

Top Ten Myths Concerning Your Rights and Liberties

Bill of Rights

United

Congress OF THE

and held at the City of New York, on

fourth of March, one thousand seven hundred

MISREADING THE BILL OF RIGHTS: TOP TEN MYTHS CONCERNING YOUR RIGHTS AND LIBERTIES

Kirby Goidel, Craig Freeman,
and Brian Smentkowski



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MISREADING THE BILL OF RIGHTS

Acknowledgments

This work is dedicated to the generations of students who, despite our best efforts, remain convinced they know their rights. On a daily basis, they revealed the myths that define us and the challenges we face in providing a forum for exchanging error for truth.

The authors wish to acknowledge and express sincere gratitude to those who have guided and challenged us—our mentors, our colleagues, our students, and our families. We are especially grateful to our families who tolerated and occasionally indulged our rants about the Bill of Rights and the myths that define American politics.

Introduction: Individual Freedoms, the Myths That Define Us, and American Public Opinion

Never let the truth stand in the way of a good story.¹

Defining Political Myth

We are defined by the stories we tell, by their resonance in a popular culture that shapes and reshapes their meaning to conform to our collective memory and to our need to define ourselves as a community and a people. George Washington may have never cut down the cherry tree, but the “truth” of his honesty and integrity gave the story resonance and life long after it was first told. Defined narrowly as a factual or accurate version of events or meanings, truth is almost always a secondary consideration in our popular conceptions of who we are and what we aspire to become. Our stories define us and give meaning to our lives.

We see this easily in the myths and mythologies that define other civilizations. The 12 labors of Hercules easily capture our imagination, as Hercules displays the integrity, strength, and character befitting a son of Zeus and sufficient to overcoming great challenges and defeating evil. We understand that Aesop’s Fables are just that, stories to teach deeper truths about morality and behavioral norms in a civil society.

Myths are harder to recognize when we move closer to home and as they speak more directly and clearly to our personal and contemporary realities. Myths surrounding the American Founding, for example, often portray the Founding Fathers as Moses-like figures who climbed a mountain

and returned with the Declaration of Independence, the Constitution, and the Bill of Rights on stone tablets, or, alternatively, as great freedom fighters who embraced and embodied an irrepressible democratic zeitgeist.² Pragmatism, negotiation, and politics are lost in a retelling that simplifies and glorifies the past as if what transpired was divinely inspired and not the work of fallible, self-interested, and imperfect human beings.

In this book, we attempt to pull the curtain back on one set of myths that have shaped and defined the American political culture, the myths surrounding the nature of our political rights and individual freedoms as expressed in and protected by the Bill of Rights. In doing so, our goal is to write a provocative but fair retelling of how Americans have come to understand their individual rights and freedoms, how that understanding is often based on ignorance and misperception, and how it has shaped and limited contemporary political debates and policy decisions.

We should note at the outset that we are agnostic on the role that myths play in society. Myths shape and define culture and serve an important role in creating and maintaining our collective identity. This is particularly true in the American context, where the very definition of American is rooted in acceptance of an American mythology.³ To be “American” has nothing to do with one’s origin of birth and everything to do with one’s acceptance (or rejection) of an American political creed that stresses freedom, individualism, and the protection of individual rights. In this sense, myths also narrow the scope of political debate,⁴ allow societies to overlook collective wrongdoing, and serve as the basis for discrimination and injustice. Myths about American equality, for example, have long sat uneasily beside a history of racial injustice and discrimination, and an implicit acceptance of economic inequality as a societal *virtue* that drives innovation and effort. Horatio Alger myths enshrine equality of opportunity and work ethic as if they were part of a natural and unending American landscape allowing upper- and middle-class citizens to downplay persistent poverty and racial discrimination as barriers to economic well-being. The reality that economic mobility is more limited in the United States than in other advanced democracies⁵ hardly subtracts from the “truth” of this persistent, often implicit, but always impactful belief. True or not, in the United States we believe we pull ourselves up by our own bootstraps.

