Human Rights: Two Hundred Years of Constitutional Experience in the United States

Robert S. Barker, Duquesne University School of Law

Available at: https://works.bepress.com/robert_barker/33/
HUMAN RIGHTS: TWO HUNDRED YEARS
OF CONSTITUTIONAL EXPERIENCE IN THE UNITED STATES

Robert S. Barker
Professor of Law, Duquesne University

I. Introduction

Two hundred years ago this month, the document called the "Constitution of the United States of America" had an uncertain status. It had been written between May and September of 1787, adopted by the Philadelphia convention on September 17 of that year, and transmitted by the President of the convention, George Washington, to the "United States in Congress assembled," then sitting in New York.¹ The Congress, in turn, submitted the proposed constitution to the states, to be ratified, or rejected by conventions to be called in each state. The debate over ratification had begun, and the principal issue in the debate was the effect which the Constitution, if ratified, would have on human rights. In mid-October an opponent of ratification, a New Yorker identified only as "The Federal Farmer," expressed his concerns this way:

It is to be observed that when the people shall adopt the proposed constitution it will be their last and supreme act.... and whenever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away.²

¹ For an excellent account of drafting and ratification of the United States Constitution, see C. Bowen, Miracle at Philadelphia.
² The Federal Farmer, "Observations Leading to a Fair Examination of the System of
Earlier that same month, a Pennsylvania opponent of the constitution, known as "Centinel," wrote:

It would not be difficult to prove, that any thing short of despotism, could not bind so great a country under one government; and that whatever plan you might, at first setting out, establish, it would issue in a despotism.3

It is particularly appropriate, today, almost exactly two hundred years after these fears were expressed, that we examine the relationship between human rights and the United States Constitution.

Any such examination requires that some preliminary consideration be given to problems of definition and format. To define "human rights" simply as those liberties declared in or protected by the United States Constitution, would be circuitous and unproductive. On the other hand, to posit a precise enumeration of human rights, and then proceed to evaluate the United States Constitution against that list, would tend to make the predetermined list, rather than the constitutional experience, the focal point of the discussion.

The most accurate definition, and the one which is likely to be most useful for present purposes, is a general one. Human rights are, of course, those rights which are inherent in the nature of man, and which, whether they are declared in any particular constitution or statute, and whether they are enforced or violated, exist because they are ordained and established by higher authority. The essence of human rights is stated very well in the Declaration of Independence of the United States:

We hold these truths to be self-evident: that all men are... endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness....

Almost two hundred years later, President Kennedy restated the essence of human rights when he asserted

---


HUMAN RIGHTS: TWO HUNDRED YEARS OF CONSTITUTIONAL

....the belief that the rights of man come not from the generosity of the state, but from the hand of God.4

This is not to suggest that the awareness and appreciation of human rights began in the United States. On the contrary, those who declared independence in Philadelphia in 1776 were the heirs of a human rights tradition which is reflected in the English Common Law,5 in Medieval and Greek philosophy,6 and in the Hebrew and Christian scrip-

4 Inaugural Address of President Kennedy, Jan. 20, 1961.
5 Magna Carta provides:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him or condemn him, but by lawful judgment of his peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either justice or right.
Magna Carta, 9 Henry 3, ch. 29

Blackstone says:

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities.

1 W. Blackstone, Commentaries on the Laws of England 120 (1st ed. 1765)

6 St. Thomas Aquinas says:

Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience; from the eternal law whence they are derived...
On the other hand, laws may be unjust in two ways: first, by being contrary to human good.... either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupiditiy or vainglory; —or in respect of the author, as when a man makes a law that goes beyond the power committed to him...
Aquinas, Summa Theologica, Question 96.

Aristotle says:

....there really exists, as all of us in some measure divine, a natural form of the just and unjust which is common to all men, even when there is no community or convenant to bind them to one another. It is this form, which the Antigone of Sophocles' play evidently has in her mind, when she says that it was a just act to bury her brother Polynices in spite of Creon's decree to the contrary —just, she means, in the sense of being naturally just.
Not of today or yesterday its force: It springs eternal: no man knows its birth.

Empedocles has the same idea when he speaks of our not killing anything that has
However, the purpose of this seminar is not a complete or abstract examination of human rights, but rather a consideration of the practical experience of the United States under its Constitution of 1789.

The study of the United States Constitution is not the exclusive province of any one discipline or profession. But, the history of the United States has demonstrated that the Constitution, particularly in its human rights aspects, is preeminently a legal document. As De Tocqueville said a century and a half ago, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” These considerations explain both the historical format and jurisprudential emphasis of this paper.

II. Background

In order to appreciate the human rights experience of the United States under the Constitution, it is important to recall the situation in the United States before the Constitution was written, and even prior to independence. The inhabitants of the thirteen English colonies along the Atlantic coast of North America enjoyed considerable freedom during most of the colonial period, exercising self-government in local matters, speaking freely, and availing themselves of such traditional English rights as trial by

---

7. The words of Isaiah are particularly poignant:

Woe to those who enact unjust statutes and who write oppressive decrees, depriving the needy of judgment and robbing my people’s poor of their rights.

Isaiah 10:1-2

St. Peter said:

Live as free men, but do not use your freedom as a cloak for vice. In a word, live as servants of God. You must esteem the person of every man. Foster love for the brothers, reverence for God, respect for the emperor.

1 Peter 16-17

8. A. De Tocqueville, Democracy in America 270 (G. Lawrence trans. 1969 ed.).
jury and habeas corpus. People were free to live and work without much interference from royal authority. There were restrictions on religious liberty. Catholics were under some civil disabilities almost everywhere, and Quakers and Baptists were harrassed in some colonies. However, as the Eighteenth Century passed its midpoint, there was a marked trend toward the relaxation of restraints on freedom of worship and the removal of political disabilities imposed because of religious belief.  

Beginning about 1763, the condition of the colonies began to change as Britain initiated a number of commercial and fiscal policies which many colonists saw as unwarranted interference in local affairs. As colonial resentment turned to resistance, royal authority became more heavy-handed. By 1775 the colonies were in open rebellion, by 1776 they were fighting for their independence, and by 1781 they had succeeded.

It is important to remember that the Revolutionary War was not fought for the purpose of introducing liberty into the colonies, but rather for the purpose of recovering those ancient liberties which the colonies had long enjoyed and which the Crown had begun to take away. In other words, what we now call “human rights” had been part of the United States experience long before the Constitution and, indeed, before independence. The historian Clinton Rossiter explains the matter very well:

By 1765 [the world of the English colonists]... had already been made over.... Americans had never known or had long since begun to abandon feudal tenure, a privilege-ridden economy, centralized and despotic government, religious intolerance, and hereditary stratification. [They]... had achieved and were prepared to defend with their blood a society more open, an economy more fluid, a religion more tolerant, and a government more popular than anything Europeans would know for decades to come. The goal of the rebellious colonists was largely to consolidate, then expand by cautious stages, the large measure of liberty and property that was already part of their way of life.

This analysis finds support in the Declaration of Independence, which lists among the reasons for rebellion and independence the facts that the King had:

---
10. For a survey of the causes, progress, and conclusion of the War of Independence, see J. Alden, The American Revolution.
The Crown was also criticized for quartering large bodies of troops among the civilian population; for depriving litigants of the benefits of trial by jury; and for abolishing colonial charters which had guaranteed individual liberties. All of these allegations were premised on the existence of many human rights, to the enjoyment of which the people had long been accustomed, and which they wished to retain. In Rossiter's words, the revolutionaries in the United States "... unlike most revolutionaries in history, already enjoyed the liberty for which they were fighting."  

How were these liberties to be secured in the independent United States of America? The answer was clear and immediate: human rights would be guaranteed by each of the thirteen former colonies, now independent states. Beginning in 1776, nearly all of the states adopted republican constitutions, abolishing or revising the colonial charters which had tied them to Britain. An important feature of most of these state constitutions was a bill of rights. For example, the Pennsylvania Constitution of 1776 guaranteed life, liberty and property; religious freedom; trial by jury in all cases and right to counsel in criminal cases; freedom from compulsory self-incrimination and from arbitrary searches and seizures; freedom of speech, press, and assembly; and other liberties.

On the national level, the approach was different. In 1777 the Continental Congress approved and submitted to the states a set of thirteen Articles of Confederation and Perpetual Union. These Articles did not enter into effect until 1781, when they were ratified by the last of the thirteen states. The Articles of Confederation (which were, in fact and in law, the first constitution of the United States) said very little about human

---

12. The Declaration of Independence paras. 7, 14, 15 (U.S. 1776).
15. Eight of the thirteen states adopted bills of rights prior to the drafting of the United States Constitution.
HUMAN RIGHTS: TWO HUNDRED YEARS OF CONSTITUTIONAL

rights. The reason is obvious. The national government created by the Articles of Confederation was so limited in its powers, and so subject to control by the states, that it posed no threat to people's liberties. Thus, a declaration of rights would have been superfluous. It was the states, not the national government, which had the power to close newspapers, punish political opponents, and persecute religious dissenters. Therefore, the guarantees in the various state constitutions provided all the safeguards which might be needed. The only individual rights guaranteed by the Articles of Confederation were those incidental to the protection of interstate commerce: the free movement of persons (paupers, vagrants, and fugitives excepted) among the several states, and the requirement that each state allow citizens of other states the same privileges and immunities as were enjoyed by its own citizens.

