing doesn’t really work without having in the background the understanding of rights that springs from our celebration of rights as absolutes.

At the same time, the rhetoric of rights would be equally intolerable without the compromises that result when we put those rights into practice. The absolute protection of rights is literally impossible in some situations, and profoundly undesirable in others. To take a simple example, we would have no real liberty unless our government had the ability to jail dangerous criminals. A lawless country is not a free one. Incarcerating a person deprives him of liberty, but if we could not do so, we would lose not only our own freedom, but equally importantly, our affection for it. In the long run, our practical instinct for survival will not permit us to sacrifice ourselves to a pantheon of abstract and unrealistic gods. Liberty depends on the ability of government, in some cases, to take it away.

Is this a contradiction—an Orwellian admonition—that “freedom is slavery”? No. Because the critical caveat is: “in some cases.” Rights lose their reality if they are not subject to exceptions, but they lose their meaning if those exceptions are not genuinely exceptional. It is the combination of aspiration and application that defines a right, and that is why the dual life of a right allows it to exist. François de La Rochefoucauld famously quipped that “[h]ypocrisy is the homage which vice pays to virtue.”\textsuperscript{254} But when it comes to the rhetoric of rights, the situation is more benign than even La Rochefoucauld suggests, because the gap between words and deeds isn’t really hypocrisy at all. We must continue to dream our dreams and we must continue to live our lives. So we beat on, as F. Scott Fitzgerald said, like boats against the current.\textsuperscript{255} We

\textsuperscript{252} See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (opinion of Frankfurter, J.) (rejecting claim that First Amendment requires that public school students raising religious objection be excused from compulsory flag salute); see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (rejecting claim that First Amendment requires that public school students be permitted to abstain from compulsory flag salute on freedom of speech grounds).

\textsuperscript{253} Frankfurter’s hesitance to hold racial segregation in public schools unconstitutional has been documented in a number of sources. See Michael J. Klarman, Civil Rights Law: Who Made It and How Much Did It Matter?, 83 Geo. L.J. 433, 438, 440, 442–43 (1994) (reviewing Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936–61 (1994)) (characterizing Frankfurter’s initial stance on the matter as “intensely ambivalent” and describing Frankfurter’s claim to have “filibustered” a decision in Brown during the 1952 term in order to prevent a ruling that desegregation was unconstitutional); see also Memorandum of William O. Douglas (Jan. 25, 1960), in The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas 169 (Melvin I. Urofsky ed., 1987) (claiming that Justice Frankfurter had stated in 1960 that he would have upheld school segregation if the issue had reached the Court in the 1940s because “‘public opinion had not then crystallized against it’”).

\textsuperscript{254} Le Duc de La Rochefoucauld, Maxims 65 (Kenneth Pratt trans., Haworth Press 1931) (1678).

have constructed a durable legal institution, designed to move amphibiously
across the waters of our aspirations and the dry land of our daily lives. As an
institution, the duality of rights is as imperfect as the human species, but no
more so. And that, in the last analysis, is quite an accolade.

I recognize that the duality of rights may strike some Americans as deeply
unpalatable. For many, this duality has been a source of profound
disappointment in our country’s performance. To some, the fault lies with the
rhetoric. According to Professor Sunstein, Americans continue “to urge,
ludicrously, that our rights are best secured by getting government ‘off our
backs,’” when, in reality, all rights necessarily entail government involvement
and expenditure. As a result, he says, “the United States seems to have
embraced a confused and pernicious form of individualism.” Until America
is rhetorically honest, he claims, the country will continue to pursue a distorted
social vision. However, with other critics, the fault is in the practice.

Professor Slaughter, after listing her various complaints, concludes that
America has failed to abide by its ideals and invites her readers to question
whether they can “still be sure that American power is a force for good.” She
goes so far as to state that she felt so “tainted and ashamed” in the wake of
prisoner abuse scandals in Iraq that she “hesitated to show [her] passport” when
passing through customs overseas. Not every critic of the dual lives of rights
reacts so strongly, but they do share a common sense of frustration,
disappointment, and often, disillusion.