Our goal is not to dispel the myths surrounding the Bill of Rights but to shed light on how they came to be and why they persist so that we can think more carefully, clearly, and critically about their meaning and

consequences. We begin with a simple definition: Myths are popular beliefs or stories used to describe an event or a history and/or to justify existing social and political institutions. While myths may be factually untrue, they often exist in a netherworld between factual truth and fiction, where truth is indeterminate or reflective of individual values. Even if we cannot determine whether the Founding Fathers were divinely inspired in creating the American political experiment, for example, we can acknowledge that this belief has played an important role in how Americans define themselves and their place in history and the world. Such myths are created and survive because they are credible; because they serve a useful political, economic, or social purpose; or because they provide a compelling narrative.⁶ The usefulness of myth—and not its truth—is what makes it enduring.

It is perhaps worth clarifying that myths are not simply lies. If they were, they would be easily dispelled and forgotten as false and inaccurate. Nor are they statistical or historical evidence that can be weighed on a balance of truth against competing claims. If they were, we could easily discard them as failed hypothesis when they no longer conformed to the best available data. Instead, they are rooted in narrative structures, their power reflected in an underlying “truth” revealed through a compelling story line and characters with cultural resonance. When they conform to our collective ideology as defined by the American political creed, we often accept them unconsciously without considering either cause or consequence.

Political Myth and the Bill of Rights

The myths surrounding the Bill of Rights are wrapped in the larger fabric of the American Founding and the near-religious reverence bestowed upon the Founding Fathers. Thomas Jefferson, the author of the Declaration of Independence and a catalyst for the Bill of Rights, casts a large shadow over our historical understanding of our individual rights and freedoms. His proclamation that “all men are . . . endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” serves as the foundation for our ongoing and persistent belief in the United States as a nation of rights. In Jefferson’s formulation, rights are “natural,” meaning that they are given not by government but by a creator and they extend equally to all citizens.

Jefferson, of course, fell short of the ideals he expressed as has the American political system he helped to create and shape. The long and

sordid histories of civil rights and civil liberties stand at odds with our collective beliefs in the United States as a nation of individual freedoms. Political rights have been anything but “unalienable,” and their application has historically been limited to privileged populations and has been highly contingent upon historical context. While it is often noted that the Founding Fathers failed to extend rights beyond white male property owners, they also wasted no time in passing laws limiting criticism of government via the Alien and Sedition Acts.⁷

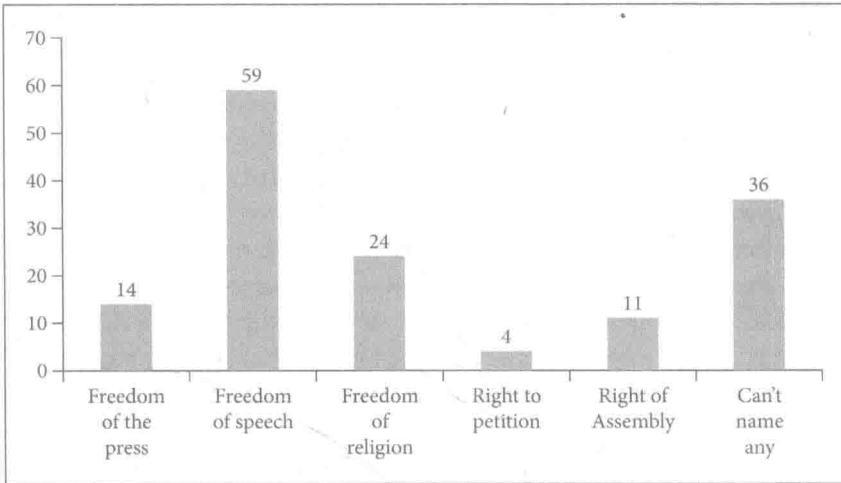
In contemporary politics, we need look no further than the Patriot Act or more recent scandals involving the National Security Administration’s (NSA) access to individual phone records to reveal a willingness to cross the line of individual freedom in pursuit of collective security.⁸ Disregard Jefferson’s natural rights; the reality has been that the definition of individual rights and their application and extension to specific populations has been the subject of ongoing and contested political debate.⁹ Perhaps this is the single most important lesson we can impart: The meaning of individual rights is not now, nor has it ever been, singular, unambiguous, or uncontested. We have the rights we fight to keep.

