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M.N.S. SELLERS*

Universal Human Rights in the Law of the United States†

This Article discusses the relationship in U.S. law between State, Federal, and international authorities on universal human rights. All U.S. State constitutions and the Federal Constitution recognize the “inherent” or “inalienable” rights of humanity. Yet despite having long accepted the binding force of universal human rights, U.S. courts and public officials have been hesitant to recognize non-U.S. authorities when identifying, interpreting, or enforcing these rights in practice. The U.S. government and courts view most international treaties and declarations concerning universal human rights as simple restatements of existing constitutional guarantees. U.S. courts and public officials have generally weighed foreign evidence of the requirements of universal human rights according to the legitimacy, importance, and probative value of the source. The undemocratic and illiberal nature of many international institutions makes it unlikely that the U.S. Federal or State legal systems will cede final control over such questions to non-U.S. or multinational authorities at any time in the near future.

The founding legal principles and separate political existence of the United States of America began with the claim that “all men” are born with certain “unalienable rights,” including rights to “life, liberty, and the pursuit of happiness.”¹ The United States’ Declaration of Independence from Great Britain rested on this assertion that human rights are universal and binding on all human beings, nations, and states and that it is only to secure these rights that governments legitimately exist, so “that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it.”² The political architects of the United States believed that by violating fundamental human rights, the

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1. THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA (July 4, 1776).

2. *Id.*

British king had made himself a “tyrant . . . unfit to be the ruler of a free people,” and therefore subject to replacement by a “new government” more suited to the “safety and happiness” of its citizens.³ Universal human rights are, will be, and always have been deeply embedded in the law of the United States, and binding in all American tribunals of justice.

There was not at the beginning, is not now, and never can be for Americans any question whether human rights are universal and binding, because universal human rights supply the theoretical foundations that support the U.S. Federal and separate State governments and necessarily provide, in the American view, the ultimate basis of all legitimate government anywhere.⁴ John Adams, the leading constitutional lawyer of the American Revolution, took it for granted as early as 1765 that “many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed.”⁵ When the North American States established their own independent governments, most followed Adams’ advice by supporting their new written constitutions with detailed declarations of rights, listing some of the “inherent rights,” of which no government or state can presume to “deprive” or “divest” its subjects.⁶

These declarations of the newly independent American States were no innovation. They followed the example of such famous documents as the Pennsylvania Charter of Privileges of 1701 or the Massachusetts Body of Liberties of 1641,⁷ and would be replicated on a larger scale by the French *Déclaration des droits de l’Homme et du citoyen* of 1789, the United States Bill of Rights of 1791, and finally the Universal Declaration of Human Rights of December 10, 1948.⁸

3. *Id.*

4. On American conceptions of rights in the era of independence, see SHAIN, BARRY A. (ED.), *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* (2007); BREEN, T.H., *THE LOCKEAN MOMENT: THE LANGUAGE OF RIGHTS ON THE EVE OF THE AMERICAN REVOLUTION* (2001); Reid, John P., *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); ADAMS, WILLI PAUL, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA*, trans. Rita Kimber and Robert Kimber (1980); WHITE, MORTON G., *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978); Hamburger, Philip A., *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907-960 (1993); Dana, William F., *The Declaration of Independence as Justification for Revolution*, 13 *HARV. L. REV.* 319-343 (1900).

5. ADAMS, JOHN, *A DISSERTATION ON THE CANON AND FEUDAL LAW* (1765) in ADAMS, CHARLES FRANCIS (ED.) *THE WORKS OF JOHN ADAMS*, volume III (1865) at p. 463.

6. These quotations are from the *Virginia Declaration of Rights* (June 12, 1776).

7. On these and other antecedents of the American declarations of rights, see SCHWARTZ, BERNARD, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* (expanded ed. 1992).

8. For a collection of such texts, see FREDERIK MARI, BARON VAN ASBECK, ED., *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ITS PREDECESSORS* (1679-1948), (1949). Cf. MORSINK, JOHANNES, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (1999).

The Universal Declaration, like the American declarations, threatened "rebellion against tyranny and oppression" unless human rights were "protected by the rule of law"⁹ and insisted that "all human beings are born free and equal in dignity and rights."¹⁰ So intimate is the relationship between universal human rights and the rights protected by the U.S. Constitution, that in the eyes of the U.S. government and courts most international covenants and treaties recognizing universal human rights are simply restatements of existing U.S. law and established constitutional guarantees.¹¹ To the extent that international documents and scholarly or other interpretations of universal human rights depart from traditional American understandings of these ancient guarantees, American officials have usually preferred their own longstanding precedents to more recent (and less well-established) interpretations of human rights law.¹²

This last point is particularly important in understanding the role that universal human rights play in the legal systems of the United States of America. While there is no question that human rights are universal and binding throughout the United States, there have been strong and persistent disagreements about who has the authority to prescribe or to identify these rights in detail, to enforce their requirements against violations in practice, and to adjudicate legal disputes that arise from their enforcement. There are international, Federal (U.S.), and State constitutions and declarations purporting to identify and to protect universal human rights, and international, Federal (U.S.) and State authorities with simultaneous and often overlapping responsibility to implement and protect the fundamental rights of the people. This discussion will consider State, Federal, and international documents and authorities in the order in which they first asserted their jurisdiction through courts, beginning with the separate State institutions.

I. HUMAN RIGHTS IN THE STATES

The United States of America forms a Union of otherwise independent States, which have delegated certain powers to a Federal

9. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (December 10, 1948), Preamble.

10. *Id.* Article 1.

11. See, e.g., Message of President Jimmy Carter to the United States Senate, February 23, 1978 (concerning the International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966; THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, signed on behalf of the United States on October 5, 1977; THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, signed on behalf of the United States on October 5, 1977; and the AMERICAN CONVENTION ON HUMAN RIGHTS, signed on behalf of the United States on June 1, 1977).