III. Drafting the Constitution

During the 1780's, the United States was beset by interstate commercial rivalries, a nationwide recession, intrastate debtor-creditor conflicts, and poor credit abroad. An increasing number of people believed that these problems could be solved only by creating a national government with significantly greater power than that provided for by the Articles of Confederation. At the request of several states, the Congress called a convention to meet in the city of Philadelphia in May, 1787, "for the sole and express purpose of revising the Articles of Confederation". The result,

17. The situation is explained very clearly by two eminent historians:

It was generally agreed that a central organization was necessary to handle such matters of common or general concern as war and peace, the army and navy, and Indian affairs. There was likewise rather general agreement that matters of local concern should be decided by the states.

M. Jensen, The Articles of Confederation 125 (1970 ed.)

A man's 'country' was still his state...... The Declaration of Independence, drawn up by the Continental Congress, was actually a declaration by 'thirteen United States of America'...... And the Articles of Confederation ... did not in fact alter this independence.


19. The events which led to the calling of the Philadelphia convention are summarized in M. Farrand, The Framing of the Constitution of the United States 1-12.
of course, was not a revision of the 'Articles of Confederation, but an
entirely new document, styled the "Constitution of the United States of
America." The new Constitution included an interstate privileges and
immunities clause\textsuperscript{20} similar to that found in the Articles of Confederation,
and a few other human rights guarantees as well: the states and the
national government were prohibited from passing bills of attainder and
ex post facto laws,\textsuperscript{21} Congress was prohibited from suspending the privi-
lege of the writ of habeas corpus except in cases of rebellion or invasion,\textsuperscript{22}
trial by jury was guaranteed in criminal cases,\textsuperscript{23} the crime of treason
against the United States was defined, minimum evidentiary requirements
for treason trials were established, and punishment of a traitor's family
was prohibited.\textsuperscript{24}

The now-familiar declarations of freedom of religion, speech, press,
and assembly; freedom from unwarranted searches and seizures; and the
right to trial by jury in civil cases, were not part of the original constitu-
tional document. The reason was not any lack of appreciation of the
importance of these rights; rather, it was that most members of the
Philadelphia convention believed that a bill of rights was unnecessary
because the new national government would not have sufficient power to
threaten the rights of any person. A proposal to appoint a committee to
prepare a bill of rights had been moved and seconded at the convention,
but had been defeated by a vote of ten states to none.\textsuperscript{25} The attitude of the
Convention was expressed by James Wilson (who had been Pennsylvania
delegate to the convention) in a speech urging that his state ratify the
Constitution:

\[ \ldots \text{it would have been superfluous and absurd to have stipulated with a}
\text{federal body of our own creation, that we should enjoy those privileges}
of which we are not divested.} \textsuperscript{26} \]

\textsuperscript{20} U.S. Const. art. IV, §2.
\textsuperscript{21} The states are prohibited by Article I, Section 10 of the Constitution from passing bills of
attainder and ex post facto laws. Similar prohibitions are imposed in the federal government by
Article I, Section 9.
\textsuperscript{22} U.S. Const. art. I, §9.
\textsuperscript{23} U.S. Const. art. III, §2.
\textsuperscript{24} U.S. Const. art. III, §3.
\textsuperscript{25} J. Madison, Notes of Debates in the Federal Convention of 1787, 630 (2d rev. ed. 1985)
[hereinafter cited as Madison, Notes].
\textsuperscript{26} Speech delivered Oct. 6, 1787 by James Wilson in the Pennsylvania State House yard,
Federalist Papers and the Constitutional Convention Debates 184.
Alexander Hamilton, a New York delegate to the Convention, explained the absence of a bill of rights in the following way:

"... affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"

To say that the Constitutional Convention considered and rejected a bill of rights is an incomplete explanation of the Convention's attitude toward human rights. Although the delegates considered a bill of rights to be unnecessary, they were very conscious of the need to preserve liberty. For the delegates at Philadelphia, human rights was the concomitant of limited, representative government. The drafters were careful to limit the national government: they retained the federal principle; they made the national government a government of enumerated, not general, powers; they divided national governmental authority among three coequal branches; and they established a system of checks and balances to prevent exclusive control of any governmental activity by any one branch of government. Although constitutional scholars frequently separate constitutional law into "structural" and "human rights" components, it is important to remember that in the United States the structure of government and the rights of citizens have always been inseparably connected.

The Constitution adopted in Philadelphia in September, 1787 was submitted by the Congress to the states for ratification by special conventions to be called by the respective state legislatures. Spirited debates ensued in every state. One of the principal objections to the proposed Constitution was the absence of a bill of rights. Although Pennsylvania was the second state to ratify the Constitution, ratification was hotly contested. The anti-constitutionalist minority of the Pennsylvania convention published a public statement of its reasons for opposing ratification. The statement included the following:

27. The Federalist No. 84 (A. Hamilton) at 559 (Random House ed.)
28. The theme of the relationship between the structure of government and the preservation of liberty runs through many of the Federalist papers, as does the idea of the republican form of government as a safeguard of freedom. See, The Federalist Nos. 6, 8, 9, 26, 28, 78, 81, and 82 (all by Hamilton); 10, 45-48 (all by Madison); and 49, 51, and 62 (each by either Hamilton or Madison).
29. The ratification process is explained in C. Bowen, supra note 1, at 267-310.
The first consideration that this review suggests, is the omission of a BILL of RIGHTS, ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the control. The principal of which are the rights of conscience, personal liberty by the clear and unequivocal establishment of the writ of habeas corpus, jury trial in criminal and civil case, by an impartial jury of the vicinage or county, with the common-law proceedings, for the safety of the accused in criminal prosecutions; and the liberty of the press, that scourge of tyrants, and the grand bulwark of every other liberty and privilege; the stipulations heretofore made in favor of them in the state constitutions, are entirely superseded by this constitution.30

Those who demanded a bill of rights were so numerous and so persuasive that, before the ratification process was complete, there developed a tacit understanding that, if the Constitution were indeed ratified, it would be immediately amended to include a bill of rights. The Constitution was ratified by the requisite number of states, and entered into effect March 4, 1789. The First Congress approved twelve constitutional amendments and submitted them to the states for ratification. The first two of these amendments, which dealt with structural detail, were not ratified.31 The remaining ten, dealing with human rights, were promptly ratified and have been known ever since as the Bill of Rights.

The Bill of Rights contained no novel concepts. The guarantees of freedom of religion, speech, press, and assembly mirrored the guarantees already found in most state constitutions. The same is true of the guarantees against unreasonable searches and seizures and the numerous protections surrounding the judicial process. The Ninth Amendment, which protects pre-existing but non-enumerated rights, and the Tenth Amendment, which protects federalism, underscored the belief of the drafters (and most others in the country) that limited government and divided sovereignty were important methods of protecting human rights.

IV. The Early Nineteenth Century

One of the most interesting features of the Bill of Rights is that, for its


31. The first of the proposed amendments dealt with the size of the House of Representatives and the second with the method of changing the compensation of members of Congress.
first seventy years, it was seldom invoked. During the early years of the Nineteenth Century, the United States government did little to cause anyone to believe that he was being deprived of any constitutionally-guaranteed rights. The constitutional controversies of this era had much more to with the precise division of authority between the states and the national government than between the prerogatives of the national (or "federal") government and the rights of the individual. There were, however, a few exceptions.

In 1798, the Federalist majority in Congress, alarmed by French Jacobinism, enacted a series of statutes, collectively known as the Alien and Sedition Acts, designed to silence a number of anti-administration newspaper editors and political propagandists, many of whom were French. Much of this legislation dealt with the exclusion or expulsion of aliens who were critical of the United States government or whose countries were hostile to the United States. The Sedition Act had a much broader application, and made it a crime for anyone to utter or publish any false, scandalous, and malicious writing against the United States Government, the President, or the Congress, with the intent to defame them or to excite hatred against them. The legislation was extremely controversial, and many argued that it violated the constitutional guarantees of freedom of speech and of the press. The legislatures of two states, Virginia and Kentucky, adopted resolutions declaring the Alien and Sedition Acts unconstitutional and purporting to render them unenforceable within their respective boundaries. In response, some New England legislatures adopted resolutions declaring that no state had the power to nullify an act of Congress. The Alien Acts were never enforced. Some twenty-five persons were arrested and charged with violating the Sedition Act, and ten of them were convicted. All of the acts, except the Naturalization Act, expired by their own terms in 1800 and 1801. Upon taking office in 1801, President Jefferson pardoned those still serving jail sentences under the Sedition Act. The Naturalization Act was repealed by the Republican-controlled Congress which was seated in 1801.