This is, in part, why myths remain so critical to contemporary political debates. “Rights talk,” Harvard Law Professor Mary Ann Glendon contends, dominates and impoverishes our discussion of contemporary political issues, stressing individualism over community and political rights over responsibility.¹⁰ Rights talk is rooted in the mythology that we are a nation of rights. It persists because it corresponds well with our collective identity, it provides a compelling narrative, and it fits comfortably within contemporary political debate. Myths are perpetuated by mythmakers, the political and business leaders who articulate visions of the future and offer interpretations of the past, the news media that reinforces myths in its framing of news and events, and the entertainment media that uses the mythology as a cultural context for story settings. They find a receptive audience in a public that has been long socialized to believe in the broader mythology and that is largely ignorant of the history underlying the creedal beliefs of the American political culture. The result is public opinion that is based more on the mythology than on actual meaning.

Public Ignorance, Myth, and the Bill of Rights

Public opinion scholars have long noted that Americans’ political beliefs are poorly formed, unstable, and misinformed.¹¹ More optimistic

FIGURE I.1. Percentage of Americans Able to Name Specific Rights in the First Amendment



“revisionist” portrayals of the American citizenry emphasize limited information rationality, the ability of citizens to rely on cues and heuristics to make reasonably informed decisions with small amounts of information.¹² Voting on the basis of a candidate’s partisan affiliation, for example, serves as a reasonably good substitute to actually learning about the issues. Alternatively, scholars have argued that factual knowledge is a poor indicator of reasoned decision-making, as individuals have poor recall of the facts but easily remember more general impressions. We may forget why we do not like Hillary Clinton, but we do not forget that we dislike her. The impression remains even if the factual underpinnings quickly fade.

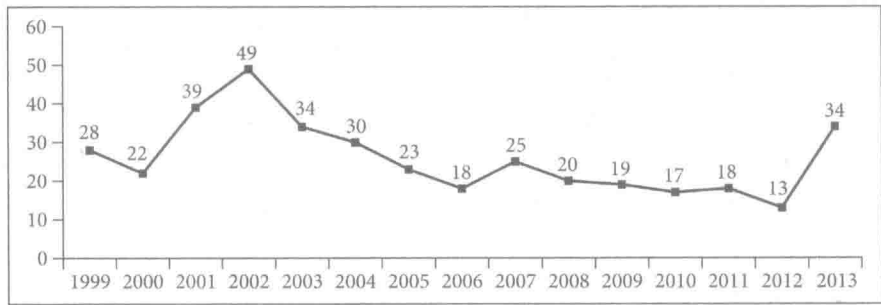
When it comes to public understanding of the Bill of Rights, the level of ignorance is astonishing. In 2011, *Newsweek* gave 1,000 citizens a U.S. citizenship test: 38 percent failed and 43 percent did not know the Bill of Rights is the first ten amendments to the U.S. Constitution.¹³ Each year, the First Amendment Center conducts the State of the First Amendment Survey to ascertain Americans knowledge and understanding of the protections provided in the First Amendment.¹⁴ The results from 2013, displayed in Figure I.1, display an alarming level of ignorance that, even more alarmingly, has remained relatively constant over time. When it comes to public knowledge of the Bill of Rights, there were no good old days. More than a third of Americans (36 percent) cannot name any of

the rights protected by the First Amendment. Moreover, most Americans equate the First Amendment narrowly in terms of freedom of speech (named by 59 percent), and are oblivious to freedom of religion (24 percent), freedom of the press (14 percent), the right to petition (4 percent), and the right of assembly (11 percent).

Somehow out of this morass of ignorance, however, we still believe we are “a nation of rights.” When asked to compare the United States to other modern industrialized nations, for example, Americans rate our individual freedoms as our best virtue.¹⁵ Even so, we have no reservation about limiting individual freedom for others, when we feel threatened, or during periods of unrest. As illustrated in Figure I.2, 34 percent of Americans in the 2013 survey said the First Amendment went too far in protecting the rights of American citizens.¹⁶ As can be seen, results to this question vary over time, suggesting public support for the First Amendment is heavily dependent on context and is not tied to some deeper understanding of the U.S. Constitution. In the wake of the 9/11 terrorist attacks, nearly 50 percent of Americans said the First Amendment went too far in protecting individual rights. Faced with an external threat, we are more than willing to limit individual freedom. In an April 2014 column, P. J. O’Rourke went so far as to argue that if the ten individual amendments that comprise the Bill of Rights were put on a national referendum, only three or four would pass.¹⁷ He assessed the chance of passage for the First, Fifth, and Sixth Amendments as “low.”