12. See, e.g., *id.* and *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 CONGRESSIONAL RECORD S4781-01 (daily ed. April 2, 1992).

government, but reserve the rest.¹³ Each of the States has its own constitution, and each of the State constitutions has its own bill or declaration of rights.¹⁴ The constitutions of five of the most influential States can be taken here as useful and typical examples of these various State provisions. Thus, the Massachusetts,¹⁵ Pennsylvania,¹⁶ Virginia,¹⁷ Texas,¹⁸ and California¹⁹ constitutions all contain their own lists of fundamental rights, which are to be protected by courts and public officials (who must take an oath to do so).²⁰ The State constitutions describe these rights as “natural, essential, and unalienable” (Massachusetts),²¹ the “inherent rights of mankind” (Pennsylvania),²² “inherent rights, of which . . . they cannot, by any compact, deprive or divest their posterity” (Virginia),²³ because “All people are by nature free and independent and have inalienable rights” (California),²⁴ which must be maintained by their “free and independent State[s], subject only to the Constitution of the United States, and the maintenance of our free institutions” (Texas).²⁵

The bills and declarations of rights of the existing American States served as the model for the U.S. Bill of Rights, which was added to the Constitution by amendment, as a condition of that document's ratification.²⁶ Many feared that under the new constitution, the U.S. government might “deprive them of the liberty for

13. This point is clarified in the United States Constitution by Amendment X, ratified on December 15, 1791.

14. These may be found easily on-line through the various State websites.

15. CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Part the First, A *Declaration of the Rights of the Inhabitants of Massachusetts*.

16. CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, Article 1, DECLARATION OF RIGHTS.

17. CONSTITUTION OF VIRGINIA, Article 1, BILL OF RIGHTS.

18. THE TEXAS CONSTITUTION, Article 1, BILL OF RIGHTS.

19. CONSTITUTION OF CALIFORNIA, Article 1, DECLARATION OF RIGHTS.

20. For example, in California all members of the legislature, and all public officials and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, must “before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation.” The oath reads: “I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.” CONSTITUTION OF THE STATE OF CALIFORNIA, Article 20. California public officials must further swear or affirm that they belong to no party or organization that advocates the overthrow of the government by force or violence.

21. CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Article CVI.

22. CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, Article 1, Section 1.

23. CONSTITUTION OF VIRGINIA, Article I, Section 1.

24. CALIFORNIA CONSTITUTION, Article 1, Section 1.

25. THE TEXAS CONSTITUTION, Article 1, Section 1.

26. Preamble of the “Bill of Rights,” as proposed by the U.S. Congress to the States (March 4, 1789).

which they valiantly fought and honorably bled"²⁷ and wanted the same protections at the Federal level of "those safeguards which they have long been accustomed to have interposed between them and the magistrate who exercises the sovereign power."²⁸ James Madison, who proposed the U.S. Bill of Rights to Congress, cited possible threats to liberty not only from the Federal executive and legislature, but also from the people of the United States themselves, "operating by the majority against the minority."²⁹

The hope expressed for the Federal, as for the State bills of rights, was that the "independent tribunals of justice" would consider themselves to be "the guardians of those rights"³⁰ and an "impenetrable bulwark" against every improper "encroachment upon rights"³¹ enumerated in the "declaration of the rights" of the people.³² The most persuasive argument offered against the Federal Bill of Rights was that such lists of rights, however carefully drafted, might seem to "disparage" those rights not explicitly set down,³³ James Madison averted this danger by proposing what became the Ninth Amendment to the U.S. Constitution, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³⁴ The citizens of the United States were united from the beginning in seeking to "fortify the rights of the people against the encroachments of the Government."³⁵

The relationship between the duty of the separate State governments to protect the natural and inherent rights of the people, and the duty of the Federal government to do the same was highly contested at first. The famous Kentucky³⁶ and Virginia Resolutions of 1798³⁷ denied both that the protection of fundamental rights in the States was the province of the Federal government³⁸ and that the U.S. government should be the final arbiter of its own jurisdiction in

27. James Madison discussed this viewpoint in his speech to the Congress proposing a Bill of Rights. *THE ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES, FIRST CONGRESS, 1ST SESSION (June 8, 1789)*, p. 449.

28. *Id.* at 450.

29. *Id.* at 455.

30. *Id.* at 457.

31. *Id.*

32. *Id.*

33. *Id.* at 456.

34. On the Ninth Amendment *see* FARBER, DANIEL A., *RETAINED BY THE PEOPLE* (2007); PRINCE, CHARLES O., *THE PURPOSE OF THE NINTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* (2005); BARNETT, RANDY, *RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1991).

35. James Madison in *THE ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES, FIRST CONGRESS, 1ST SESSION (June 8, 1789)* p. 459.

36. *RESOLUTIONS OF THE KENTUCKY LEGISLATURE (November 10, 1798)*.

37. *RESOLUTION OF THE VIRGINIA SENATE (December 24, 1798)*.

38. *RESOLUTIONS OF THE KENTUCKY LEGISLATURE (November 10, 1798)* no.3.

these or any other circumstances.³⁹ Kentucky claimed the right to "nullify" any Federal Acts that overstepped the proper limits of Federal control,⁴⁰ insisting that "it is jealousy, and not confidence which prescribes limited constitutions."⁴¹ Both State and the Federal authorities claimed to protect fundamental rights and justice, without being certain at first which jurisdiction had ultimate control.

Chief Justice John Marshall concluded in the famous case of *Barron v. City of Baltimore* (1833) that the "liberty of the citizen" was a subject on which the States remained the judges "exclusively"⁴² under the U.S. Constitution. Marshall suggested that the purpose of listing fundamental rights in the Federal Constitution was solely to constrain the U.S. government, while the State courts, constitutions, and legislature had primary responsibility for keeping their own governments in check.⁴³ This did not mean that the fundamental and inherent rights of all persons did not apply against the State governments, but rather that the U.S. courts were not responsible for their enforcement against the States' own public officials.⁴⁴ The "fundamental" guarantees, "which belong, of right, to the citizens of all free governments," have been enjoyed by the citizens of the American States "from the time of their becoming free, independent, and sovereign,"⁴⁵ and generally protected by the State courts.⁴⁶ The famous Federal cases of *Calder v. Bull* (1788) and *Corfield v. Coryell* (1823) confirmed that State governments have a duty to respect "that security for personal liberty, or private property, for the protection whereof government was established" (*Calder*)⁴⁷ and to uphold those rights which are "in their nature, fundamental" (*Corfield*).⁴⁸

The United States discovered in the eighteenth and nineteenth centuries what has become apparent to the world since the Second World War, which is that local ("national" or "sovereign") enforcement of the "great rights of mankind" fails in the face of petty prejudice and the parochial self-interest of local ethnic, religious, and political factions.⁴⁹ For example, the Court of Appeals of Kentucky

39. *Id.*, Resolution no. 1.

