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## Foreword - A Decent Respect to the Opinions of Mankind, 25 J. Marshall L. Rev. 207 (1992)

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## ARTICLES

### FOREWORD — “A DECENT RESPECT TO THE OPINIONS OF MANKIND”

BY MICHAEL P. SENG\*

In 1991, we celebrated the Bicentennial of “Our Bill of Rights.”<sup>1</sup> Generally, anniversaries mark a death or a culmination, or they mark a birth or a beginning. The bicentennial of Our Bill of Rights can mark either.

We can celebrate the anniversary of Our Bill of Rights as the culmination of a long movement to secure human rights in our Anglo-American tradition. The movement might be said to have started in 1215 A.D. with the signing of Magna Carta, which contained the seeds for our modern concept of due process of law.<sup>2</sup> The movement received momentum from such events in English history as the enactment of the British Bill of Rights in 1689, which sharply curtailed the prerogatives of the Crown.

British and colonial experiences and the philosophical works produced by the Eighteenth Century “Age of Enlightenment” provided the inspiration for the American Declaration of Independence, drafted by Thomas Jefferson in 1776. Jefferson grandly summarized the concept of human rights in his revolutionary proclamation “that all men are created equal; that they are endowed, by their creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”

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\* Professor, The John Marshall Law School. Special thanks is given to Professor Walter J. Kendall III for his important contributions as a co-organizer of this Conference.

1. In *Younger v. Harris*, 401 U.S. 37, 43-45 (1971), Justice Black wrote a glowing appreciation to “Our Federalism.” We are equally proud and possessive of “Our Bill of Rights” and consider it second to none. Thus, we rarely acknowledge that we might learn something about human rights from the laws of other countries or from international law.

2. Paragraph 39 of the Magna Carta provided that “No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgement of his peers or by the law of the land.” Translation of Magna Carta in *SOURCES OF OUR LIBERTIES* 11, 17 (Richard L. Perry ed., 1959). In *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856), the Supreme Court observed that, “The words ‘due process of law’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land’ in Magna Carta.”

During the period between 1776 and 1791 there was a flurry of activity among the united states. Many states enacted new constitutions that contained protections for individual liberties. The United States Constitution was enacted in 1789 "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

Although the Constitution was primarily concerned with providing the mechanics for fashioning a workable federal government, it contained some provisions to protect individual rights. It protected the Privilege of the Writ of Habeas Corpus<sup>3</sup> and prohibited Bills of Attainder and ex post facto laws by the states and the federal government.<sup>4</sup> It prohibited states from impairing the Obligation of Contracts,<sup>5</sup> provided for trial by jury and proper venue in federal criminal trials,<sup>6</sup> limited the crime of Treason,<sup>7</sup> and provided that the Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several states.<sup>8</sup>

The Constitution was criticized during the ratification process because it did not contain a bill of rights. This defect was remedied by the First Congress when it drafted Our Bill of Rights. Clearly, the ratification of Our Bill of Rights by the states as an amendment to the Constitution marks a culmination deserving celebration.

But the Bicentennial of Our Bill of Rights can also be celebrated as a birth or a beginning. From our perspective in late Twentieth Century America, Our Bill of Rights looks much like a first draft — a magnificent first draft, but still only a first draft.

The unalienable rights articulated in the Declaration of Independence of "life, liberty and the pursuit of happiness" were narrowed in the Fifth Amendment to "life, liberty and property." The First Amendment protected speech, press, assembly, and freedom of religion. The Fourth Amendment provided procedures to protect the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. The Third Amendment also protected the security of the home by forbidding the quartering of soldiers in any house. The Fifth, Sixth, and Eighth Amendments contained protections for persons accused or convicted of criminal offenses. The Fifth Amendment provided for due process of law when persons suffer deprivations of life, liberty and property and for compensation when private property is

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3. U.S. CONST. art. I, § 9, cl. 2.

4. U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1.

5. U.S. CONST. art. I, § 10, cl. 1.

6. U.S. CONST. art. III, § 2, cl. 3.

7. U.S. CONST. art. III, § 3, cl. 1 & 2.

8. U.S. CONST. art. IV, § 2, cl. 1.

taken for public use. The Seventh Amendment protected the right to a jury trial in civil cases. The Ninth Amendment provided that the enumeration of these rights did not deny or disparage other rights retained by the people.