Other surveys provide collaborating evidence into public ambivalence toward the Bill of Rights. Americans, at once, embrace the importance of the Bill of Rights while also recognizing the rights and freedoms it protects are limited. A survey conducted in 2002 by the National Constitution Center,¹⁸ for example, found that nearly three-quarters of Americans

FIGURE I.2. Percentage of Americans Saying the First Amendment of Rights Goes Too Far in Protecting Rights



(73 percent) believe the Bill of Rights comes with limits and responsibilities compared to only 24 percent who believe it should be complete and absolute. The same survey found that more than 6 in 10 Americans believe the meaning of rights and freedoms changes with the times while only 1 in 3 Americans believe the meaning never changes.

So what does it mean about our rights if their meaning changes with the political, social, and economic context? For one, we too often misapply the Bill of Rights to contexts where they are not applicable. When Duck Dynasty's Phil Robertson made homophobic and racist comments to *GQ* magazine, A&E executives suspended the popular reality television star. Many conservative politicians—including Louisiana Governor and Rhodes Scholar Bobby Jindal, who presumably should have known better—rushed to Robertson's defense claiming a violation of his First Amendment rights. Phil Robertson certainly had the right to say whatever he wanted, but he was protected only from government censorship and not from his employer. In the end, Robertson won the debate but on economic grounds rather than First Amendment principles. His market value in audience and advertising revenue proved more valuable to A&E than any harm caused by his politically charged comments. Had the Duck Dynasty been less popular, he would have followed in the footsteps of Food Network star Paula Deen, who was dismissed after admitting racially insensitive comments in the past.

Alternatively, we are often slow to extend basic, natural rights to others, despite an abstract commitment to individual freedom and political equality. Our understanding of rights may be rooted in the Declaration of Independence, but our practice of protecting individual rights has been more suspect, more guarded, and more limited. Historically, we have offered, at best, limited protection of individual rights particularly for racial minorities or unpopular groups. African-Americans, for example, received *de jure* protection only with the passage of the 1964 Civil Rights Act, a hundred years after the civil war and the ratification of the Fourteenth Amendment. Practices of unequal protection (e.g., racial profiling) continue today. Similarly, we continue to debate whether the rights protected by the Bill of Rights should extend to immigrant populations or gay, lesbian, bisexual, and transgendered populations.

Misreading the Bill of Rights: The Top Ten Myths

The myths that we discuss in the remainder of the book reflect various flaws in our historical understanding of the Bill of Rights. Some of these

myths are based on a historical misunderstanding created by a collective need to read our own values into a more complex and nuanced political history. The fact that we debated whether a bill of rights was even necessary, for example, is glossed over in most retellings of the American Founding, as if Thomas Jefferson simply reminded James Madison that he forgot to add in protections of individual freedoms. Other myths reflect the gap between belief and action. Our collective unwillingness to apply individual freedom to minority or unpopular groups has been a recurring theme in American political history. Indeed, one might argue that the single most important theme of American political history has involved marginalized groups demanding that the political system live up to its founding ideals.

In the chapters that follow, we discuss ten myths we believe have been most important to our historical understanding and contemporary political debates. The order is not indicative of their importance, but rather of how we believe these myths best fit together historically and politically. At the risk of giving away the ending, these are outlined as follows:

Myth #1: *We need a bill of rights to protect our individual freedoms.* One of the greatest misunderstandings regarding individual rights involves why the Bill of Rights was added to the U.S. Constitution in the first place. James Madison, the architect of the U.S. Constitution, strongly opposed the Bill of Rights, yet drafted and then advocated for it as a mechanism for assuring ratification of the U.S. Constitution. Madison was not alone. Many of the Founding Fathers saw the Bill of Rights as an unnecessary add-on to a constitution meant to create the political institutions and structures that would define the American polity.

The arguments against the Bill of Rights are instructive and counterintuitive in the context of contemporary governance. Opponents argued that setting a limited number of specified rights would imply only those rights listed in the Bill of Rights would be protected. Despite this history, constitutional fundamentalists, like the Tea Party, routinely argue that no rights should be created beyond those explicitly granted in the U.S. Constitution.

Myth #2: *The Bill of Rights applies equally and to everyone.* *Barron v. Baltimore* stands as one of the landmark cases in the early American republic. When the city of Baltimore redirected the water flow and adversely affected an existing wharf, the owner sued for federal government protection under the provisions of the Fifth Amendment. The Supreme Court ruled that the Bill of Rights only protected citizens against federal government action. Even after the Civil War and the ratification of the Fourteenth Amendment, individual rights were guaranteed against state government action only on a

case-by-case basis through the process of selective incorporation. In contemporary politics, we often forget that the Bill of Rights does not necessarily (or clearly) protect us from employers or fellow citizens or that their application has been historically uneven.