40. *Id.*, Resolution no. 8.

41. *Id.*

42. *Barron v. City of Baltimore*, 32 U.S. 243, 248 (1833).

43. *Id.* at 250-1.

44. The Constitution itself referred to the "privileges and immunities of citizens in the several states," CONSTITUTION OF THE UNITED STATES (1787), Article IV, section 2.

45. *Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3230 C.C.E.D. Pa. (1823).

46. See *Calder v. Bull*, 3 U.S. 386, 388 (1798) for those acts "which the Federal, or State, Legislature cannot do, without exceeding their authority."

47. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

48. *Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3230 C.C.E.D. Pa. (1823).

49. James Madison saw this already when he proposed the Bill of Rights to the First Congress and observed that he thought "there is more danger of those powers being abused by the State Governments than by the Government of the United States." James Madison, in THE ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES,

held in the case of *Amy, a woman of color, v. Smith* (1822) that “free negroes and mulattoes” are a “degraded race of people”⁵⁰ and therefore not entitled to any of those “ordinary rights of personal security and property” enjoyed by others in the Commonwealth.⁵¹ The same was true in Tennessee, which considered any “man of color” to belong to an “inferior caste in society” and “scarcely” worthy of enjoying “a single right in common with the mass of citizens of the State.”⁵² All this in spite of constitutional clauses in their State bills or declarations of rights, which guaranteed that “no free man shall be . . . deprived of his life, liberty of property, but by . . . the law of the land.”⁵³

The disregard by the southern States in the American Union of the universal or “inherent” rights of humanity, as applied not only to their slaves, but also to free African Americans, led to increasingly sharp conflicts with other States and their representatives in the U.S. legislature, and in the courts.⁵⁴ U.S. Chief Justice Roger B. Taney tried to settle the question, and to strengthen the slaveholders’ position, by extending the reasoning of the *Amy* and *Claiborne* cases to the United States as a whole in the infamous decision of *Dred Scott v. Sandford* (1857),⁵⁵ in which Taney argued that the “self-evident” truths of the Declaration of Independence, although they “would seem to embrace the whole human family,” were never intended to extend to the “African Race.”⁵⁶

The promotion of such reasoning, and principled resistance against it, led in time to a great Civil War (1861 – 1865), and ultimately to the passage of three new amendments to the U.S. Constitution, prohibiting slavery (Amendment XIII),⁵⁷ extending the vote to African Americans (Amendment XV),⁵⁸ and prohibiting the States from depriving “any person of life, liberty, or property, without due process of law” or denying “any person within its jurisdiction the equal protection of the laws” (Amendment XIV).⁵⁹ These provisions

FIRST CONGRESS, FIRST SESSION (June 8, 1789), p. 458. For “the great rights of mankind,” see page 449.

50. *Amy, a woman of color, v. Smith*, 11 Ky. 326; 1 Litt. 326, 334.

51. *Id.* at 333.

52. *The State v. Claiborne*, 19 Tenn. 331, 1 Meigs 331, 340. “An emancipated slave is called a freeman in common parlance . . . but in reference to the conditions of a white citizen, his condition is still that of degraded man, aspiring to no equality of rights with white men, and possessing a very few only of the privileges pertaining to a ‘freeman’”. *Id.* at 341.

53. State of Tennessee, CONSTITUTION OF 1835, Article I, DECLARATION OF RIGHTS, section VIII. Cf. Magna Carta, chapter 39.

54. For the vast literature on the antebellum conflict over fundamental human rights, see BARNETT, RANDY, *RESTORING THE LOST CONSTITUTION* (2004).

55. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

56. *Id.* at 410.

57. The Thirteenth Amendment was ratified on December 6, 1865.

58. The Fifteenth Amendment was ratified on February 3, 1870.

59. The Fourteenth Amendment was ratified on July 9, 1868.

had the effect of overturning *Dred Scott v. Sandford*, which had protected legal discrimination against African Americans, but also reversed *Barron v. Baltimore*, because the Fourteenth Amendment gave the U.S. Congress the power to enforce the provisions of the amendment "by appropriate legislation."⁶⁰

The Fourteenth Amendment to the U.S. Constitution did not limit or in any way compromise the separate duty of the governments and courts in each of the States to protect and respect the universal, inherent, and inalienable rights of humanity, as recognized by the Declaration of Independence and in the various State constitutions and bills of rights.⁶¹ States continue to apply their own bills and declarations of rights directly, through their own courts.⁶² But the imposition of the Fourteenth Amendment gave the Federal government and courts full power to intervene when states invade or fail to protect the "life, liberty, or property" of any person subject to their jurisdiction. State governments and courts can and often do protect rights (including universal rights) more broadly and generously than has yet been required by U.S. courts, but they cannot now diminish the rights of their citizens by narrow or parochial constructions of universal human rights.⁶³

II. FEDERAL PROTECTIONS OF HUMAN RIGHTS

The U.S. government did not at first fully exercise the powers conferred by the Fourteenth Amendment,⁶⁴ and even when the United States did act, such action was not at first supported by the courts, which were slow to accept the vastly expanded jurisdiction of the Federal authorities.⁶⁵ U.S. courts recognized that some "additional guarantees of human rights" were provided by the Fourteenth Amendment, along with "additional powers" for the Federal government, and the "additional restraints" upon the States⁶⁶ concerning "fundamental rights" as described in the old case of *Corfield v. Cory-*

60. United States Constitution, Amendment XIV, section 5.

61. See Brennan, William J. Jr., *The Bill of Rights and the States, The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Brennan, William J. Jr., *State Constitutions and the Revival of Individual Rights*, 90 HARV. L. REV. 489 (1977).

62. See, e.g. Marshall, Margaret H., *Wise Parents Do Not Hesitate to Learn from their Children: Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.L. REV. 1633 (2004).