---

32 The statutes, identified by their popular titles, are the Naturalization Act (Act of June 18, 1798, ch. 54, 1 Stat. 566); the Alien Act (Act of June 25, 1798, ch. 58, 1 Stat. 570); the Alien Enemies Act (Act of July 6, 1798, ch. 66, 1 Stat. 577); and the Sedition Act (Act of July 14, 1798, ch. 74, 1 Stat. 596).
34 The anti-nullification resolutions of Rhode Island and New Hampshire are reprinted id. at 184-185.
35 The enforcement and demise of the Alien and Sedition Acts is described in J. Miller, The Federalist Era 1789-1801, 228 et seq.
The controversy over the Alien and Sedition Acts was important for two reasons. First, the fact of their enactment demonstrated that the national government had the power to violate constitutionally-guaranteed rights. Second, the dispute over the constitutionality of these statutes raised the question of how the constitution was to be enforced. Some believed that this was the responsibility of the judiciary. The Kentucky and Virginia Resolutions raised the possibility of a different, or additional, method of enforcement. The definitive answer came in 1803 in a Supreme Court decision which did not directly involve human rights, and whose definitive character was not immediately conceded. The decision, of course, came in the landmark case of *Marbury v. Madison*, and established the principle of judicial review. In *Marbury*, the Supreme Court asserted the right to declare unconstitutional any act of Congress which violated the Constitution. Seven years later, in *Fletcher v. Peck*, the Supreme Court exercised judicial review over state legislation, declaring unconstitutional a Georgia statute. In 1817, the Court, in *Martin v. Hunter's Lessee*, logically extended the rule in *Marbury* by asserting its right to review, on appeal, state court decisions involving questions of federal law. Although these are not usually thought of as human rights

---

36. Hamilton, in the Federalist No. 78 (written in 1788), took the position that the interpretation of the Constitution and the enforcement of its provisions were judicial functions. A similar approach was enunciated by Justice James Iredell in his concurring opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798). The theory that the states could interpret and enforce the Constitution by nullifying allegedly unconstitutional federal statutes was advanced on several occasions, long after the controversy over the Alien and Sedition Acts had ended. In 1832, South Carolina adopted an ordinance purporting to nullify the federal tariff statute enacted earlier that same year, and in 1833 South Carolina passed another ordinance purporting to annul federal legislation designed to enforce the disputed tariff. These attempts nullifications were unsuccessful. The South Carolina nullification ordinance and President Andrew Jackson's proclamation rejecting the theory and practice of nullification may be found in H. Commager, *supra* note 33 at 261-270. For a complete discussion of the tariff controversy, see W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina 1816-1836*.

In the 1850's, several Northern states, although avoiding the term "nullification", attempted by the enactment of "personal liberty laws" and by state-court decisions, to prevent the operation within their borders of the Federal Fugitive Slave Law. See, e.g., the Massachusetts personal liberty law in *H. Commager, supra* note 33 at 335. The effort of the Wisconsin Supreme Court to nullify the Fugitive Slave Law within that state was held unconstitutional by the United States Supreme Court in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

In the 1950's, several Southern states employed a variant of nullification called "interposition," in unsuccessful attempts to prevent the enforcement of court-ordered school desegregation. Such efforts by the state of Arkansas were declared invalid in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958).

37. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

38. 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810).

39. 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816).
cases, their importance in human rights matters has been enormous. *Marbury* and its progeny made clear that the Constitution was not merely a statement of ideals and aspirations. The Constitution emerged from those cases as an operating set of legal norms which are enforceable in the ordinary course of a suit at common law or in equity.

There were very few human rights decisions under the Constitution in the early part of the Nineteenth Century. One reason has already been mentioned above: the national government usually limited itself to conducting foreign relations, maintaining the national defense, delivering the mail, regulating currency, and promoting interstate and foreign commerce. Most governmental activities which directly affected individual liberties were carried out by the states and their municipalities and subdivisions. Occasionally, individuals attempted to invoke the guarantees of the Bill of Rights against state and local officials. One such instance occurred when the city of Baltimore undertook to pave some of its streets in the early 1830's. The owner of some waterfront property in the city brought suit in a Maryland court alleging that the city's project had caused large amounts of dirt to be deposited under his wharf, thereby rendering it useless. He argued that this constituted a taking by the city of his property without compensation, in violation of the Fifth Amendment to the United States Constitution. On appeal, the United States Supreme Court held that the Fifth Amendment applied only to the national government, not to the states. Speaking through Chief Justice Marshall, the Court said:

The Constitution [of the United States] was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument... We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. 40

---

This case, Barron v. Mayor and City Council of Baltimore, made clear that the Bill of Rights applied only to the federal government, and had nothing to do with the states. The only human rights guarantees applicable to the states were those, such as the prohibitions against ex post facto laws, bills of attainder, and titles of nobility, which expressly referred to the states. This did not mean that human rights were ignored; rather it meant that most human rights questions were argued and decided in the states, according to their own respective legal and constitutional criteria. For example, the nationwide egalitarian movement of the 1830's and '40's, commonly called "Jacksonian Democracy", was carried out primarily in the states, through the abolition of property qualifications and religious test for voting and holding public office, the abolition of imprisonment for debt, and the easing of restrictions on the rights of married women to own and control property.41

V. Slavery and Its Abolition

Although the limited nature of federal activity usually kept the national government out of human rights matters, there was an important exception. With each decade of the Nineteenth Century, the federal government, and the United States Constitution, became increasingly involved in the most serious human rights problem of the times: slavery.

Of the twelve states represented at the Constitutional Convention of 1787, six were states where slavery was protected by law. The other six had either never known slavery, had already abolished it, or had enacted legislation providing for its imminent demise.42 Many free-state delegates (and a few delegates from slave states) found slavery repugnant, and did not want the new constitution to be an instrument for the extension or preservation of slavery.43 On the other hand, spokesmen for the slaveholding interests insisted that the constitution not become a device for the abolition of slavery, and sought assurances that their "peculiar institution" would be


42. The slave states were Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. The free states were Pennsylvania, New Jersey, New York, Connecticut, Massachusetts, and New Hampshire. Rhode Island, a free state, declined to send delegates to the convention.

43. See, e.g., the anti-slavery remarks of George Mason, a Virginia delegate, in Madison, Notes 503-4.
HUMAN RIGHTS: TWO HUNDRED YEARS OF CONSTITUTIONAL

constitutionally protected.\(^{44}\) The result was a series of compromises. The number of Representatives in Congress to which a state was entitled was to be based on the whole number of free persons plus three-fifths of the number of slaves.\(^{45}\) The assessment of direct taxes was to be based on the same "three-fifths" rule.\(^{46}\)

Congress was forbidden to prohibit the slave trade before the year 1808.\(^{47}\) Fugitive slaves could not gain freedom by escaping to free states, but must be returned to slavery.\(^ {48}\) Although many Northern anti-Federalists attacked these concessions to the slaveholders, it was obvious that the Constitution could not have been ratified without compromise on the slavery question.\(^ {49}\) Oliver Ellsworth, a delegate from Connecticut, stated the matter this way:

The morality or wisdom of slavery are considerations belonging to the states themselves... the states are the best judges of their particular interest. The old confederation had not meddled with this point, and [I do] not see any greater necessity for bringing it within the policy of the new one.\(^ {50}\)

In March, 1807, Congress acted to prohibit the slave trade as of the earliest constitutionally-permissible date; \textit{i.e.}, January 1, 1808.\(^ {51}\) This legislation passed with little opposition because, by that time only, one state, South Carolina, still permitted the importation of slaves from outside the country.\(^ {52}\) The Constitutional controversies over slavery centered on two issues: the regulation of slavery in the territories, and the disposition of fugitive slaves. From 1820 through 1854, Congress attempted to continue the original constitutional compromise by balancing free-state interests against slave-state interests. New states were admitted to the Union with a conscious regard for maintaining approximate parity

\(^{44}\) The most outspoken advocates of slaveholding interests at the convention were Charles Pinckney, Charles Cotesworth Pinckney, and Pierce Butler, all of South Carolina. See Madison, \textit{Notes}, 268, 278-9, 286, 503-4, 545-6.

\(^{45}\) U.S. Const. art. I, §2.

\(^{46}\) U.S. Const. art. I, §9.

\(^{47}\) U.S. Const. art. I, §9.

\(^{48}\) U.S. Const. art. IV, §2.