The Second and Tenth Amendments were drafted in terms of state's rights rather than individual freedoms. The Second Amendment, which protected the right of the people to keep and bear arms, was explained on the basis that a well regulated Militia was necessary to the security of a free state. The Tenth Amendment explicitly provided that the states would have the powers not delegated to the Federal government by the Constitution.

Our Bill of Rights, as ratified in 1791, was an incomplete document, as was implicitly recognized in the Ninth Amendment. The most glaring defect in Our Bill of Rights was that it did not touch the institution of slavery. Not only did it not touch slavery, Our Bill of Rights was interpreted by the United States Supreme Court to extend no protection to African-Americans whether free or slave.<sup>9</sup> Furthermore, Our Bill of Rights did not protect persons from abuses by the states.<sup>10</sup> It did not protect the rights of women or define who was a United States citizen<sup>11</sup> or guarantee the right to vote.<sup>12</sup> Many liberties enumerated in twentieth century documents, such as the right of association and the right of privacy, were not articulated in Our Bill of Rights.

The Constitution did, however, provide two means by which Our Bill of Rights could be expanded. The first was by the process of amendment.<sup>13</sup> This process has been used to abolish slavery through the Thirteenth Amendment and to protect individual liberties from deprivation by the States and to prevent the states from denying persons due process of law and the equal protection of the law through the Fourteenth Amendment. It has also been used to prevent the right to vote from being abridged because of race, color or previous condition of servitude through the Fifteenth Amendment; because of sex through the Nineteenth Amendment; because of age, if a citizen is eighteen years of age or older, through the Twenty-Sixth Amendment; and, in federal elections, for failure to pay any poll tax or other tax through the Twenty-Fourth Amendment.

These amendments, important as they are — and the Fourteenth Amendment clearly effected a revolution in federalism regarding individual rights — still left major gaps in protecting

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9. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

10. *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833).

11. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

12. *See Minor v. Happersett*, 88 U.S. 162 (1874).

13. U.S. CONST. art. V.

individual liberties. The right to vote is still not in itself secured by our Constitution.<sup>14</sup> Private deprivations of individual rights are not protected by the federal government in many instances where the states fail to intervene.<sup>15</sup> The Constitution does not itself secure economic and social rights (such as education, housing, health care, or other necessities of life) that many people today expect from a just and efficient government and that are secured by the constitutions of many foreign governments and by various international covenants and agreements.<sup>16</sup> The focus of our Constitution on individual rights, as opposed to group rights, places in jeopardy the legal viability of minority communities, as well as such devices to assure minority participation as affirmative action<sup>17</sup> and proportional representation,<sup>18</sup> which are not explicitly protected in Our Bill of Rights.

The other means of expanding Our Bill of Rights has proved to be even more important than the amendment process. One of the most important contributions of our Constitution to the World is contained in its Third Article, which guarantees judicial independence from the legislative and executive branches of government. Although the doctrine of judicial review of governmental acts to determine their constitutionality is not explicitly contained in our Constitution, it was recognized in 1803 in Chief Justice John Marshall's landmark opinion in *Marbury v. Madison*.<sup>19</sup>

The practice of judicial review has made Our Bill of Rights a living document and has allowed Our Bill of Rights to have a greater impact in actually securing rights against governmental abuse than the bills of rights of many other countries, even though they may be much more explicit and detailed, because they cannot be enforced through an independent judiciary. Although there have been occasional lapses when our Judges of the Third Article have failed to staunchly defend Our Bill of Rights,<sup>20</sup> we can justifiably celebrate the contribution made by these Judges to the human

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14. *Minor v. Happersett*, 88 U.S. 162 (1874).

15. *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189 (1989).

16. See, e.g., INDIA CONST. pt. 4; *United Nations Int'l Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

17. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. Cf. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

19. 5 U.S. 137 (1803).