63. Linde, Hans A., *E Pluribus - Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, Hans A., *First things First - Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

64. The first major attempt to enforce the Fourteenth Amendment to protect Civil Rights in the States was the Civil Rights Act of 1871 (also known as the "Enforcement Act" or the "Ku Klux Klan Act") (17 STAT. 13).

65. For example, the Civil Rights Act of 1875 (18 STAT. 335) was struck down as unconstitutional by the United States Supreme Court in *The Civil Rights Cases*, 109 U.S. 3 (1883).

66. *Slaughter-House Cases*, 83 U.S. 36, 67-68 (1873).

*ell.*⁶⁷ But the Court could not at first accept that the Federal government should really have the power to enforce “the entire domain of civil rights heretofore belonging exclusively to the States.”⁶⁸ The whole history of U.S. human rights law since the Supreme Court first interpreted the Fourteenth Amendment in the *Slaughter-House Cases* in 1873 has been the story of gradual progress towards broader acceptance by the Federal Courts and Congress that the Fourteenth Amendment did indeed “radically change[] the whole theory of the relations of the State and Federal governments to each other,”⁶⁹ by protecting “the rights of person and property” against the arbitrary power of the States.⁷⁰

American judges disagreed initially, not about the existence of “natural and inalienable” rights,⁷¹ “which of right belong to the citizens of all free governments,”⁷² but about whether the Federal Constitution protected these “common rights” against State action.⁷³ Gradually, over decades, Federal judges and other American public officials came to accept that the Fourteenth Amendment “was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”⁷⁴ Put more prosaically, more than a century after the ratification of the Fourteenth Amendment to the U.S. Constitution, the Federal and other courts in the United States now fully accept that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States”⁷⁵ through the section of the Fourteenth Amendment which declares that no State shall “deprive any person of life, liberty or property without due process of law.” The controlling word in most such cases is “liberty.”⁷⁶

The protection of liberty “against executive usurpation,” “tyranny,” and “arbitrary legislation,”⁷⁷ has been the business of American courts from the beginning, often resting on the ancient

67. “Rights which belong of right to the citizens of all free governments” and “embrace nearly every civil right for the protection of which civil government is instituted.” *Id.* at 75-76. *Cf.* above on *Corfield v. Coryell*.

68. *Slaughter-House Cases*, 83 U.S. 36, 77 (1873) at 77.

69. *Id.* at 78.

70. *Id.* at 82.

71. *Id.* (Field dissent), p. 96.

72. *Id.* (Field dissent), p. 97.

73. *Id.* (Field dissent), p. 89.

74. *Id.* (Field dissent), p. 105.

75. Justice O'Connor, Justice Kennedy, and Justice Souter, writing for the majority in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) quoting Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357, 373 (1927).

76. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 846.

77. *Id.* at 847 quoting Justice Harlan, dissenting on jurisdictional grounds in *Poe v. Ullman* 367 U.S. 497, 541 (1961), in which Justice Harlan quoted the case of *Hurtado v. California*, 110 U.S. 516, 537 (1884).

promise of the English Magna Carta that "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed . . . but by the law of the land."⁷⁸ This final phrase, "*per legem terrae*," was understood by English Whigs and by the American constitutional writers who followed them, to protect life, liberty, and property from deprivation except through the "due process of law."⁷⁹ Some such protection and guarantee appears in most American State bills of rights, in the U.S. Bill of Rights (Amendment V), and in the Fourteenth Amendment to the U.S. Constitution, which requires that no State shall "deprive any person of life, liberty, or property, without due process of law."

The historical antecedents of the phrases "liberty" and "due process" in the Fourteenth Amendment have colored their interpretation from the beginning. The U.S. Supreme Court, in its most detailed recent discussion of the meaning of the word "liberty" in the Due Process clause of the Fourteenth Amendment, cited Magna Carta and quoted the phrase "*per legem terrae*" as interpreted by Supreme Court jurisprudence going back to the nineteenth century.⁸⁰ The Supreme Court has construed this fundamental "liberty" to encompass most of the rights enumerated in the U.S. Bill of Rights,⁸¹ but also other fundamental human rights, such as the rights to marry,⁸² to procreate,⁸³ to pursue an education,⁸⁴ or to enjoy "privacy" as privacy relates to abortion⁸⁵ and to homosexuality.⁸⁶ To determine the scope of such rights, U.S. courts have looked to the concepts of "personal dignity" and "autonomy" that are "central to the liberty protected by the Fourteenth Amendment."⁸⁷

The U.S. executive, congress, and the courts feel a responsibility to strengthen and to advance the American legal tradition of "liberty,"⁸⁸ "having regard to what history teaches are the traditions

78. MAGNA CARTA, 39 (1215).

79. See, e.g., Justice Bradley's dissent in the Slaughter-House Cases 83 U.S. 36, 50 (1873). Cf. Planned Parenthood v. Casey, 505 U.S. 833 at 847 (1992).

80. Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992), quoting Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 541 (1961), which itself quoted Hurtado v. California, 110 U.S. 516, 532 (1884).

81. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992); Duncan v. Louisiana, 391 U.S. 145, 147-148 (1968).

82. Loving v. Virginia, 388 U.S. 1, 12 (1967).

83. Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942).

84. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

85. Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833 (1992).

86. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

87. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

88. See, e.g., Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 850 (1992), quoting Justice Harlan dissenting in Poe v. Ullman, 367 U.S. 497, at 542 (1961).

from which it developed as well as the traditions from which it broke.”⁸⁹ This includes concern for judicial precedents in U.S. courts protecting “personal autonomy,”⁹⁰ but also the protection of other rights implicit in the concept of ordered “liberty.”⁹¹ A persistent but isolated minority of judges on U.S. courts has sometimes seen the concept of “tradition” as a limitation on “liberty” and fundamental rights.⁹² Such attitudes misunderstand the role of liberty in the American legal tradition, which protects fundamental human rights, not because they are “traditional,” but because they are just—and “unalienable” by any person or government official.⁹³ Tradition, precedent, and American legal history play a central role in clarifying the meaning of liberty and universal human rights in U.S. courts, not because American legal precedents *create* rights, but because the American legal system and judges seeking to understand its promise of liberty have studied individual human rights for so long, so carefully, and so well.⁹⁴