\(^{49}\) The necessity of compromise on slavery was often acknowledged during the convention. See, \textit{e.g.}, the statements of James Wilson (of Pennsylvania), Edmund Randolph (of Virginia), and George Mason (also of Virginia) in Madison, \textit{Notes} 275, 279, 503-4.

\(^{50}\) Madison, \textit{Notes} 503.


\(^{52}\) W. Freehling, supra note 36 at 11.
between free states and slave states. Slavery was prohibited in some territories and permitted in others. The slave trade was abolished in the District of Columbia, but a thoroughgoing criminal statute was enacted to compel the return of slaves who escaped to free states.\footnote{53} Despite these efforts, by the middle of the 1850's both sides had become less inclined to compromise, as each believed that the other was seeking to upset the constitutional balance.\footnote{54} Some people believed, or at least hoped, that the slavery controversy could be solved judicially, and in 1856 a case came before the United States Supreme Court which seemed to provide the opportunity for such a solution.\footnote{55} The case was \textit{Dred Scott V. Sand-}

\footnote{53. The most important compromises were the Missouri Compromise (1820-1821), the Compromise of 1850, and the Kansas-Nebraska Act (1854). The Missouri Compromise provided for the admission of Missouri as a slave state but prohibited slavery in all other parts of the Louisiana Purchase north of 36° 30' latitude. See the Missouri Enabling Act (Act of March 6, 1820, ch. 22, 3 Stat. 545) and the resolution admitting Missouri as a state (Res. of March 2, 1821, Res. 1, 3 Stat. 645). The admission of Missouri was "balanced" against the admission in 1820 of Maine, a free state. The Compromise of 1850 consisted of a number of resolutions and statutes, which resulted in the admission of California under a state constitution prohibiting slavery; the organization of the territories of New Mexico and Utah on terms which would permit their eventual admission to the Union with or without slavery, as their respective legislatures might determine; the abolition of the slave trade in the District of Columbia; and the enactment of stricter measures to compel the return of fugitive slaves. The terms of the Compromise were outlined in a series of resolutions offered by Senator Henry Clay (Whig; Kentucky) on Jan. 29, 1850 (U.S. Senate Journal, 31st Cong. 1st Sess. pp. 118 et seq. (1850). The actual legislation consisted of An Act...to Establish a Territorial Government for New Mexico, Act of Sept. 9, 1850, ch. 49, 9 Stat. 446; An Act for the Admission of California into the Union, Act of Sept. 9, 1850, ch. 50, 9 Stat. 452; An Act to Establish a Territorial Government for Utah, Act of Sept. 9, 1850, ch. 51, 9 Stat. 453; The Fugitive Slave Act, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462; and An Act to Suppress the Slave Trade in the District of Columbia, Act of Sept. 20, 1850, ch. 63, 9 Stat. 467. The Kansas-Nebraska Act (An Act to Organize the Territories of Nebraska and Kansas, Act of May 30, 1854, ch. 59, 10 Stat. 277) created two new territories out of the Louisiana Purchase and repealed the Missouri Compromise so as to permit the inhabitants of the newly-formed territories to decide for themselves whether slavery should be permitted or prohibited therein. (The Missouri Compromise had prohibited slavery in the entire area comprehended by the two new territories.)}

\footnote{54. For an account of the increasing sectional tensions of the 1850's, see D. Potter, \textit{The Impending Crisis, 1848-1861}.}

\footnote{55. President Buchanan, in his inaugural address, concluded his discussion of the issue of slavery in the territories, with the following words:}

This is, happily, a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be....

\textit{Inaugural address of President Buchanan, March 4, 1857.}
ford, a suit by a Missouri slave to obtain his freedom. Scott’s argument was that his previous residence, with his owner, in a free state (Illinois) and in free territory (now Minnesota) had operated to set him free.

Early in 1857 the Court decided against Scott, by a vote of seven to two. The holding of the case was that a black person, whether slave or free, was not and could not become a “citizen” for purposes of invoking the jurisdiction of federal courts. The Supreme Court went beyond this narrow holding to explain that persons of African ancestry did not enjoy the benefit of any constitutional guarantees. A majority of the Court also said that neither Congress nor any territorial government had power to prohibit slavery in the territories. The opinion had serious political ramifications, since it destroyed the legal basis for the legislative compromises of 1820, 1850, and 1854. From a human rights perspective, the opinion was even more devastating. The court had effectively excluded an entire race of people from the protection of the United States Constitution. Ironically, the Court justified this massive denial of human rights by invoking human rights—the property “rights” of slaveowners:

...the rights of property are united with the rights of persons, and placed on the same ground by the fifth amendment to the constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.57

As might be expected, the Dred Scott decision heightened Southern expectations, intensified Northern fears, and demonstrated the inability of the judicial system to resolve the most pressing human rights controversy of the day. Within four years of the decision the nation was divided by secession and on the verge of civil war.58

The overriding human rights issue of the Civil War was, of course, slavery. But the War also tested human rights in another way: it was the

56. 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857). For an excellent discussion of the factual background, and the legal and political significance of the case, see H. Hyman & W. Wieck, supra note 41 at 172-190.
57. 60 U.S. (19 How.) at 450.
58. For a detailed account of political events between the Dred Scott decision and the election of 1860, see R. Nichols, The Disruption of American Democracy.
occasion for a number of confrontations between civilian and military authority. President Lincoln, utilizing his powers as commander-in-chief to suppress the rebellion, gave extensive authority to military commanders to arrest and try civilians believed to be aiding the Southern cause. In *Ex parte Merryman*, Chief Justice Taney (sitting as a judge of the United States Circuit Court for the District of Maryland and not as a justice of the United States Supreme Court) held that the President could not suspend the writ of habeas corpus, and that only the Congress could do so. In *Ex parte Milligan*, the Supreme Court held that in an area where the duly-constituted civilian courts were able to operate, the president had no power to authorize the trial of a civilian by court martial. The *Merryman* decision was not enforced, and thousands of civilians were arrested by military commanders and detained for periods of time without benefit of judicial protection. Nevertheless, the persistence of the Supreme Court in asserting constitutional rights, and the restraint shown by President Lincoln in the exercise of his powers as commander-in-chief, were important in establishing for posterity the primacy of civilian over military authority.

Although slavery was abolished in 1865 by the Thirteenth Amendment, the result had already been accomplished by force of arms. In the aftermath of the Civil War, it was widely believed that full freedom for former slaves could not be achieved by formal emancipation alone. Therefore, Congress proposed, and the states ratified, two additional amendments to the Constitution, the Fourteenth (which became effective in 1868) and the Fifteenth (which became effective in 1870). The heart of the Fourteenth Amendment is Section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

59. 17 F. Cas. 144, No.9, 487 (C.C.D. Md. 1861).
60. 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).
61. Concerning the suspension of habeas corpus and the limiting of free speech during the Civil War, see 2 L. Pollak (ed.), *The Constitution and the Supreme Court: A Documentary History* 7-8, 115-125.
HUMAN RIGHTS: TWO HUNDRED YEARS OF CONSTITUTIONAL

The Fifteenth Amendment declares that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

VI. From Reconstruction to the New Deal

The major human rights developments between the Civil War and the 1930's all involved, in one way or another, the Fourteenth Amendment: the enunciation of the concept of “state action,” the narrow construction of the privileges and immunities clause, the expansive construction and extensive use of the due process clause, and the cautious use of the equal protection clause. Before analyzing these specific trends, however, it is important to recall the political, economic, and social context in which they occurred. The Lincoln administration had brought about an enormous increase in the activities of the federal government. Some of these activities were so intimately related to the war effort that they ceased shortly after the fighting ended. Others were more enduring.

In the 1860's the federal government began to promote the development of the West by making federal land available to settlers on reasonable terms under the Homestead Act. The national government began to support education through a program of land-grants to the states for the establishment of agricultural and mechanical-arts schools. The federal government (and the Republican Party, which dominated national politics from 1860 until 1932) supported and allied itself with big business and industry. This alliance no doubt contributed to the rapid growth of industrial enterprises and the tremendous increase in production, but it also gave license to entrepreneurs to engage in all manner of predatory practices. The railroads became very powerful, using their control over access to markets to reduce many farmers, small businessmen, and politicians to positions of subservience. The steel and coal companies of the Northeast paid subsistence wages, effectively ruled the "company towns" where many of their workers resided, and brutally suppressed both indi-

63. U.S. Const. amend. XV, §1.
65. An Act Donating Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanic Arts, Act of July 2, 1862, ch. 130, 12 Stat. 503.
individual and organized worker protests, often with the assistance of federal, state, and local officials. 66

In the South, the political, economic, and social pattern was established by a bargain made between Northern Republicans and Southern Democrats to settle the disputed presidential election of 1876. A number of Southern states acquiesced in the awarding of their electoral votes to the Republican presidential candidate, Rutherford B. Hayes, in exchange for a promise that federal troops (which had occupied much of the South since the Civil War) would be withdrawn and Southern whites would be left free to deal with the newly-emancipated blacks without federal interference. 67 The result was the subjection and disenfranchisement of most blacks by violence, intimidation, and the unfair administration of election laws, and the segregation of the races in most places of public accommodation.

