The Worldwide Influence of the United States Constitution as a Charter of Human Rights

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Abstract

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Recently Anthony Lester, Q.C., the famed British barrister and world-renowned human rights advocate, delivered a speech entitled “The Overseas Trade in the American Bill of Rights.”1 His focus was on the Bill of Rights, although at the same time he accepted the broader truth that, as Professor Albert P. Blaustein phrased it, “the United States Constitution has inevitably been an influence for constitutionalism. Every nation that has a one-document constitution (or is committed in principle to having one) is inevitably following the United States precedent-model.”2

One reason for the influence of the American Constitution abroad, Professor Blaustein asserts, is “[t]he American penchant for constitutional proselytizing. . . . From the earliest days of the American revolutionary movement, its leaders were conscious that they were doing something of worldwide significance. They had convinced themselves that they were creating a new Eden, not only for America but for all of mankind. They had a story to tell and a message to deliver. They were proselytizers.”3 Perhaps these views reflect a degree of immodesty or perhaps only an excess of enthusiasm. Yet, Mr. Lester informs us that today there is an ever-increasing overseas trade in the American Bill of Rights that is “brisk and vitally important.”4 It is, he says, a trade conducted both internationally (before foras such as the European Commission and Court of Human Rights) and nationally (in constitutional litigation in-

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3. Id. at 12.
4. Lester, supra note 1, at 541.
volving norms derived from American constitutional law): "When life or liberty is at stake [he asserts], the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg, as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois."

These comments from such distinguished authorities as Mr. Lester and Professor Blaustein prompt me tonight to essay an examination of "The Worldwide Influence of the United States Constitution as a charter of Human Rights."

The profound influence claimed for our Constitution on the nations of the world has been attributed to many things. Ours was, of course, the first written constitution in history. Moreover, as the charter of one of the most powerful and largest nations on earth, our Constitution has always been among the most conspicuous. And, as I already mentioned, lest anyone dare forget its prominence, the Framers and their successors took it upon themselves to proselytize the Constitution abroad.

All those factors have, no doubt, contributed to our Constitution's influence abroad, but they go only part way in explaining it. There must be something about the Constitution's substance that accounts for its worldwide appeal. That elusive something, I believe, is the Constitution's status as a charter of human rights. Three distinct characteristics of American constitutionalism coalesce to distinguish our Constitution as a human rights charter. First, is the very premise on which the Constitution is based — that government springs from the People. Second, is the Constitution's enumeration of specific rights that are guaranteed against government intrusion. Third, and in my view most important, is the Constitution's implementation of a mechanism — judicial enforcement — that makes those enumerated rights meaningful. Those three human-rights elements have, to varying degrees and in various ways, infiltrated their way into the constitutional schemes of our neighbors abroad.

Perhaps the Constitution's greatest innovation and undoubtedly its most profound impact abroad is a concept that is today so well and pervasively established that its revolutionary character is readily overlooked. It is the very premise on which the Constitution is based — that sovereign individuals, "We the People," can create a government. Our Constitution was, in that respect, the ultimate effectuation of the

5. Id.
Enlightenment, an effectuation that went beyond the wildest musings even of some of the most prominent thinkers of the time. As one historian observes, the "European thinkers, in all their discussion of a political or social contract, of government by consent and of sovereignty of the people, had not clearly imagined the people as actually contriving a constitution and creating the organs of government. They lacked the idea of the people as a constituent power." Our Constitution, built on that vision of the People as a constituent power, was itself a charter of human rights and self determination, quite apart from its specific content.

The vision caught like wildfire. Within two years, France ratified a constitution which, although it lasted only two years, served as a model for the 1812 Spanish constitution and the constitutions of Naples, Sicily and much of Latin America. So, too, did Poland, whose constitution recognized that "all authority in human society takes its beginning in the will of the people." Shortly thereafter, Venezuelans, Mexicans, and Argentinians, to name a few, seized upon our Constitution as inspiration to revolt against tyranny and oppression, and to fashion governments of the People. Today, there exist a total of 162 constitutions. All but six nations—three that follow the Koran and three that are based on the principle of parliamentary supremacy—either follow a written constitution or (in the case of the twenty that have suspended their constitutions) are committed to doing so.

Implicit in the notion that the People can and do create government is the corollary that it is the People's prerogative and responsibility to limit the power of the government that they create. The Constitution's accommodation of that corollary, by enumerating individual rights that the government may not invade, is the second, and perhaps most conspicuous, attribute that distinguishes it as a charter of human rights.

At the risk of preaching heresy, I will offer one simple admonition about this second attribute: As human-rights achievements go, the value of our Constitution's enumeration of specific rights, however conspicuous and however inspirational to our sister nations they may be, ought not to be overrated. Let me explain. In so belittling the Constitution's enumeration of rights, I am referring neither to the Framers' initial decision to omit from its text all but a handful of what today we consider fundamental rights, nor to the fact that its content was not

particularly novel.