The role of American tradition in understanding the meaning of “liberty” becomes particularly important when the U.S. Supreme Court must overturn its own mistaken precedents concerning fundamental rights, as it did recently in the cases of *Lawrence v. Texas* (2003) regarding homosexuality⁹⁵ and *Roper v. Simmons* (2005) regulating to the death penalty for juvenile offenders.⁹⁶ In both cases the Court looked for support to decisions made by State courts interpreting their own bills or declarations of rights,⁹⁷ but also to the practices of foreign and international tribunals interpreting universal rights as applied to their own jurisdictions.⁹⁸ When the Supreme Court overturned its own recent precedents⁹⁹ to hold in *Lawrence v. Texas* that homosexual adults must be left free to engage in “private conduct in the exercise of their liberty under the Due Process clause of the Fourteenth Amendment to the Constitution,”¹⁰⁰ the rationale for this holding depended on the Court’s own evolving jurisprudence,¹⁰¹ but also on the jurisprudence of the European Court of Human Rights,

89. *Id.*

90. *Planned Parenthood v. Casey*, 505 U.S. 833, 857, 860 (1992).

91. *Id.* at 869.

92. *See, e.g.*, Chief Justice Rehnquist, dissenting in *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 951-952, 981 (1992).

93. *See, e.g.*, the United States Declaration of Independence (1776) on “unalienable rights” and the CONSTITUTION OF THE UNITED STATES (1787) Preamble on “Justice” and “the Blessings of Liberty.”

94. *See Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, at 848 (1992).

95. *Lawrence v. Texas*, 539 U.S. 558 (2003).

96. *Roper v. Simmons*, 543 U.S. 551 (2005).

97. *Lawrence v. Texas*, 539 U.S. 558 (2003).

98. *Id.*

99. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

100. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

101. *Id.* at 564-566.

which had recognized similar protection of consensual homosexual conduct under the European Convention on Human Rights.¹⁰² The *Roper v. Simmons* case invalidating the juvenile death penalty in the United States cited the United Nations Convention on the Rights of the Child (to which the United States is not a party)¹⁰³ and the views of “leading members of the Western European community.”¹⁰⁴

Cases such as these, interpreting the fundamental requirements of “liberty” under the Due Process clause of the Fourteenth Amendment to the U.S. Constitution, cite foreign opinions to establish “civilized standards,”¹⁰⁵ not because the opinion of the world community “controls” the outcome of American cases,¹⁰⁶ but because “the express affirmation of certain fundamental rights by other nations and peoples . . . underscores the centrality of those same rights within our own heritage of freedom.”¹⁰⁷ American judges interpreting “values we share with a wider civilization”¹⁰⁸ have been guided in some cases by foreign jurisdictions towards better understanding which rights (or which applications of known rights) should be protected “as an integral part of human freedom.”¹⁰⁹ This direct reference by American courts to the fundamental and inalienable requirements of human liberty is often described (and sometimes criticized) as establishing the “substantive” due process of law.¹¹⁰

The U.S. Constitution was intended by its drafters to constitute, and accepted by the States that ratified it as having constituted, the “supreme Law of the Land,” not only in itself, but also through all laws or treaties made under its provisions.¹¹¹ With the ratification of the Fourteenth Amendment in 1868, the U.S. Supreme Court became the final arbiter of all “fundamental rights” requiring judicial protection under the concept of “liberty” confirmed by the due process clause of the U.S. Constitution.¹¹² To understand which rights liberty requires, judges and other officers of the State have looked to the U.S. Bill of Rights,¹¹³ to the practices of the American State governments

102. *Id.* at 573, citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) and par. 52.

103. *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

104. *Id.* at 561.

105. *Id.*

106. *Id.* at 578.

107. *Id.*

108. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

109. *Id.*

110. Justice Scalia dissenting in *Lawrence v. Texas*, 539 U.S. 558, 593 (2003).

111. CONSTITUTION OF THE UNITED STATES, (1787) Article VI.

112. On the Fourteenth Amendment, see EPPS, GARRETT, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006); NELSON, WILLIAM E., *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); CURTIS, MICHAEL KENT, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

113. *Roper v. Simmons*, 543 U.S. 551, 555 (2005).

and courts,¹¹⁴ to the opinions of the broader world community,¹¹⁵ and directly to the “purpose and function” of liberty and rights in the “constitutional design.”¹¹⁶ This allows judicial and other public understandings of the rights protected by constitutional liberty to “evolve” as society “progresses” and “matures.”¹¹⁷

III. INTERNATIONAL HUMAN RIGHTS STANDARDS

The U.S. Supreme Court puzzled some observers when it cited the United Nations Convention on the Rights of the Child (a treaty the United States never ratified)¹¹⁸ and the International Covenant on Civil and Political Rights (to which the United States had made a specific reservation on this precise issue)¹¹⁹ in concluding that the imposition of the death penalty on juveniles under State law would violate “liberty” rights protected by the Fourteenth Amendment.¹²⁰ Such references by American courts to treaty provisions that are not in themselves directly binding on the United States raises the broader question how American courts, legislators, and government officials apply generally accepted international human rights standards to American circumstances.¹²¹ American courts and American public officials have usually weighed foreign evidence of the requirements of universal human rights according to the legitimacy, importance, and probative value of the treaty, judicial decision, custom, or academic opinion advanced to substantiate the suggested universal standard.¹²²

The use by American courts (and other public officials) of non-American authorities to better understand fundamental rights protected by the U.S. Constitution reflects a broader American tradition of looking beyond purely American precedents to clarify the requirements of international law.¹²³ The most detailed exposition of this American attitude was set out by the U.S. Supreme Court in the case of *The Paquete Habana* in 1900, which negated the seizure of two

114. *Id.* at 568.

115. *Id.* at 576, 578.

116. *Id.* at 560.

117. *Id.* at 561.

118. *Id.* at 576.

119. *Id.*

120. See the florid dissent of Justice Scalia in *Roper v. Simmons*, 543 U.S. 551, 622 (2005) for his strongly worded objections to considering the views of such “like-minded foreigners.” *Id.* at 608.