20. In the early days of our country, many federal judges strenuously enforced the Alien and Sedition Acts, which went squarely against the protections of the First Amendment. See JAMES M. SMITH, *FREEDOM'S FETTERS* (1956). Later, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Justice Brennan recognized that those Acts did indeed violate the First Amendment. In World War II, the Supreme Court sanctioned the internment of Japanese-American citizens under circumstances that most persons today would consider to violate

rights cause. They have interpreted Our Bill of Rights expansively to include freedom of Association<sup>21</sup> and the right to privacy.<sup>22</sup> They have interpreted the Equal Protection Clause to forbid not only racial discrimination,<sup>23</sup> but also, in many instances, gender discrimination<sup>24</sup> and discrimination against aliens,<sup>25</sup> illegitimate children<sup>26</sup> and those exercising fundamental rights.<sup>27</sup> Also, many of the remedies that protect Our Bill of Rights have been created by the Judges of the Third Article.<sup>28</sup> The process has been uneven and, because Our Bill of Rights is vague on many issues, the Judges of the Third Article are frequently criticized for usurping powers not given to them by the Constitution.

Many foreign nations and international bodies have used Our Bill of Rights as a first draft in creating their own bills of rights. Also, many foreign courts look to our constitutional decisions in interpreting their bills of rights.<sup>29</sup> The practice is not reciprocal, however. Rarely does one see any reference to foreign court decisions or to other bills of rights in our debates or court decisions about individual rights.

The Universal Declaration of Human Rights and the bills of rights of many foreign nations specify many rights and liberties that are not expressly enumerated in our Constitution. Also, many of these documents not only provide restraints against government but specify various economic and social rights that government should endeavor to provide. One of the most recent examples is the draft bill of rights published by the African National Congress of South Africa ("ANC").<sup>30</sup> The draft specifies such personal rights as the right to life, dignity, a fair trial, judicial review, home life, pri-

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numerous constitutional provisions. See *Korematsu v. United States*, 323 U.S. 214 (1944). Other examples could be cited.

21. *NAACP v. Alabama*, 357 U.S. 449 (1958).

22. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

23. *Loving v. Virginia*, 388 U.S. 1 (1967).

24. *Craig v. Boren*, 429 U.S. 190 (1976).

25. *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

26. *Trimble v. Gordon*, 430 U.S. 762 (1977).

27. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote); *Douglas v. California*, 372 U.S. 353 (1963) (access to courts).

28. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (civil action for damages for unconstitutional conduct by law enforcement officers); *Wong Sun v. United States*, 371 U.S. 471 (1963) (suppression of evidence brought to light by the illegal actions of law enforcement officers).

29. See, e.g., *Regina v. Morgentaler*, 62 C.R.3d 1 (1986) (comparing the Canadian Bill of Rights to Our Bill of Rights on the right of women to choose to have an abortion); *Ariori v. Elemo*, [1984] 5 N.C.L.R. 1, 11 (Supreme Court of Nigeria referred to United States court decisions in construing the right to a speedy or fair trial under similar provisions of the Nigerian Constitution).

30. The draft is reprinted in 3 *AFR. J. OF INT'L AND COMP. L.* 608 (1991).

vacy, movement, and conscience. It would protect various political rights, freedom of speech, assembly, and information, and freedom of association, religion, language and culture. It specifically protects the rights of workers, women, disabled persons and children, and it specifies a wide range of social, educational, economic, environmental and welfare rights. The draft also contains specific provisions for enforcement.

The South African situation may or may not be relevant to our situation in the United States, but the experiences and thinking of others might lead us to reevaluate some of our own positions and come away with either a conviction that we are doing things right in the United States or that we might improve our efforts. Mary Ann Glendon has published a study comparing American and European laws on abortion that is helpful in discussions of that explosive topic.<sup>31</sup> Our discussion of affirmative action might likewise be enriched by more consideration to how similar programs work in other nations.