As to the initial omission of a Bill of Rights: that decision in no way suggests that the Framers considered those rights unimportant. Rather, they were initially content to leave the protection of other rights to the states, some of which had extraordinarily protective constitutions. In fact, some of the Framers, Hamilton among them, eschewed explicit federal rights for fear that they might be understood inferentially to permit the extension of federal powers beyond those enumerated. Moreover, that the People themselves insisted on express guarantees of certain fundamental rights as a condition for their acceptance of the Constitution evinces both the primacy and the foresight of the People in creating — and limiting — government.

And as to the novelty of our Bill of Rights: Although it is true that the 1789 French Declaration of the Rights of Man directly inspired the Bill of Rights, the former in turn was inspired at least partially by the constitutions of several of our own states, and authored in part by such American notables as Thomas Jefferson and Gouverneur Morris.

I intend, therefore, to impugn neither the vigilance or the originality of the Framers. My admonition boils down to the simple proposition that merely to enumerate rights on paper is not to guarantee them. Madison, himself, expressed doubts whether the “parchment barriers” of declared rights would be effective in a republic. The rights of the People — even if expressly enumerated — are not worth the parchment they are written on if they are easily abrogated, unenforceable, or anachronistic. So even if we cannot fairly credit the Framers of our Constitution with the notion of enumerated individual rights, and even if their articulation of those rights was less than original, we can still acclaim the genius of a system that effectively implements, not just enumerates, those rights.

A truly meaningful implementation of rights must, I think, include at least three elements: stability, enforceability, and adaptability. By “stability” I mean not necessarily permanence, but resistance to abrogation. A constitutional right is of little comfort if the government is free whimsically to repeal it the moment it is invoked. Wary of the fragility of constitutional guarantees, the Framers of our Constitution devised an amendment process that all but precludes the diminution of the textual rights. They made it extraordinarily difficult to amend any of the Constitution’s terms including the rights that were themselves

With the hindsight of two centuries, that device might not seem particularly remarkable. But comparing our Constitution’s amendment process to the permissive amendment processes that, until recently, prevailed among most of our neighbors (with the notable exception of Australia) evinces the Framers’ wisdom. For the 150-year period following the ratification of our Constitution, it was common among European nations, for example, to permit amendment of their constitution by the simple expedient of legislation. In fact, there evolved a practice — as exemplified by the constitution of the Weimar Republic — of qualifying every articulation of a particular right with the words, “unless the law provides otherwise.” A legislative act could, under those schemes, constitutionally abrogate any constitutional right.

Since World War II, however, a trend toward burdening the amendment process has emerged. Such changes have been made often with express attribution to our Constitution. The German experience is most instructive. In reaction to Hitler’s manipulation of the Weimar constitution through parliament, Article 79 of the German constitution requires that any amendment be accomplished expressly, and be approved by a two-thirds super-majority of both houses of parliament. In practice, a constitutional amendment cannot pass unless supported by a national consensus. And the German constitution squarely prohibits any interference by amendment with the democratic order or basic human rights.

The resistance of a proclamation of rights to convenient amendment only goes part of the way toward full implementation of rights. After all, without enforceability — that is, a mechanism by which to enforce those rights — even an unalterable proclamation of rights could amount to little more than an impotent proclamation. (In fact, some would maintain that unenforceable pronouncements of rights are not rights at all. But that is an issue that I leave to the philosophers among us.) At any rate, the French Declaration of Rights of Man, however well-intentioned and foresighted, fell to desuetude precisely because it instituted no mechanism by which individuals could challenge infringement of the rights they purported to guarantee. The same has been said of the extensive panoply of rights that the Soviet Constitution purports to guarantee.

In the enforcement of constitutional rights under our system, the judiciary plays the pivotal role. Since Chief Justice Marshall’s holding in Marbury v. Madison that “[i]t is emphatically the province and
duty of the Judicial Department to say what the law is,“ judicial re-
view has been accepted as a permanent and indispensable feature of
American constitutionalism. There is a sense in which judicial review is
decidedly counter-majoritarian. The judiciary does not sit to count
votes. It rests on the principle, expressed in the Constitution, that there
are circumstances in which the majority must yield to the greater na-
tional interest in the protection of rights.

Chief Justice Marshall was therefore quite understandably at
some pain, as Hamilton was in The Federalist, No. 78, to square judi-
cial review with America’s dedication to government by the consent of
the governed. To cede to Congress the power claimed for the Supreme
Court would be to give the legislature “practical and real omnipo-
tence,” making a mockery of the people’s attempt “to limit a power, in
its own nature, illimitable.” The American people’s chosen instrument
for keeping all their governors strictly within the limits of their as-
signed powers is the power of judicial review entrusted by that Consti-
tution to the Supreme Court. As Alpheus Mason has said:

Judicial review is an adjunct of democracy; without it, the supreme
will of the people, embodied in the Constitution, [c]ould be flouted,
and the distinction between fundamental law and ordinary acts of
Congress, would be broken down. . . . [Thus,] [w]hen the Court
upholds the Constitution and disregards an act of Congress con-
trary to it, what prevails is not the Court’s will but the people’s will
as embodied in the Constitution. . . . [J]udicial review sustains pop-
ular power; it does not disrupt it.