121. *Id.*

122. *Roper v. Simmons*, the most prominent recent case to make such a judgment, looks to the “express affirmation of certain fundamental rights by other nations and peoples” to underscore “the centrality of those same rights within our own heritage of freedom.” 543 U.S. 551, 578 (2005).

123. For the early history, see JANIS, MARK W., *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789-1914* (2004).

Cuban fishing boats as contrary to the law of nations.¹²⁴ To substantiate this “rule of international law” against the seizure of coastal fishing vessels, even in time of war, the Supreme Court referred (*inter alia*) to the practices of English and French kings,¹²⁵ to treaties among various European nations,¹²⁶ to French declarations,¹²⁷ to a U.S. treaty with Prussia¹²⁸ and to Richard H. Dana’s edition of Henry Wheaton’s treatise on the *Elements of International Law*.¹²⁹ The Court suggested that taken together such authorities tend to indicate a consensus among “civilized nations” concerning the requirements of international law.¹³⁰ The concept of what constitutes a “civilized nation” is to a large extent circular, but still plays a significant role in Supreme Court jurisprudence concerning fundamental human rights.¹³¹ Foreign States that generally respect universal human rights and the requirements of international law thereby show themselves to be “civilized,” and their views and practices are taken as good evidence of what fundamental human rights and international law require of them and others.¹³²

Courts (and others) in the United States have long recognized that “International law is part of our law” and “must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented” for determination.¹³³ But U.S. Federal and State courts will generally look to the controlling acts of Federal executive or legislative authorities to determine the requirements of international law in practice.¹³⁴ This reflects in part the natural deference of the judiciary to legislative and executive authority, but also the positive grant to Congress by the U.S. Constitution of the power “to define and punish . . . offenses against the law of nations.”¹³⁵ This can lead to serious tension, where congressional or executive conceptions of the requirements of international law are at variance with the more widely held views or practices of other nations. But even in such cases, when they concern universal human rights, the positive requirements of existing U.S. laws and the Constitution have usually been sufficient to

124. *The Paquete Habana*, 175 U.S. 677 (1900).

125. *Id.* at 687.

126. *Id.* at 687-688.

127. *Id.* at 688-689.

128. *Id.* at 690-691.

129. *Id.* at 691.

130. *Id.* at 686.

131. *See Roper v. Simmons*, 543 U.S. 551, 561 (2005), citing *Thompson v. Oklahoma* 487 U.S. 815, 826 (1988).

132. The Supreme Court usually looks to “the Western European community” and to “other nations that share our Anglo-American heritage.” *Id.*

133. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

134. *Id.*

135. UNITED STATES CONSTITUTION, Article I, Section 8.

maintain general compliance with widely accepted international standards.¹³⁶

The most difficult question facing Americans and U.S. Courts in seeking to implement universal human rights in practice has been to determine which international institutions or foreign (or American) authorities deserve deference (or at least consideration) in specific cases.¹³⁷ For example, in the recent case of *Medellin v. Texas*, the U.S. Supreme Court concluded not only that the International Court of Justice had no binding authority to order the review and reconsideration of Texas State court convictions and (ensuing death-penalty sentences) as violations of the Vienna Convention on the Law of Treaties, but also that the President of the United States had no authority to require Texan compliance with what he judged to be the nation's binding obligations under international law.¹³⁸ The underlying conflict arose from a difference of opinion between American and Mexican public officials about the right to life as applied to the death penalty, but this difference expressed itself in jurisdictional claims relating to the proper domain and democratic legitimacy of the International Court of Justice.¹³⁹ The Supreme Court held in the *Medellin* case both that the judgments of the International Court of Justice are *not* directly enforceable as domestic law in the United States¹⁴⁰ and that the President of the United States cannot order the States to treat them as such¹⁴¹ without first securing Federal implementing legislation to give separate domestic effect to international obligations already created by the treaty itself.¹⁴²

The *Medellin* case is particularly revealing, because the Supreme Court stressed the significance of the United States' Security Council veto in limiting the authority of the International Court of Justice.¹⁴³ The United States has not, and according to this rationale, *should not* cede the same authority to the United Nations or to its organs that the States ceded to the Federal government with the ratification of the Fourteenth Amendment to the U.S. Constitution.¹⁴⁴ Certain in-

136. See, e.g., *Hamdan v. Rumsfeld* 548 U.S. 557 (2006), which relied on Federal law and the Uniform Code of Military Justice to require the U.S. government to respect the humanitarian requirements of the Geneva Conventions.

137. See, e.g., "The Use of Foreign Law in American Constitutional Adjudication: A Revealing Colloquy between Justices Scalia and Breyer" on the American University website and discussed in Dorf, Michael G., *NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY FIRST CENTURY* (Lanham, Maryland, 2006), pp. 213-219.

138. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

139. On American worries concerning the democratic legitimacy and general reliability of international courts, see Amann, Diane M. & Sellers, M.N.S., *The United States of America and the International Criminal Court*, 50 *AM. J. COMP. L. (Supplement)* 381 (2002).

140. *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008).

141. *Id.*

142. *Id.* at 1357.

143. *Id.* at 1359.

144. *Id.* at 1360.

ternational tribunals may enjoy a special status because of implementing legislation enacted by Congress, but otherwise their power is (and should be) limited.¹⁴⁵ Even the President of the United States may not act in such cases, without prior Congressional legislation that empowers him to do so.¹⁴⁶ The pronounced aversion of U.S. courts and public officials to ceding final control over the meaning or interpretation of international law or human rights guarantees to foreign authorities or to international tribunals might seem at first to contradict the insight of the Fourteenth Amendment that local perceptions of universal human rights are necessarily incomplete.¹⁴⁷ What makes the circumstance different (from the American perspective) is that international tribunals have not yet secured the judicial autonomy or democratic legitimacy of the U.S. Supreme Court or other institutions of the U.S. Federal government.¹⁴⁸

U.S. attitudes towards the International Criminal Court provide a striking recent example of American distrust of what some perceive as the insufficiently liberal and democratic foundations of many international institutions.¹⁴⁹ The U.S. government refused to ratify the Rome Statute establishing the International Criminal Court (ICC) on the theory (as it was expressed in the U.S. Senate) that ICC decision-making "will not be confined to those from democratic countries with the rule of law."¹⁵⁰ The fear was that since each state party to the ICC has one vote in the Assembly of States Parties,¹⁵¹ this will make the selection and removal of the prosecutor and judges,¹⁵² the development of the rules of procedure and evidence,¹⁵³ and the alteration of the treaty through amendment,¹⁵⁴ all ultimately subject to the in-

145. *Id.* at 1365-1366.