Interestingly, the first Supreme Court test of the Civil War Amendments (as the Thirteenth, Fourteenth, and Fifteenth Amendments came to be called), arose not because of racial discrimination, but over an act of the Louisiana legislature creating a private monopoly of the slaughterhouse business in New Orleans. A number of suits were commenced by independent butchers who argued that the law subjected them to involuntary servitude, in violation of the Thirteenth Amendment, by requiring them to carry on their business through the state-created monopoly. The plaintiffs also argued that the law abridged their privileges and immunities as United States citizens and denied them due process of law and equal protection of the laws, in violation of the Fourteenth Amendment. The Louisiana courts upheld the statute. The plaintiffs appealed to the Supreme Court, where the cases were consolidated for argument under the title of the Slaughterhouse Cases. 68 In its decision, the Court made clear that the Thirteenth Amendment meant only to prohibit such institutions as slavery, peonage, and coolie labor, and had no application to the Louisiana scheme. The Court proceeded to dispose of the plaintiff’s due process and equal protection arguments in a few words. Most of the Court’s opinion dealt with the butcher’s principal contention, that the slaughterhouse monopoly abridged a privilege and immunity of their citizenship; that is, their right to engage in the independent practice of a lawful trade. The Supreme Court dealt with this argument by giving the Privileges and Immunities Clause the limited meaning which it has to this day. The Court said that the clause was intended to protect from state

67. See, C. Woodward, Reunion and Reaction (1956 rev.ed.).
68. 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873).
abridgement only those privileges and immunities attendant to United
States citizenship, not those privileges and immunities which were inci-
dents of state citizenship. The right asserted by the plaintiffs, if it was a
privilege or immunity at all, was a result of their state citizenship, and was
thus outside the scope of the Fourteenth Amendment. The result has been
that the Privileges and Immunities Clause of the Fourteenth Amendment,
which many had believed to be the most important part of the Fourteenth
Amendment, has come to protect a fairly narrow range of rights, of a
distinctly national character, such as the rights to travel from state to state
and to leave and re-enter the United States. 68a

Another limitation on the operation of the Constitution, although
implicit in the document from the very beginning, became explicit in the
late Nineteenth Century. This is the concept of “state action,” i.e., the rule
that the guarantees in the United States Constitution are limitations on
governmental action, not on private conduct. This means that unless an
alleged wrong is committed by or with the participation of government, it
does not violate the Constitution. This principle was made clear in 1883 in
the Civil Rights Cases, 69 where the Supreme Court held invalid those
provisions of the federal Civil Rights Act of 1875 70 which prohibited racial
discrimination by private persons in certain places of public accom-
modation. In enacting those provisions, Congress had relied on its power to
enforce the Fourteenth Amendment. The Supreme Court held that the
Fourteenth Amendment, like most other human rights guarantees in the
Constitution, applied only to government. Consequently, the Court con-
tinued, the power given to Congress in the Fourteenth Amendment to
enforce the other provisions of that Amendment meant only that Congress
could regulate and prohibit state action; it conferred no power to regulate
private conduct. In recent years the Supreme Court has said that the
enforcement powers given to Congress in the Civil War Amendments are
broader than the substantive provisions of the amendments themselves; 71
however, this does not alter the fact that “state action” remains a valid,
important, and salutary principle of constitutional law. 72

---

69. 109 U.S. 3, 3 S.Ct. 18; 27 L.Ed. 835 (1883).
70. An Act to Protect All Citizens in their Civil and Legal Rights, Act of March 1, 1875, 18
Stat. 335.
(1968).
72. The present-day distinction between state action and private conduct is illustrated by
Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed. 2d 627 (1972) and Burton v.
The Equal Protection Clause, which had received little attention in the *Slaughterhouse Cases*, was successfully invoked against public officials who excluded blacks from juries and denied business licenses to Chinese merchants. However, efforts to use the Equal Protection Clause to end racial segregation were frustrated in 1896 by the decision of the United States Supreme Court in *Plessy v. Ferguson*. In that case the defendant, a man of some African ancestry, was convicted of violating a Louisiana statute which required that blacks and whites ride in separate railroad cars. The defendant argued that this statutorily-imposed segregation denied him equal protection of the laws. Louisiana argued that as long as the accommodations for the separate races were, in a physical sense, "equal", there was no denial of equal protection. The Supreme Court agreed with the state, thus creating the "separate-but-equal" doctrine which prevailed for another fifty-eight years.

The history of the due process clauses of the Fifth and Fourteenth Amendments in the latter part of the Nineteenth Century and the early part of the Twentieth is fairly complex, having three distinct, though interrelated, aspects. First, and most obviously, the due process clause of the Fourteenth Amendment (which applies to the states) and the due process clause of the Fifth Amendment (which applies to the national government) were always understood to mean that government must employ fair and reasonable procedures whenever it takes action which adversely affects personal or property rights. Thus, for example, when a person has been sued in a federal or state court, due process requires that he be given notice of the suit and an opportunity to defend himself before a fair and impartial tribunal. This concept is usually referred to as "procedural due process".

In the latter part of the Nineteenth Century, "due process" came to acquire an additional meaning. Litigants began to argue that the due process clauses, in addition to guaranteeing fair procedures, also protected certain substantive rights. The argument was persuasive, as indicated by the following excerpt from the opinion of the Supreme Court in *Algleyer v. Louisiana*:

The liberty mentioned [in the due process clause of the Fourteenth

---

75. 163 U.S. 537, 165.Ct. 1138, 41 L.Ed. 256 (1896).
77. 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897).
Amendment]... means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that reason to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.78

This doctrine came to be called "substantive due process", and its emphasis on economic freedom reflected the laissez faire philosophy of the age. Substantive due process, particularly in its "freedom of contract" dimension, was used by the Supreme Court to invalidate numerous federal and state statutes enacted to ameliorate some of the worst abuses of the age. Minimum wage laws,79 maximum hours laws,80 and laws designed to protect the right of workers to unionize,81 were among the statutes declared unconstitutional in the name of "freedom of contract," which the Court had elevated to the level of a human right.

The doctrine of substantive due process did not always lead to pernicious results. For instance, in *Meyer v. Nebraska*,82 the Court found in due process the basis for protection of the right of parents to direct the education of their children, and thus struck down a Nebraska law which forbade instruction in a foreign language. In *Pierce v. Society of Sisters*,83 the Court, for the same reason, declared unconstitutional an Oregon law which prohibited elementary school students from attending Catholic or other private schools.

The third use of due process was as a vehicle by which most of the guarantees of the Bill of Rights were made applicable to the states. The *Barron* decision in 1833 had made clear that the guarantees in the Bill of Rights applied only to the federal government, not to the states. With the adoption of the Fourteenth Amendment, this rule began to change. Litigants argued that the Fourteenth Amendment's guarantee of due process in state matters meant that the states were obligated to respect the same rights which the Bill of Rights protects in federal matters. In the 1880's there began an evolutionary process by which the Supreme Court, over an eighty-year period, would use the due process clause of the Fourteenth Amendment.

78. 165 U.S. at 589, 41 L.Ed. at 835-836.
82. 262 U.S. 390, 43 S.Ct. 625 L.Ed. 1042 (1923).
83. 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).
Amendment to apply most of the Bill of Rights to the states. While the Court’s precise reasoning has varied somewhat over the years, the usual rationale was based on theories of human rights. The Court reasoned that the Due Process Clause guarantees as against the states those rights which are “fundamental principles of liberty and justice” or are “implicit in the concept of ordered liberty.”84 Using this and related rationales,85 the Supreme Court has determined that all but two of the rights guaranteed against the federal government by the Bill of Rights are guaranteed against the states by the due process clause of the Fourteenth Amendment.86 Only the right to a jury trial in civil cases (guaranteed by the Seventh Amendment)87 and the right to a grand jury in criminal cases (guaranteed by the Fifth Amendment) have no application to the states.88

Despite the increasing emphasis on the Bill of Rights, most of the important human rights decisions at the turn of the century involved “freedom of contract” (i.e. due process) challenges to federal and state economic regulation. Very little first Amendment litigation occurred until the security concerns caused by World War I and bolshevism led to the prosecution by the federal government and persons opposing military conscription and mobilization, and the prosecution by various states of persons advocating proletarian revolution. In a series of cases decided between 1919 and 1937, the Court began to develop a body of law concerning the First Amendment guarantees of freedom of speech, freedom of the press, and freedom of assembly. From these cases there evolved the rule that the First Amendment prohibits almost all prior restraints on freedom of speech and press,89 and the rule that the advocacy of illegal conduct is constitutionally protected unless it presents a clear and present danger that unlawful conduct will in fact result.90 Both of these