Myth #3: *Thanks to the First Amendment, no one can tell me what to say (or what not to say).* In American politics, citizens often believe they can say whatever they want. Indeed, no right is more central to democratic governance than the right of free speech. Yet, shortly after ratifying the Bill of Rights, the Founders passed the Alien and Sedition Acts, making criticism of public officials a crime. Similarly, free speech, as defined by the Founding Fathers, would not have necessarily covered nonpolitical or *artistic* expression.

Political protest similarly has a long and storied history in American politics reaching back from the Boston Tea Party to the Civil Rights era and on to the contemporary Tea Party and Occupy Wall Street movements. Despite this history, the constitutional right to protest is poorly understood and little valued. Despite our First Amendment protections, many Americans believe the will of the majority should silence *disruptive* speech. Freedom of expression has been limited not only by government but also by public opinion that supports free speech in the abstract but not in practice.

Myth #4: *A free press is independent from the government and the government officials it reports on.* We are routinely told that a free press is critical to democracy, yet the press has never been free. Indeed, the development of the American news media has been closely tied to government subsidies that allowed the growth of newspapers through reduced postal rates and regulations that protected the broadcast industry from competition by narrowly defining and controlling the public airwaves. In contemporary politics, the press is highly dependent on access to government officials for news and information and corporate advertising for financial support. Popular criticisms of the news media emphasize *liberal biases*, but, more often than not, the news media serve as a mouthpiece for the powerful.

Myth #5: *The United States is a Christian nation.* Religion, unquestionably, played an important role in the American Founding, but the connection between Judeo-Christian traditions and democracy is far looser than most Americans care to believe. Many of the Founding Fathers were best described as deists, believing there was a creator but not one who regularly intervened in human affairs. In an act that would be considered heresy in contemporary politics, Thomas Jefferson literally cut out the parts of the Bible he did not like. The Founding Fathers clearly saw the danger that creating a state religion would pose to republican government and to individual freedom.

Myth #6: *There is a strict wall of separation between church and state.* If characterizations of the United States as a Christian nation are easily discarded, so

too are conceptualizations build on the metaphor of a strict wall of separation between church and state. Even if religion has most often been used in ceremonial and symbolic ways, it has never been very far removed from the public sphere.

Myth #7: *The Second Amendment was written to protect Americans against criminals.* Like much of the U.S. Constitution, the Second Amendment is written in vague, ill-defined language that is the subject of considerable dispute. Does the Second Amendment recognize the need for a *well-regulated militia* or the right of individual citizens to own guns as a mechanism for self-defense? The answer is not particularly satisfying to gun-control advocates or Second Amendment defenders. The Second Amendment was written to assure protections against an overly intrusive federal government and likely extends to individual gun ownership. However, none of our rights are absolute, so there is little reason to believe that the Founding Fathers would recoil at limits on semi-automatic rifles or mandatory background checks for gun ownership. And there is little reason to connect the Second Amendment to protection from criminal behavior. The Second Amendment does not give a right to *stand your ground* and shoot an intruder, but was instead put in place as yet another effort to assure the people were protected against an overly intrusive federal government and that they quickly organize for defense against a foreign invasion.

Myth #8: *Too many criminals get off on technicalities.* Americans routinely express concerns that our judicial system does too much to protect criminals. The reasons for these protections, however, are rooted not in criminal justice but in politics. The long history of despotism shows ample reason for concern: Authoritarian governments routinely use criminal proceedings to silence political opposition. The importance of these political considerations in the definition of civil liberties is poorly understood and generally unappreciated. This is perhaps most frequently expressed as concern that criminals *get off on a technicality* when the technicality is the Bill of Rights. As a result, Americans show a willingness to scale back individual protections against self-incrimination, search and seizure, and trial by jury if it means putting more criminals behind bars.