It need not be so. If rights rhetoric and rights practice both embody their
own distinct set of virtues, then the distance between them need not always be
cause for derision. The gap between rights rhetoric and rights practice, so often
a justifiable occasion for disillusionment throughout our history, need not
remain so for all time. The question is whether the gap’s undoubted historical
malevolence will prevent us from ever recognizing its present value. The gap is
not inevitably a matter of America leading her people astray or failing to live
up to her ideals; it is the natural and useful foundation for our future legal

256. Cass R. Sunstein & Randy E. Barnett, Constitutive Commitments and Roosevelt’s
Sunstein’s critique is manifest. He takes issue with the practices of “endor[ing],” “claim[ing],”
“insist[ing],” “complain[ing],” “urg[ing],” “object[ing],” and “argu[ing]” in connection with
various aspects of rights. Id. at 215–16.

257. Id. at 215.

258. Admittedly, there is a certain coalescence between critics of rights rhetoric and critics
of rights practices. Some, if not all, critics of the rhetoric of rights seek to see it changed because
of its effect on rights practices. Similarly, critics of our practices often seek to impose a particular
interpretation upon the rhetoric of rights, which might be re-characterized as altering the rhetoric
itself. That Sunstein and Slaughter both advocate positive conceptions of rights is a testament to
this reality. But regardless of the direction from which the issue is approached, the underlying
assumption is that rhetoric and practice must match.

259. Slaughter, supra note 210, at 4.

260. Id.
order. Rather than being a source of shame, the dual lives led by rights can become a source of national pride.

Some of the most famous phrases in our law capture this duality. Justice Jackson’s observation that the Constitution is not “a suicide pact” leaves room for the recognition of rights in a manner that embodies practical compromise.\textsuperscript{261} Justice Cardozo’s use of the phrase “ordered liberty” highlights the duality that must define a viable legal regime.\textsuperscript{262} And quite beyond law, both pragmatism and aspiration are indelible parts of the American character. The iconic historian, Frederick Jackson Turner, once cataloged what he saw as the pragmatic strains in the American mind: “[t]hat coarseness and strength combined with acuteness and inquisitiveness; that practical, inventive turn of mind, quick to find expedients; that masterful grasp of material things, lacking in the artistic but powerful to effect great ends . . .”\textsuperscript{263} The knitting together of an audacious idealism and a strict adherence to common sense is what defines this country. As John F. Kennedy observed, the American is by nature “experimental, an inventor and a builder who builds best when called upon to build greatly.”\textsuperscript{264}

Those who settled the West had their dreams, but knew how to cope with the elements. Soldiers died for American values, but survived through American ingenuity. America is a hardheaded country as well as high-minded one. The dual lives of rights thus embody not only the duality of law, but the duality of the American character.

Those who see in America only a prolonged record of falling short perform in one sense a valuable service. Their freedom to proclaim their disillusionment from every rooftop is itself a monument to freedom that no mason or carpenter could ever build. Their dismay forces the nation into a continual process of reexamination, and that can only be for the good. I suspect that affection for America is expressed in many ways, and bemoaning the dual lives of our most precious rights may be among them. In one sense, the dismay is understandable. Absolutist rhetoric often begets an equally absolute response. The heights of ideals and the depths of disillusionment often follow one another like night does day.

And yet this basic failure to appreciate the fact that rights naturally and inescapably lead dual lives has led our culture to states of alienation that deny America her due. While we must never stop questioning whether our compromises go too far or whether they are the proper compromises to make, we must equally guard against imagining that our compromises betray or invalidate the rhetoric of rights. For, in doing so, we come perilously close to

\textsuperscript{261} \textit{Terminiello v. Chicago}, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
\textsuperscript{263} Frederick Jackson Turner, \textit{The Significance of the Frontier in American History} (1893), \textit{reprinted in Rereading Frederick Jackson Turner} 59 (John Mack Faragher ed., 1994).
flipping America’s highest ideals on their heads. The more the nation aspires
to, the more it can be said to be making promises that it will never entirely
keep. Critics too often take the gap between rhetoric and practice as a sign that
America has not simply failed to live up to its aspirations, but that it has failed
even to aspire. “Intellectual and emotional commitment to an idealization of a
society is no substitute for some serious attachment to the actual one,” as one
scholar has put it.265 The process of realizing our ideals entails tradeoffs,
compromises, and imperfect solutions, and, like the sun, our ideals “should
never be contemplated directly,” but “[o]nly through the protective lens of this
abiding truth.”266