The reception abroad of our Constitution’s vision of judicial review
has, again, until recently, been lukewarm. In the mid-nineteenth cen-
tury, a handful of nations, concentrated in Central America, adopted
schemes of judicial review patterned after ours. But they were excep-
tional; in most of the world, judicial review was not well-received. For
example, the Swiss ratified a constitution that expressly withdrew from
the judiciary any power to review legislation. England, for its part, has
also definitely rejected Blackstone’s suggestion that the British courts
ought, in the exercise of their common-law powers, sometimes overrule
acts of Parliament.

11. See id.
The concept of judicial review became infinitely more attractive after World War II, once history has taught the somber lesson that totalitarian regimes could make a mockery of constitutionally guaranteed rights in precisely the manner that Hamilton and Marshall had feared 150 years earlier. Just as the movement began to stabilize constitutions against convenient amendment, there emerged a trend toward increased review of the popularly elected branches by a neutral branch, shielded from popular control. I understand that varying degrees of judicial review have emerged in Germany, France, Italy, and Austria. Perhaps the most important guardians of constitutional rights in Europe are the administrative courts (or councils of state) that review executive action for consistency with the constitution.

It seems clear that other nations have been influenced, at least conceptually, by our Constitution's accommodation of the interests of stability and enforceability in the implementation of rights. It is more difficult to measure the impact abroad of the third requisite element of meaningful rights implementation that I mentioned—flexibility in the face of changing times. None of the Framers of our Constitution was so optimistic or naive as to think that delineations of power on a piece of parchment would prevent any attempted abuse of governmental power. They were practical as well as wise men and we impugn their craftsmanship if we assume that they were blind to the inevitability of conflicts among the federal branches, between the federal government and the states, and between the individual and both governments. Of course, they knew that turf battles would develop over what belonged to which sovereignty, and how much either might infringe the liberty of the individual. Such are the limitations of human imagination, that no constitution could have delineated the precise boundaries of the authority assigned the several repositories of governmental power. Nor, in the nature of things, could the Framers have fashioned guidelines for the resolution of the myriad collisions between power exercised by any of these repositories, and the guarantees of individual liberty erected to restrain governmental oppression whatever its source.

Accordingly, we know that the Framers' choice of general language was deliberate. They were formulating a Constitution for the inlimitable future. They wrote in broad outlines so that the past would not too much govern the future. In recognition of the Framers' intended flexibility, the Supreme Court has always breathed life into the Constitution's words by reexamining its interpretation in light of the changing times and emerging values.

There are those who find legitimacy in fidelity to what they call
"the intentions of the Framers" or "original intent." In its most doctrinaire incarnation, this view demands that judges attempt to discern exactly what the Framers or ratifiers thought in 1789, or 1791, or 1866, about the question under consideration in 1987 and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But, I ask, how can we gauge accurately the intent of the Framers on application of principle to specific, contemporary questions? All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves disagreed about the application of particular constitutional provisions and cloaked their differences in generality, or agreed only that the constitutional provision should not be governed by their own specific intentions. Apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. Those who would restrict claims of right to the values of 1791 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

I frankly conclude that I approach my responsibility as a Justice to read the Constitution in the only way that I can: as a Twentieth Century American. I look to the text, to the history of the time of framing, and to the intervening history of interpretation, of course. The complexity and range of constitutional issues before the Court changes to reflect the times. The Court's work is actually a daily mirror of the battles of forces going on outside the Court. So the ultimate question for me must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. The Constitution's wisdom in other times cannot be their measure to the vision of our time.

The vision of human dignity embodied in our Constitution throughout most of its interpretive history is, at least for me, deeply moving. It is timeless. It has inspired citizens of this country and others for two centuries. If we are to continue to be an example to the nations of the world, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. The political and legal ideals that form the foundation of much that is best in American institutions — ideals jealously preserved and guarded throughout most of our history — still
form the vital force in creative political thought and activity within the nation today.

I close these remarks with the prayer with which Mr. Lester closed his speech. "I hope that, [he prayed], during the third century of the Constitution, the United States will accept that the obligation to protect human rights is an international obligation to be accepted by the United States themselves. I also hope that the United States judiciary will not retreat from the strong interpretation of the Bill of Rights into literalism, positivism and historicism. If American human rights are diminished, so are the rights of the rest of humanity."13 My response is to repeat my conviction that as Americans we adopt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity — liberty and justice for all individuals — will continue to inspire and guide us because they form the core of our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit inheres in the aspirations not only of all Americans, but of all the people throughout the world who yearn for dignity and freedom.