To celebrate Our Bill of Rights, The John Marshall Law School decided to look backward to the Declaration of Independence, where Thomas Jefferson invoked "a decent respect to the opinions of mankind." In justifying our break with Great Britain, Jefferson sought the approval of foreign peoples and attempted to do so by placing our cause in the context of the natural rights recognized by "mankind."<sup>32</sup> We believe that more concern should be given to "the opinions of mankind" in the future. With the increased emphasis on international law in the field of human rights and the growing interdependence of nations, we cannot be parochial in the twenty-first century in our approach to individual rights and liberties in the United States.

Professor Louis Henkin, who has long been an advocate for the international recognition of human rights, has made a most important contribution to this celebration. He eloquently demonstrates that we can have "a more perfect Union" if we enlarge our conception of human rights by becoming more attentive to the judgments and values of others. As a statement of scholarship and of moral principle, Professor Henkin's paper cannot be improved upon. It sets the right course for us to follow into this Third Century of Our Bill of Rights.

Professor James C.N. Paul discusses the right of individuals and groups to participate in decisions regarding the planning of projects under the Human Right to Development recognized by the United Nations in 1986. This right is often thought to be of concern

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31. See MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

32. See GARY WILLS, *INVENTING AMERICA* (1978).

primarily to Third World Nations, but it should also be of concern to us in the United States. One can speculate on the difference the recognition of that right would have made to Native Americans who were displaced during our drive to the Pacific, or to the lives of persons uprooted because of such massive projects as the Tennessee Valley Authority or even lesser urban renewal projects.

There must be increased attention given to the right to development. The rising expectations of persons in underdeveloped societies, whether foreign or domestic, to share in the world's wealth, coupled with the increasing interdependence of the world's economies and cultures, will require that decisions be made about development that will have momentous consequences on the environment — both human and natural. Simple justice requires that those persons who are affected be consulted. Broad participation will not only further the demands of justice but will help insure that long-term consequences are considered. Professor Paul's thoughtful recommendations on implementing the human right to development give concrete substance to what many critics argue is a most nebulous concept.

A most difficult problem is how to resolve the dilemma when international human rights conflict with indigenous cultural and religious traditions. A criticism of international human rights standards is that they largely reflect western values. Professor Abdullah Ahmed An-Na'im provides us with an Islamic perspective on human rights, and he forcefully argues, not for the diminution of standards under international law, but for the right of Islamic countries "to follow their own paths to self-determination in accordance with their own world-visions of the public good." Professor An-Na'im submits that cross-cultural interaction can contribute to stimulating the theoretical formulation of reform proposals and to supporting the political struggle for their implementation.

The problem articulated by Professor An-Na'im has been part of the debate in the United States about our acceptance of agreements on human rights. In the late 1940's and 1950's, Southerners opposed the recognition of United Nations standards on human rights out of fear that they would conflict with our segregation laws. That concern has become moot since 1954 when the Supreme Court pronounced the death sentence to segregation in *Brown v. Board of Education*.<sup>33</sup> Although that decision may have been prompted to some extent by concerns about how "the leader of the Free World" could lawfully sanction racial segregation, international norms were not discussed by the Supreme Court in *Brown* or in any of its other racial discrimination decisions.

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33. 347 U.S. 483 (1954).



Present discussions about the outlawing of "hate speech" (speech that deprecates persons on the basis of race or other immutable characteristics) might be enlivened by reference to the United Nations declaration<sup>34</sup> and the international covenant<sup>35</sup> to eliminate racial discrimination, which require states to take measures to condemn propaganda and organizations that advocate ideas or theories of racial superiority. These standards may very well violate our tradition of free speech embodied in the First Amendment,<sup>36</sup> but "a decent respect to the opinions of mankind" requires us to explain to the World why our tradition is justifiable over the international norm.

The three papers presented here provide the opening for lively debate and we hope that they will stimulate further research and publication. They are a most fitting way of saying Happy Birthday to Our Bill of Rights and may we have many more.

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34. *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. No. 15, art. 9, U.N. Doc. A/5515 (1963).

35. *United Nations Int'l Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature March 7, 1966, pt. 1, art. 4, 660 U.N.T.S. 195 (1969). The United States has not ratified this convention.

36. In *Reid v. Covert*, 354 U.S. 1, 15-18 (1957), Justice Black stated that a treaty that conflicted with Our Bill of Rights would have no effect.