85. The different approaches are illustrated by the separate opinions in Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947).
86. See, e.g., Wolf v. Colorado, 338 U.S. 25, 69S.Ct. 1359, 93 L.Ed. 1782 (1949), in which the Court applied the Fourth Amendment prohibition of unreasonable searches and seizures to the states; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), in which the Court applied the Sixth Amendment right to counsel to the states; and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed 2d 653 (1964), in which the Court applied the Fifth Amendment protection against compulsory self-incrimination to the states.
principles have undergone refinement and rephrasing, but the basic contours of freedom of speech and press were established by the late 1930's. 91

In 1929 the United States fell into the most serious economic crisis it has ever known. The shock of the depression, and the inability of the Hoover administration to deal with the crisis, brought about significant changes in the political and economic life of the nation. 92 To combat the depression, the Democratic administration of President Franklin Delano Roosevelt (who took office in 1933) initiated numerous programs designed to bring about relief, recovery, and reform. 93 Although these measures were economic in purpose and effect, they were to have a profound effect on human rights and, more to the point, on the Supreme Court's perception of human rights. For decades the Supreme Court had been invalidating federal and state attempts to regulate the economy, on grounds that such legislation violated the due process "liberty of contract". At the same time, the Court was construing the Commerce Clause of the Constitution very narrowly so as to deprive Congress of the power to regulate many local activities which had profound effects across the country. 94 As Roosevelt's New Deal made unprecedented attempts to regulate the economy, the Court responded with an unprecedented activism of its own. Between 1933 and 1936, the Supreme Court declared twelve pieces of New Deal legislation unconstitutional. 95 However, Roosevelt's landslide re-election in 1936 and his proposal to increase the membership of the Supreme Court had a moderating influence on some members of the

---


94. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918), in which the Court held unconstitutional a federal statute prohibiting the shipment in interstate commerce of goods manufactured by child labor. Congress, said the Court, was impermissibly using the commerce clause as a means of regulating working conditions, which were purely a local matter and thus beyond the authority of the federal government.

REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO

Court, tipping the balance in favor of sustaining New Deal legislation against constitutional challenges. Thereafter, as older Supreme Court justices retired, Roosevelt was able to appoint to the Court persons whose views on economic issues paralleled his own.96

The human rights consequences of this change were three: first, it became constitutionally permissible for both the federal government and the states to protect workers and other disadvantaged persons against the oppressive practices of employers, speculators, and other powerful interests. Second, the Court abandoned the notion of substantive due process in economic matters. Specifically, the Court rejected the Nineteenth Century notion that due process protected an individual’s freedom to contract with his workers and his customers on whatever terms he might be able to impose or extract.97 It is important to note, however, that while the Court abandoned substantive due process in economic matters, it retained the concept in social matters. Thus Meyer and Pierce, the Nebraska and Oregon school cases, remain good law and continue to be cited, appropriately, as pillars of human rights.98

The third important result was the removal of most limitations on the power of Congress to legislate on matters of national importance. Prior to 1937, the Supreme Court’s narrow construction of the Commerce Clause had prevented the federal government from regulating wages, hours, working conditions, marketing, and production.99 In the last years of the 1930’s, the Court abandoned this grudging approach to the commerce power, and within a few years came to interpret the commerce clause so broadly that, as a practical matter, there were few entities and activities so local that they could not be regulated by the federal government.100 This

96. The change was evident in such 1937 decisions as N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct.615, 81 L.Ed. 893 (1937), in which the Court, construing the commerce clause more broadly than it had in the recent past, upheld the National Labor Relations Act against constitutional challenge; Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), in which the Court gave broad meaning to the taxing power of Congress and upheld the constitutionality of the Social Security Act; and West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), in which the Court rejected a “freedom of contract” challenge to a state minimum-wage law. The role of the Supreme Court in frustrating economic and social programs from the 1870’s through 1936, and the Court’s abandonment of this practice in favor of a policy of judicial restraint are explained in R. Jackson, The Struggle for Judicial Supremacy.

97. The movement away from economic substantive due process was evident in West Coast Hotel Co. v. Parrish, supra note 96.


99. See the cases cited in notes 94 and 95, supra.

100. See, e.g., United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941);
proved to be of particular significance for the civil rights movement, when the public accommodations provisions of the Civil Rights Act of 1964 were upheld as a permissible exercise of the commerce power.\textsuperscript{101}

\textbf{VII. Contemporary Developments}

The Depression, the Second World War, and the increasing complexity of postwar society caused a tremendous increase in governmental activity at all levels. Government began to touch the lives of people in new and different ways, thereby increasing the potential for violation of constitutional rights. Thus, it should come as no surprise that the amount of constitutional litigation — and particularly human rights litigation — has increased tremendously since World War II. This increase in constitutional adjudication is itself one of the most important human rights developments of our age. There is hardly a constitutional guarantee that has not been defined, refined, and expanded in recent years.\textsuperscript{102} This makes it difficult to provide the same overview that is possible for the Nineteenth Century, or even for the first forty years of the Twentieth Century. Nevertheless, it is possible to identify several constitutional developments as having had the most profound effect on human rights in recent years. They are:

(1) the expansion of the rights of the accused in criminal proceedings;

(2) the increased use of "equal protection";

(3) intense scrutiny under the religion clauses; and

(4) the development of the "right of privacy".

\textsuperscript{101} \textit{Wickard v. Filburn}, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); and \textit{United States v. South-Eastern Underwriters Assn.}, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

\textsuperscript{102} \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1965); \textit{Katzenbach v. McClung}, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed. 2d 290 (1965). The former case involved a motel, located near an interstate highway, which actively sought out-of-state guests. Thus, its relationship to interstate commerce was obvious. The latter case, however, involved a family-owned restaurant which did not seek, and was not shown to have served, patrons from outside the state, and which purchased all of its food from in-state suppliers. The Court found a constitutionally sufficient connection to interstate commerce in the fact that the restaurant purchased 46\% of its food from a supplier who had procured it from outside the state.

\textsuperscript{102} See, e.g., the remarks of Chief Justice Burger on the State of the Judiciary, Mid-Year Meeting of the American Bar Association (New Orleans, Feb. 6, 1983)
Much of the Bill of Rights deals with criminal law: for example, the Fourth Amendment prohibits unreasonable searches and seizures; the Fifth Amendment prohibits double jeopardy and compulsory self-incrimination; the Sixth Amendment guarantees, in criminal cases, a jury trial and the rights to confront opposing witnesses, to compel the attendance of witnesses in one’s favor, and to have the assistance of legal counsel. Originally, of course, these guarantees applied only to federal proceedings; but, after World War II the Supreme Court accelerated the process, begun decades earlier, of applying Bill of Rights guarantees to state proceedings. At the same time, the Court was interpreting these guarantees liberally in favor of the accused.\textsuperscript{103} For example, the Sixth Amendment right to the “assistance of counsel” came to mean the right to be represented by an attorney, at government expense if necessary, at virtually all stages of any major criminal case,\textsuperscript{104} and the Fifth Amendment freedom from compulsory self-incrimination grew to mean, among other things, that an accused, once in custody, has the right to be informed, in precise terms, of his right to remain silent and his right to legal counsel.\textsuperscript{105}

The importance of these declarations of rights is enhanced by the method chosen by the Supreme Court to enforce them. In \textit{Mapp v. Ohio},\textsuperscript{106} decided in 1961, the Court held that the appropriate way to prevent unconstitutional searches and seizures by state authorities was to render inadmissible any evidence obtained as the result of such unconstitutional activity. This approach, which has come to be called the “exclusionary rule,” is, practically speaking, as important as the substantive constitutional guarantees themselves, and has been applied generally to violations of the constitutional rights of an accused. Although the Court has imposed some limits on a few of its more expansive decisions of the recent past, there is no reason to believe that this is indicative of any general retreat from the important principles announced in the 1950’s and 1960’s concerning the rights of the accused.\textsuperscript{107}


\textsuperscript{104} See, \textit{Gideon v. Wainwright}, supra note 86; \textit{Scott v. Illinois}, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979). For a thorough account of the former case, which provides considerable insight into the workings of the Supreme Court, see A. Lewis, \textit{Gideon’s Trumpet}.


\textsuperscript{107} Cf. Y. Kamisar, “The ‘Police Practice’ Phases of the Criminal Process and the Three Phases of the Burger Court,” in H. Schwartz (ed.), \textit{The Burger Years}. 