146. *Id.* at 1367-1368.

147. *Id.* at 1367. "Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections'."

148. European Courts have showed a similar hesitancy to defer to less-than-democratic international institutions in cases affecting fundamental human rights, see the joined cases of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* in the Court of Justice of the European Communities (C-402/05 P and C-415/05 P) (2008).

149. On American attitudes towards the International Criminal Court, see Amann & Sellers, *supra* note 139.

150. "Is a U.N. International Criminal Court in the National Interest?", Hearing on the International Criminal Court before the International Operations Subcommittee of the U.S. Senate Foreign Relations Committee (July 23, 1998) (statement of Senator Rod Grams).

151. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF. 183/9 (1998), art 112.

152. *Id.*, Arts. 36(6)(a); 46(2)(a); 42(4); and 46(2)(b).

153. *Id.*, Arts. 9(1) and 51(1).

154. *Id.*, Arts. 121; 122.

fluence of undemocratic and illiberal regimes.¹⁵⁵ As a general rule the United States has been hesitant to cede judicial, legislative, or enforcement authority to any international institution or tribunal that is not subject (as in the United Nations) to the veto power of the United States.¹⁵⁶

The confidence of Americans in their own constitutional protections of universal human rights has been so great that the United States has joined in proposed international articulations or clarifications of universal human rights only with the greatest reluctance, always taking care to maintain its own existing Federal constitutional understandings intact.¹⁵⁷ Whenever the United States has taken the unusual step of ratifying an international treaty governing or defining universal human rights, the motive has been to encourage greater respect for fundamental rights in other nations, rather than to change existing American constitutional guarantees.¹⁵⁸ For example, when the United States ratified the International Covenant on Civil and Political Rights, it was with express reservations preserving existing American conceptions of the right of free speech,¹⁵⁹ the right to life,¹⁶⁰ the prohibition of cruel or degrading treatment or punishment,¹⁶¹ the punishment of juvenile offenders,¹⁶² and racial and other discrimination,¹⁶³ as well as a general statement that "Nothing in this covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."¹⁶⁴

The United States ratified the United Nations conventions against Torture,¹⁶⁵ against the Crime of Genocide,¹⁶⁶ and against All

155. See Amann & Sellers, *supra* note 139, at 389.

156. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008) and particularly the remarks by Chief Justice Roberts quoted *supra*, note 147.

157. See, e.g., Message of the President of the United States, Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. Docs. C, D, E and F, 95th Congress 2d. Session at III (February 23, 1978).

158. See, e.g., the statement of the American delegate Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights*, United Nations General Assembly (December 9, 1948).

159. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONGRESSIONAL RECORD S4781-01 (daily ed., April 2, 1992) at I(1).

160. *Id.* at I (2).

161. *Id.* at I (3).

162. *Id.* at I (5).

163. *Id.* at II (1).

164. *Id.* at IV.

165. U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Congress, 2d session in 136 CONGRESSIONAL RECORD S17486 (October 27, 1990).

166. U.S. Reservations, Declarations, and Understandings, Convention on the Prevention and Punishment of the Crime of Genocide, CONGRESSIONAL RECORD S1355-01 (February 19, 1986).

Forms of Racial Discrimination,¹⁶⁷ but all with restrictive reservations, declarations, and understandings similar to those that applied in the case of the Covenant on Civil and Political Rights. These American reservations protect existing understandings of the U.S. Bill of Rights, while also usually providing that rights treaties will in any case be “non-self-executing,” requiring that implementing legislation must pass through the U.S. Congress before U.S. courts will apply the provisions of international human rights conventions directly to U.S. cases and controversies.¹⁶⁸ The general policy of the United States with respect to all new multilateral human rights treaties has been to view the great majority of their substantive provisions as consistent with the existing constitutions and laws of the United States, but to the extent that the treaties are not consistent with existing practice, to require a modifying reservation, understanding or declaration before giving the treaty legal effect in the Courts of the United States.¹⁶⁹

IV. CONCLUSION AND PROSPECTS FOR THE FUTURE

The courts and people of the United States have been committed throughout their history to the proposition that human rights are universal, binding, and enforceable by law—or even by extra-legal action and revolution when rights are not protected fully by the State. Americans and American judges have also become accustomed through their own history and in light of the American experience of oppression, revolution, and civil war to cede jurisdiction over the protection of fundamental rights to inter-State institutions, such as the U.S. Congress and the Federal judiciary. Americans demanded, when they created their Federal Union, that the U.S. Constitution should guarantee the same protections of inalienable human rights already present in their own State constitutions, and they required in due course that the United Nations Organization also declare its commitment to fundamental human rights¹⁷⁰ and to protect the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁷¹

The first U.S. delegate to the United Nations General Assembly, Eleanor Roosevelt, played a leading role in securing the creation and

167. U.S. Reservations, Declarations, and Understandings, International Convention on the Prevention of All Forms of Racial Discrimination, CONGRESSIONAL RECORD S14326 (June 24, 1994).

168. See also Message from the President of the United States, Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. Docs. C, D, E and F, 95th Congress 2d. Session at III (February 23, 1978).