Myth #9: *If you have not done anything, you should not care if government searches your house or monitors your emails.* The right to privacy is not mentioned in the Constitution. The right emerged more than a century later after advertisers used the image of a child without her family's permission. The body of law has grown to include the right to protect one's body, likeness, reputation, and even emotional state. Some protections are firmly rooted in sections of the Fourth Amendment, which limit police search and seizures. As the branch of privacy rights has developed, we shed light on the rights covered by the right to privacy. In doing so, we return to an

earlier point: The Founding Fathers never intended for our rights to be limited to those protections specifically spelled out in the U.S. Constitution. We also address our ninth myth: "If you have not done anything, you should not care if government searches your house or monitors your emails." Privacy protections exist not to protect the guilty but to protect the innocent from unnecessary government intrusion. In the chapter, we impugn broad notions of a constitutional right to privacy. We also show the limited protections from governmental intrusions on privacy and reveal the broad areas left unprotected by the Constitution.

Myth #10: *Killing is not cruel or unusual, but torture is.* The language in the Eighth Amendment prohibits "cruel and unusual punishment," but most Americans are willing to let criminals rot in jails. Few Americans sympathize with criminals subject to hard labor, squalid conditions, and overcrowding. But the penitentiary system did not exist at the drafting of the Bill of Rights. Punishments were often swift and public. Jails were reserved for those awaiting trial, not as a form of punishment for committing a crime. In Chapter 10, we examine how our notions of cruel and unusual punishment have changed over the past two centuries. Many of the swift and painful punishments doled out by our Founding Fathers would not be socially acceptable today. Alternatively, many of our contemporary practices would fail colonial definitions of cruel and unusual punishment. In doing so, we address our tenth myth that "killing is not cruel or unusual, but torture is" by critically examining the cruelty of executions. We also challenge conventional thinking about our current plan to *throw away the key* for certain criminals.

We conclude by returning to a central theme. Our collective understanding of the Bill of Rights is clouded in misinformation and ignorance. As a result, the protections are considerably less protective than they may at first appear. Indeed, our freedoms are largely contingent upon historical context and the public's willingness to support the expansion of individual freedoms or, alternatively, to suppress dissent. The good news here is that the larger timeline of American political history has generally revealed an expansion of individual rights and freedoms. We may fairly say that we are freer today than during most of American history. This optimism, however, has to be tempered by the fact that Americans are more than willing to suppress dissent and limit freedom when faced with an external threat. Revelations that the NSA-monitored domestic telephone calls were, for example, largely met with a collective yawn. Similarly, technology allows for greater monitoring of individual behavior, setting up the capacity for more intrusive federal government and a collective loss of

individual liberty. If, as we argue, the meaning of individual rights is never set in stone but is instead contested and ambiguous, the future of our political freedom is set, in no small part, by what we allow and what we forbid. Those boundaries will be determined not by definitions of rights that transcend time and place but by the myths that we believe in, the stories we tell about who we are as a people, and how we choose to apply them in contemporary and future contexts.

Notes

1. Often attributed to Mark Twain, the phrase appears to be from J. Frank Dobie, though its origins are not entirely clear.

2. Dan Nimmo and James E. Combs, *Subliminal Politics: Myths & Mythmakers in America* (Englewood Cliffs, NJ: Prentice Hall, 1980).

3. G. K. Chesterton, *What I Saw in America* (New York: Dodd, Mead, and Company, 1923); Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: WW Norton & Company, 1996).

4. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

5. Markus Jäntti, Bernt Bratsberg, Knut Røed, Oddbjørn Raaum, Robin Naylor, Eva Österbacka, Anders Björklund, and Tor Eriksson, *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, the United Kingdom and the United States*, Institute for the Study of Labor, Discussion Paper No. 1938 (January 2006).

6. In their 1980 book *Subliminal Politics*, Nimmo and Combs outline several characteristics of myths. They are credible, socially constructed, dramatic, and taken for granted as reality; see Nimmo and Combs, *Subliminal Politics*.

7. John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Atlantic-Little, Brown, 1951).

8. Darren Davis and Brian D. Silver, "Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America," *American Journal of Political Science* 48 (2004): 28–46.

9. Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor: University of Michigan Press, 2004).

10. Glendon, *Rights Talk*.

11. Philip Converse, "The Nature of Belief Systems in Mass Publics," In *Ideology and Discontent*, ed. David Apter (New York: Free Press, 1964, pp. 2012–2261); John Zaller, *The Nature and Origins of Mass Opinion* (Cambridge: Cambridge University Press, 1992).

12. Samuel Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (Chicago: University of Chicago Press, 1994); Milton