28
Perhaps the most dramatic human rights development of our era has been the increasing (and increasingly effective) use of the Equal Protection Clause of the Fourteenth Amendment. The process began in 1954 with the landmark decision in *Brown v. Board of Education*,[108] in which the Supreme Court held that state-imposed racial segregation in public schools constituted a denial of equal protection of the laws to the black children who were the victims of such segregation. The Court expressly repudiated the old “separate-but-equal” doctrine which had prevailed since *Plessy v. Ferguson*. The *Brown* decision ushered in an era of active judicial use of the Equal Protection Clause, not only in school segregation cases and other instances of state-imposed racial discrimination,[109] but also in many other areas of life. In 1964 the Supreme Court held that the apportionment by a state of its legislature in such a way that legislative districts were of unequal size, denied equal protection to those voters in the more populous districts by diluting their votes. This principle, as announced in *Reynolds v. Sims*,[110] and as refined in subsequent cases, has led to the rule that whenever state and local legislative bodies are composed of members elected by district, each district must have approximately the same population, and that historical, geographical, political and socio-economic considerations cannot justify any departure from a “one-man, one-vote” standard. This development constituted not only a dramatic expansion of the concept of equal protection, but also a substantial

---

[108] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). In *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), decided the same day as *Brown*, the Supreme Court held that racial segregation in the public schools of the District of Columbia violated the equal protection guarantee which the Court found to be implicit in the due process clause of the Fifth Amendment. Since the Fourteenth Amendment (which was the basis of the *Brown* decision) applies only to the states, and since there is no explicit equal protection provisions in any part of the Constitution which applies to the federal government, the strained rationale in *Bolling* was necessary to avoid the politically unacceptable conclusion that the Constitution prohibits the states from practicing racial segregation but leaves the federal government free to do so. The wider significance of *Bolling* is that the national and state governments are now subject to identical equal protection requirements.


diminution of the "political question" doctrine which until the 1960's had allowed the states considerable discretion in structuring their own governments.111

In addition, the Supreme Court has used the Equal Protection Clause to invalidate many governmentally-imposed distinctions between men and women,112 citizens and aliens,113 documented and undocumented aliens,114 and rich and poor.115 This increasing use of the Equal Protection Clause, sometimes referred to as "galloping equal protection," parallels Twentieth Century changes in the text of the Constitution itself. Four of the last eight constitutional amendments have been directed toward the establishment or maintenance of equality. The Nineteenth Amendment, which became effective in 1920, guarantees to women the right to vote 'on the same terms as men. The Twenty-Third Amendment (1961) assures to residents of the District of Columbia the same voice in presidential elections as is enjoyed by residents of the states. The Twenty-Fourth Amendment (1964) prohibits the use of a poll tax in federal elections; and the Twenty-Sixth Amendment (1971) prohibits both the United States and the states from denying the franchise on account of age to anyone eighteen years of age or older. This emphasis on equality is not confined to constitutional amendments and judicial decisions. In recent years there have been many statutes, state and federal, prohibiting governmental and private discrimination on the basis of race, creed, color, sex, ethnic origin, or physical handicap. The most important legislation of this kind is the Civil Rights Act of 1964 which, inter alia, prohibits discrimination on the basis of race, creed, color, or national origin in most places of public accommodation.116

The Third important contemporary human rights phenomenon is the willingness of the Supreme Court to invalidate legislation on the basis of one or the other of the Religion Clauses of the Constitution. As you will recall, the First Amendment begins:

111. The "political question" doctrine, insofar as it was a bar to federal judicial review of state legislative apportionment, was repudiated in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d (1962).


HUMAN RIGHTS: TWO HUNDRED YEARS OF CONSTITUTIONAL

Congress shall make no law respecting an establishment of religion, or
prohibiting the free exercise thereof....

Until the 1940's, these provisions applied only to the federal govern-
ment, and there was very little litigation on the subject. Throughout the
Nineteenth Century and the early part of this century, the relationship
between government and religion was almost entirely a matter of state
law. Freedom of religion was a standard guarantee in state constitutions.
During the colonial period and the early decades of independence, a
number of colonies and states had "established" religions; that is, official
preference was given to one or more churches. Gradually, the preferences
were abolished, as were civil disabilities based on religious belief, and by
1838 no church could be said to be "established" by law anywhere in the
United States. There were, from time to time, campaigns (sometimes
violent) against one or another religious group, especially during the
1840's but these were short-lived and rarely had governmental support.

In the post-Civil War era, anti-Catholic feeling led to a campaign to amend the
United States Constitution to prohibit state financial assistance to
religious schools. The proposal, known as the "Blaine Amendment," failed
of ratification, although "little Blaine Amendments" were adopted by
some states.

---

117. U.S. Const. amend. 1.
118. Religion-clause litigation prior to 1947 is summarized in L. Manning, The Law of
Church - State Relations 21-24.
119. The juridical status of religion in the nineteenth century receives thorough attention and
analysis in M. Howe, The Garden and the Wilderness.
120. Concerning the nativist, anti-Catholic movements of the early nineteenth century, see 1
S. Ahlstrom, supra note 9 at 670-681. Concerning the difficulties encountered by the Mormons
at about the same time, see M. Marty, supra note 9 at 201-208.
121. The amendment was proposed by Representative James G. Blaine on December 4, 1875:

Resolved by the Senate and House of Representatives that the following be pro-
posed to the several States of the Union as an amendment to the Constitution:

Article XVI

No State shall make any law respecting the free exercise of religion or prohibiting the
free exercise thereof; and no money raised by taxation in any State for the support of
public schools, or derived from any fund therefor, nor any public lands devoted
thereto, shall ever be under the control of any religious sect, nor shall any money so
raised or lands so devoted be divided between religious sects or denominations.


The Blaine amendment was approved by the House of Representatives but failed to receive
In 1947, the Supreme Court decided *Everson v. Board of Education*, in which some New Jersey taxpayers argued that their state’s program of providing financial reimbursement to parents for the cost of transporting their children to elementary and secondary schools was a “law respecting an establishment of religion” insofar as some of those payments were made to parents whose children attended Catholic schools. Although the Court’s holding upheld the program, 5-4, its opinion established a contrary trend. The Court began by holding that the Establishment Clause applied to the states through the due process clause of the Fourteenth Amendment. The Court proceeded to base Establishment Clause analysis on the theory that the framers of the Constitution intended to create a “wall of separation between church and State.”

The metaphor of the wall has become an enduring part of Establishment Clause analysis, and has led to the judicial denial, on constitutional grounds, of governmental benefits to otherwise-eligible students, parents, and educational institutions solely because the education in question was under religious auspices and based on religious principles. The companion of the Establishment Clause, the Free Exercise Clause, has been the subject of judicial ambivalence. While some cases have acknowledged that religious belief is entitled to special protection, other cases suggest that religiously-motivated conduct enjoys no advantage, and may even be

---

the necessary two-thirds majority in the Senate. The language of the proposed amendment reflects not only the fact that the religion clauses of the First Amendment did not then apply to the states, but also the general belief at that time that the prohibition against laws “respecting an establishment of religion” did not prohibit governmental assistance to religious schools.


122. 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

123. The conceptual difficulties associated with the application of the establishment clause to the states are discussed in P. Kauper, *Religion and the Constitution* 55-57.

124. The validity of the “wall of separation” metaphor is questioned in *e.g.*, M. Howe, supra note 118; D. Moynihan, “What Do You Do When the Supreme Court is Wrong?”, *The Public Interest* 3 (Fall, 1979); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment*; and in the concurring opinion of Weis, J., in *Public Funds for Public Schools v. Byrne*, 590 F. 2d 514, 521-523 (3d Cir. 1979).

125. See, *e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971), disallowing partial reimbursement to parents for the cost of teachers’ salaries, textbooks, and instructional materials with respect to secular subjects taught in religious schools; *Wolman v. Walter*, 433 U.S., 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977), disallowing the loan of audio-visual equipment for secular subjects in religious schools and field trips for parochial school students to historic and cultural sites selected by public officials; and *Grand Rapids School Dist. v. Ball*, ----U.S.-----, 105 S.Ct. 3216, 87 L.Ed. 2d 267 (1985), prohibiting a local school district from providing remedial instruction and community-education programs on secular subjects in
particularly suspect. The task of balancing the guarantee of religious liberty against the traditional fears of theocracy and Erastianism and against the modern threat of state-sponsored irreligion is not easy. Even so, the practical effect of many recent Religion Clause decisions suggests neither a willingness to accommodate secular and religious interests, nor even an insistence on governmental neutrality in matters of religion, but rather a judicial hostility to religion. There is considerable irony in this situation. While the tendency in recent decades has been to expand the scope of most constitutionally-guaranteed rights (e.g., freedom of speech, press, and assembly; the rights of the accused; the concept of equality), the same cannot be said of that right which the Bill of Rights lists first: freedom of religion.