There is a distinction to be made between disagreements over particular
curtailments of rights on the one hand, and more general condemnations of the
entire system on the other. In specific instances, rights practices may well do
too little. But it is one thing to criticize, say, capital punishment discreetly, and
quite another to conclude that America as a whole is not serious about rights or
about the ideals for which they stand. There is value in keeping disappointment
focused, not only because it is more accurate and precise, but also because the
practice of constantly harping on the very institution of rights compromises is
demoralizing. Parents know this (good parents, at any rate). A parent taking
issue with a child’s behavior knows not to turn the particular criticism into a
broadside against every aspect of the child’s character. Spouses similarly learn
to keep their disagreements from leaping all bounds. There is nothing to be
gained from bringing up old grievances and slights in the course of every
particular dispute. Coaches learn that one bad flaw or game does not discredit
the whole athlete, and film directors understand not to write off the talents an
actor does possess by dwelling on the ones he does not.

So should the criticism of rights practices be quick to go broadside? Should we leap to the conclusion that the system is broken, that every potential
shortcoming is renewed evidence of that fact, and that the structure of ideals on
which the enterprise of rights is built is a charade? With every charge of
hypocrisy, our nation is put through a kind of show trial, the verdict inevitable
and the sentence vengeful and humiliating. These costs to our country are as
real as those that follow from a gap between rights rhetoric and practice that is
too wide.

CONCLUSION

In 1936, Supreme Court Justice Harlan Fiske Stone expressed perhaps the
most important tenet of the new learning that had already begun to transform
American law. “[L]aw is not an end,” he declared, “but a means to an end.”267

266. Id.
It is that idea, borrowed from the traditions of German philosophy and jurisprudence, which led to the gradual supplanting in legal discourse of "rights" talk with a new vocabulary of "interests." Anglo-American law has always had a healthy regard for practicality, and prudence was a virtue every bit as precious to the revolutionaries who founded this nation as the courage to stand up for the inalienable rights of man. But the emergence of an understanding of law as simply an analysis of interests promised to go a step too far. Justice Stone was right that the law is a means to an end, but he was wrong to suppose that it was not also an end in itself. The law is an instrument for obtaining what is good, but it is also an expression of certain goods themselves. In the apt words of Stone's colleague, Justice Louis Brandeis, "[t]hose who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."

Rights rhetoric reaffirms the truth that men like Stone mistakenly thought they could transcend. As Walt Whitman noted, we "contain multitudes." If we are not a single whole ourselves, why should we expect our rights to be? Our complexity is the source of so much of our nobility; our variousness gives us so much of our strength. Some dimensions of ourselves are useful for some purposes; others are useful for others. We applaud these features in ourselves, and we should do the same for our rights. Rights change character as they shift from context to context. So do we all.

Duality is not foreign to our concept of ourselves or of our sovereignty. There is no reason that it should be alien to our concept of rights. The language of rights is not merely descriptive but imaginative. The practice of rights must be measured, not mechanical. We should accept rights and their dual natures for what they are. Asking them to change would diminish us all.

(1936).


269. See Roscoe Pound, Interests in Personality, 28 Harv. L. Rev. 343, 343, 349 (1915) (stating that "[a] legal system attains its end by recognizing certain interests" and that the aim of the law "ultimately is to balance individual interests and social interests, but to balance this social interest with other social interests and to weigh how far securing this or that individual interest is a suitable means of achieving the result which such a balancing demands."). For Justice Stone's embrace of this outlook, see Symposium Transcript, Biographies of Titans: Holmes, Brandeis, and Other Obessions, 70 N.Y.U. L. Rev. 677, 680 (1995) (remarks of Robert Post) (opining that the "most modernist" Supreme Court Justice during the 1920s is Justice Stone, not Justices Oliver Wendell Holmes or Louis Brandeis, and citing as evidence his interest-balancing approach to dormant commerce clause cases); see also Aleinikoff, supra note 178, at 963–64 (stating that Stone applied the new methodology of balancing "with creativity and vigor" in a variety of fields of constitutional law).


271. Walt Whitman, Song of Myself, in Leaves of Grass 113 (Modern Library 1993) (1892) ("Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.").