169. *Id.*

170. CHARTER OF THE UNITED NATIONS (1945), Preamble.

171. *Id.*, Art. 55.

unanimous approval of the Universal Declaration of Human Rights in 1948.¹⁷² Speaking on behalf of the United States to the General Assembly of the United Nations, Roosevelt embraced the Universal Declaration as a “great event . . . in the life of mankind”¹⁷³ and expressed her nation’s hope that “this Universal Declaration of Human Rights may . . . become the International Magna Carta of all men everywhere,” a document as significant for all humanity as the Bill of Rights had been for the people of the United States.¹⁷⁴ Then, as now, the U.S. government embraced “basic principles of human rights and freedoms,” applicable to “all peoples of all nations,” without wishing thereby to alter in any way American law or the existing “legal obligation” of the United States.¹⁷⁵

The American commitment to liberty and inalienable human rights that animated the Revolution, the constitutions (State and Federal), and the legal systems of the United States has two primary components: substantive and procedural. The substantive rights of humanity are enumerated (to the extent that this is possible) in the State declarations of rights, the U.S. Bill of Rights, and the international covenants and Universal Declaration of Human Rights. The procedural commitments to democratic deliberation, to the separation of powers, to legislative and executive checks and balances, and to an independent judiciary have been much more important in securing the rights and liberty of American citizens. As James Madison well expressed it in the *Federalist*, explaining the U.S. Constitution to the People of New York, “parchment barriers” against despotism will not be effective without “divided and balanced” institutions, so that each part of government can effectively “check” and “restrain” the excesses of the others.¹⁷⁶

The independence of the judiciary has played a particularly important role in the procedural protection of universal human rights in the United States, since judges have always had the last word in interpreting the U.S. Constitution, including the Fourteenth Amendment guarantees of “liberty” and the “due process of law.”¹⁷⁷ The drafters of the U.S. Constitution made sure that judges would

172. GLENDON, MARY ANN, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

173. Roosevelt, Eleanor, *On the Adoption of the Universal Declaration of Human Rights*, United Nations General Assembly (December 9, 1948).

174. *Id.*

175. *Id.*

176. “Publius” [James Madison], *THE FEDERALIST* No. 48 in the *NEW YORK PACKET* (February 1, 1788).

177. This judicial authority was famously confirmed by the United States Supreme Court in the case of *Marbury v. Madison*, 5 U.S.(1 Cranch) 137 (1803), when Chief Justice John Marshall declared for the Court that “It is emphatically the province and duty of the judicial department to say what the law is” and reiterated that “the Constitution is superior to any ordinary act of the legislature.”

serve “during good behavior,”¹⁷⁸ which is to say for life, and that their salaries “shall not be diminished” during their continuance in office.¹⁷⁹ Americans knew (and know) this to be “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”¹⁸⁰

Alexander Hamilton, in his *Federalist* essays in favor of the U.S. Constitution, praised judicial independence and long judicial terms in office as an “excellent barrier” against despotism¹⁸¹ and insisted (quoting Montesquieu) that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”¹⁸² Then, as now, judges in the United States needed “complete independence” to exercise properly their power “to declare all acts contrary to the manifest tenor of the Constitution void.”¹⁸³ The framers of the U.S. Constitution knew that “without this, all reservations of particular rights or privileges would amount to nothing.”¹⁸⁴ Alexander Hamilton and other architects of the U.S. legal system saw the independence of judges as absolutely necessary to protect the “rights of individuals” against “serious oppressions of the minor party in the community.”¹⁸⁵ None of this could be expected “from judges who hold their offices by a temporary commission.”¹⁸⁶

U.S. judges interpreting the U.S. Constitution in U.S. Courts have been the greatest guardians of fundamental human rights throughout the history of the United States of America, and they are unlikely to cede their jurisdiction to international institutions until the procedural safeguards of liberty in international organizations, courts and tribunals have reached a considerably higher stage of development.¹⁸⁷ American States have ceded ultimate authority over the universal and inalienable rights of their people to the Federal government, which establishes a precedent for similar deference to international courts, but the limited terms in office of judges on most international tribunals,¹⁸⁸ and the participation of illiberal and un-

178. CONSTITUTION OF THE UNITED STATES, Article III, Section I.

179. *Id.*

180. “Publius” [Alexander Hamilton], FEDERALIST 78 in the INDEPENDENT JOURNAL (June 14, 1788).

181. *Id.*

182. *Id.*, citing CHARLES DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, THE SPIRIT OF THE LAWS, volume I, p. 181.

183. “Publius” [Alexander Hamilton], FEDERALIST 78 in the INDEPENDENT JOURNAL (June 14, 1788).

184. *Id.*

185. *Id.*

186. *Id.*

187. See the remarks of Chief Justice Roberts in *Medellin v. Texas* 128 S. Ct. 1346, 1367 (2008).

188. Judges on the International Court of Justice serve for renewable nine-year terms. *Statute of the International Court of Justice*, Article 13(1).

democratic regimes in the selection of judges,¹⁸⁹ makes it unlikely that any such American move towards global federation will take place at any time in the near future.

The U.S. Supreme Court is the final arbiter of the fundamental rights required by liberty and the due process of law under the Fourteenth Amendment to the U.S. Constitution, and the highest State courts have similar authority over their own bills and declarations of rights. But these documents, in both instances, depend ultimately upon universal and inalienable liberties, which apply to all peoples, everywhere. American judges and public officials are far more likely to *refer* to the *substantive* views of foreign and international authorities on the requirements of universal human rights than they are to *defer* to their *procedural* authority. Because “liberty” is an absolute and universal value, guaranteed by the U.S. Constitution, American judges properly can and often do consider international and foreign perceptions of liberty and fundamental human rights, including views expressed in documents and tribunals to which the U.S. has never been a party.

Human rights are universal and binding in U.S. law and U.S. courts. They are protected by each of the States in their separate bills and declarations of rights, by the Federal government in the U.S. Bill of Rights and Fourteenth Amendment, and by the law of nations, which is part of the law of the United States and of the law of each of the States in the Union. To understand the requirements of liberty and the fundamental and inalienable rights of humanity, U.S. courts, and public officials consider all sources that illuminate the requirements of “life, liberty, and the pursuit of happiness,” including international conventions and foreign judicial opinions. International courts and international organizations cannot, as yet, exercise effective jurisdiction, judicial or otherwise, over the law of the United States, even as it applies to fundamental human rights, but U.S. law itself incorporates the requirements of universal human rights. “A decent respect to the opinions of mankind” has always illuminated American understandings of the rights of Americans.¹⁹⁰ The law of the United States seeks to secure the “Blessings of Liberty” for all its subjects.¹⁹¹

189. Judges on the International Court of Justice are elected by the General Assembly and Security Council of the United Nations, *id.*, Article 4(1).

190. DECLARATION OF INDEPENDENCE OF THE UNITED STATES OF AMERICA (July 4, 1776).

191. CONSTITUTION OF THE UNITED STATES (1787), Preamble.