126. The Supreme Court has acknowledged the special protection conferred by the Constitution on religious belief and practice in such cases as Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963) (upholding the right of a job-seeker who refused to accept employment which would require her to work on her Sabbath, to receive unemployment compensation benefits) and Wisconsin v. Yoder, 95 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972) (upholding the right of Amish parents to refuse to send their children to high school). On the other hand, in the more recent case of Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed. 2d 557 (1985), the Court declared unconstitutional a state statute which gave employees the right not to work on their religious day of worship. Although this statute might appear to be nothing more than a reasonable way to protect the right of free exercise of religion (in a way consistent with Sherbert), the Court reasoned that the statute had the primary effect of advancing religion, and was thus a law “respecting an establishment of religion.”

127. In Grand Rapids School Dist. v. Ball, supra note 126, the Court was concerned that the public programs of remedial and adult education conducted on the premises of religious schools might be perceived as implying governmental approval of the religious groups in whose buildings the programs were conducted, thus creating a “symbolic union” between church and state. 105 S.Ct. at 3226-3227. In Larkin v. Grendel’s Den, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed. 2d 297 (1984), the Court declared unconstitutional part of a Massachusetts statute which gave to the governing bodies of schools and churches the power to veto applications for state liquor licenses for establishments located within five hundred feet of the school or church. This statute, the Court said, violated the establishment clause by delegating governmental authority to ecclesiastical officials.

The conceptual differences among accommodation, neutrality, and hostility, and the practical ramifications of each, are discussed in P. Kauper, supra note 123 at 80-119.

128. U.S. Const. amend I. That religious liberty was mentioned first was not an accident. Most bills of rights in the United States in the late eighteenth century gave priority to freedom of religion. See, e.g., Pa. Const. of 1776. Decl. of Rights, in which the first specific guarantees pertain to religious belief and worship.
A discussion of contemporary human rights would be incomplete without some mention of a right found, or created, by the Supreme Court in 1965—the right of privacy. The right was first declared in Griswold v. Connecticut,129 in which the Court held unconstitutional a Connecticut statute prohibiting the sale of contraceptive devices, on grounds that the statute violated the constitutional right of privacy. In Griswold, the Court concluded that a right of privacy is to be inferred from the various constitutional provisions prohibiting governmental involvement in particular areas of individual conduct. It was on the basis of the “right of privacy” that the Court decided Roe v. Wade130 in 1973, effectively invalidating state anti-abortion laws designed to protect the unborn. For a time it seemed that the right of privacy might proliferate to protect an ever-widening range of activities which have traditionally been prohibited in civilized societies. However, the 1986 decision in Bowers v. Hardwick,131 in which the Supreme Court held that Georgia’s anti-sodomy statute did not violate any constitutionally-protected privacy right, may have set the outer limits of the privacy doctrine.

It may well be that “privacy” will become a salutary method of protecting those rights traditionally cherished by humane and civilized societies, as its cognate doctrine of due process was in Meyer and Pierce. On the other hand, there remains the danger that “privacy” may be used, as in Roe v. Wade, (and as its cognate, due process, was used in Dred Scott) to justify, in the name of the human rights of the powerful, the most profound denials of the human rights of the weak.

**VIII. Overview**

The history of human rights under the United States Constitution is much too involved to be covered in a brief presentation such as this. Considerations of time and continuity necessitate the omission of such important topics as the treatment of indigenous peoples,132 the problems

---

132. The human rights record of the United States with respect to American Indians leaves much to be desired. The story of the Cherokee Nation of Georgia is not atypical. By a series of treaties with the United States, the Cherokees had established a separate nation in Georgia. Notwithstanding the treaties, the State of Georgia refused to recognize Cherokee autonomy, interfered with the treaty rights of the tribe, and permitted and encouraged encroachments by white settlers on Indian land. In two decisions, the United States Supreme Court upheld the treaty rights of the Cherokees against Georgia. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 17
associated with expansion into new territories, and the relocation of “suspect” nationality groups in time of war. Even so, it is possible to draw a number of conclusions about human rights under the United States Constitution.

First, the Constitution was adopted by a society in which human rights were already usually recognized and respected. The original constitutional document and the Bill of Rights were meant to conserve rights, not to introduce them. (For this reason, the Constitution might be said to be both “liberal” and “conservative”; liberal in its attachment to the idea of liberty, and conservative in its pledge to preserve the tradition of liberty.) Thus, the burden on the Constitution has been lighter, and the probability of enforcement greater, because its guarantees reflect a longstanding consensus about the importance of human rights.

Second, in the United States experience, “human rights” take the form of limitations on governmental power. The First Amendment says, “Congress shall make no law....” The Fourteenth Amendment provides that, “No state shall make or enforce any law....” In other words, human rights are stated (and understood) in terms of things that government may not do. Some nations’ constitutions, and some international conventions, impose affirmative obligations on government: to provide education,
employment, social security, and so forth. While guarantees of this kind may be appropriate in countries with different cultures and histories, the inclusion of such economic guarantees in the United States Constitution would be counterproductive. One of the virtues of the United States Constitution is its ability to function as a set of enforceable legal norms. This has been possible only because the guarantees contained in the Constitution are by nature susceptible of judicial enforcement. Courts can and do protect persons against arbitrary arrests and forced confessions, and can and do prevent government from interfering with free speech and religious worship; but it is doubtful if courts can, or should, build schools, manage factories, levy taxes, and appropriate monies on a continuing basis. In a democratic society, decisions to pursue this or that economic program (or none at all) are, or should be, matters of policy to be decided by the elected government of the day. In the United States, any attempt to constitutionally mandate "economic rights" would seriously infringe on democratic government, impose unmanageable responsibilities on the judiciary, and bring the entire Constitution into disrepute by reducing it to a set of unenforceable slogans.  

Third, in the United States experience, the protection of human rights has been intimately connected with the structure of government. Effective judicial review is impossible without a judiciary which is independent of both the President and the Congress; and Presidential excesses, such as those uncovered during the Watergate hearings, could not have been exposed and halted without a Congress which was constitutionally independent of the executive.

135. This is not to say that economic and social wellbeing are not human rights. The same principle of human dignity which establishes that each person is free to speak and worship, also dictates that each person should have a wholesome family environment, a comfortable home and neighborhood, just and charitable neighbors, and opportunities for education and for employment on fair and reasonable terms. But it does not follow that such rights ought to be constitutionally guaranteed, particularly in a society where constitutional guarantees are legally enforceable norms. Not only is there the problem of trying to enforce the unenforceable, there is also a problem of preemptsing the prerogatives of the democratically-elected branches of government. Whenever government acts to promote economic and social objectives, prudence dictates that the nature and extent of such governmental activity be determined (subject, of course, to constitutional guarantees of basic civil and political rights) by the legislative process and not by constitutional mandate. The prudential considerations relevant to such a determination should certainly include the material resources available to the society, and the extent to which human rights are being respected without governmental action.

Equally important is the fact that the full realization of human rights cannot be achieved by governmental alone; it requires a morally responsible society, of which government is but one part. To invest the state with power to enforce all human rights is to invite the most inhuman tyranny.
The separation of powers is only part of the structural protection of human rights in the United States. The other part is federalism; that is, the division of governmental authority between the national government and the several states. While it is true, in fact and in law, that the actions of the national government take precedence over state constitutions and laws, it is also true that the vast majority of governmental decisions involving the day-to-day life of the citizen are made by the states, their municipalities and subdivisions. The existence of the states serves to lessen the danger of pervasive federal control of the details of everyday life, as the existence of the federal government operates to limit oppressive conduct growing out of local prejudices. Perhaps most important, the existence of effective state and local decision-making keeps government within the reach of the people and lessens the chances that popular participation in government will be suffocated by a remote and non-responsible national bureaucracy. These considerations may be unimportant, or even irrelevant, in countries whose geography or homogeneity lessen the dangers of tyranny. But in the United States, federalism and the separation of powers are crucial to the defense of human rights.

Fourth, human rights under the United States Constitution are personal, not collective. Rights are guaranteed to each person because he or she is a human person, not because he or she may be a member of a particular group, espouse a particular cause, or demonstrate social utility. While this emphasis on the person can lead to distorted ideas of individual autonomy, as in *Dred Scott v. Sandford* and *Roe v. Wade*, it is important to realize that the corrective for such distortions is not the collectivization of rights, but a more thorough appreciation of the inherent dignity of each and every human being, young or old, weak or strong, as a person created in the image and likeness of God.

Finally, the constitutional experience of the United States illustrates the fact that human rights, in their practical application, are combinations of universal, transcendent principles, and particular national traditions. Thus, the protection of human rights requires, in every part of the world, a clear perception of, and dedication to, eternal principles. It also requires an awareness and appreciation of the particular history, geography, and culture of each nation, for it is in the context of national traditions and national institutions that human rights find their application.

The human rights record of the United States has not been perfect, but it has been very good. To the people of the United States, the value of the Constitution as an instrument for the preservation of human rights has been immeasurable. As for the significance of the United States Constitution in other parts of the Americas, I look forward to the presentations of my distinguished colleagues on this panel.

Thank you.