Louisiana Law Review

Volume 49 | Number 5
May 1989

Revolutions and Constitutions

Louis Henkin

REVOLUTIONS AND CONSTITUTIONS*

*Louis Henkin***

The year 1989 marks important bicentennials in both the United States and France. For the United States, 1989 is the bicentennial of the Constitution and of rights: In 1789 the Constitution came into effect and the first Congress adopted the Amendments that came to be known as the Bill of Rights, both realizations of the promises of the American Revolution. In France, 1989 is the bicentennial of the Revolution and of the Declaration of the Rights of Man and of the Citizen, the Revolution's most noble, and perhaps most enduring, product. 1989, then, would seem to be a particularly appropriate time for contemplating and comparing the experiences of the two countries over the past two hundred years in securing the rights that their respective revolutions promised.

This article is divided into two parts. The first, entitled "Rights and Revolutions," examines the original affinity, as well as the differences, between the American and French Revolutions and between their respective commitments to individual rights. I then chart the striking divergence as to the treatment of rights in the United States and France in the years following the revolutions. In the second part, entitled "Rights and Constitutions Today," I examine the contemporary rapprochement between the American and French "rights systems," focusing on constitutions in one of their widely accepted characteristics—as reflections, repositories, and guardians of individual rights. I suggest that the differences between the two systems as to the rights protected and the means of providing that protection are in large measure attributable to the manner and time of the constitutionalization of rights in each country.

I. RIGHTS AND THE REVOLUTIONS

Both the United States and France underwent revolutions in the eighteenth century, revolutions that were among the most significant in Western history. The two revolutions were intimately related in several respects. France supported the American Revolution and the French

---

* This article is adapted from the Edward Douglass White lectures delivered on March 2, 1988. I am grateful to Grace Shelton, J.D. 1989, Columbia Law School, and Elizabeth Martin, B.A. 1989, Columbia University, for their assistance.

** University Professor Emeritus and Special Service Professor, Columbia University.

regarded many of our revolutionary leaders as heroes. Franklin and Jefferson, in particular, were honored visitors in France during the years between the two revolutions and George Washington was admired from afar. During the French Revolution, Thomas Jefferson was in France. Thomas Paine inspired both revolutions.

The two revolutions were related in more fundamental respects. Both revolutions claimed that their central motivation was to secure fundamental human rights. The American Declaration of Independence remains probably the most famous articulation of the idea of rights. In France, the National Assembly adopted the Declaration of the Rights of Man and of the Citizen during the early days of the Revolution.

The two declarations of rights had common origins. The idea of rights that was formally articulated in America in 1776 had European roots, in the writings of Locke, Montesquieu, and Rousseau. Americans modified their ideas and these modifications also influenced the French. In France, revolutionary leaders invoked the American Declaration of Independence as the voice of reason, and proclaimed its principles as universal. Lafayette came home to France after the American Revolution with a copy of the Virginia Bill of Rights, a close cousin of our Declaration of Independence. On July 12, 1789, two days before the Bastille fell, Lafayette asked the National Assembly to adopt a declaration of rights drawing on bills of rights of the states of the United States. In August, the Assembly adopted the French Declaration of the Rights of Man and of the Citizen.

The American declarations of rights and the French Declaration have essential similarities both in spirit and in detail. For a brief time, the two countries remained similar in their commitments to rights and in the regimes they established to secure them. In 1789, the French Assembly adopted its Declaration and the United States Congress approved the Bill of Rights. In 1791, the Bill of Rights became a part of the United States Constitution and the French adopted a constitution that included the Declaration. But after 1793 the French commitment to a government based on rights and exhibiting some separation of powers began to fail. The King lost his crown and, soon, also his head. Then came the Reign of Terror, civil and external war, and the rule of Bonaparte. Thereafter, the French commitment to constitutionalism, including the recognition and protection of constitutional rights, was at best erratic.

From 1793 to 1945, the political histories of the two countries diverged sharply. During those 150 years, the United States knew only one republic. During the same 150 years, France, beginning with an absolute monarchy, had three constitutional monarchies, two empires, three republics, and the Vichy government. To date, while the United States has had one constitution, or at most two (some call the Civil War Amendments a "second constitution"), France has had sixteen constitutions and draft constitutions. It has been called the greatest

producer—and consumer—of constitutions in the Western world, perhaps in the whole world, perhaps in all history.

The two countries diverged not only in their constitutional politics but also in their commitments to rights. During 200 years of transformation, with a Civil War, two world wars, and rise to superpower status, the United States continued on the rights path. The Bill of Rights remained intact and the federal courts expanded and enriched it by interpretation. Most of the later amendments to the Constitution were rights-related or rights-inspired. The constitutional jurisprudence of the United States is rich with rights.

France, too, was conceived in rights but the French experience with rights was quite different. The French Declaration, proclaimed in 1789, was included in the Constitutions of 1791 and 1793, but between those constitutions and the most recent French Constitutions of 1946 and 1958, more than 150 years, the Declaration was in limbo, at best a brooding presence. Sometimes it was invoked; often it was denounced. The French Declaration states that "any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution,"[1] but, in France, for 150 years, the separation of powers was the focus of controversy, and political leaders paid little attention to rights. Even during the later French revolutions, rights were not of central concern; certainly they were not guaranteed or assured after those revolutions. The liberal, progressive spirits of France went in a different direction toward other goals.

There are no clear, easy explanations for this sharp divergence in the "rights" histories of the two countries. I suggest that a principal reason is that the American and the French revolutions were fundamentally different and that the relationships between the revolutions and the idea of rights were different. What is more, the commitments to rights in the two revolutions were significantly different.

That the revolutions of France and of the American colonies were different is widely recognized. As revolutions go, the American Revolution was modest. It has been called "a 'safe and sane' revolution of gentlemen, by gentlemen, and for gentlemen."[2] In fact, it was not a revolution at all, but a "war of independence." (The social and economic revolution did not really begin in the United States until the nineteenth century and the end of slavery.) The British called the struggle of the colonies a revolution, and labeled those who participated in it "rebels" (and therefore "traitors"). Americans did well to call the struggle a war of independence. Today it might be called a war of "people's liberation," a war for self-determination against external and distant forces.

---

1. French Declaration of the Rights of Man and of the Citizen, art. 16.
2. J. Miller, Origins of the American Revolution 498 (1943).

The American Revolution—we do call it that—was virtually complete in 1776. It was a simple and irrevocable cutting of ties with the mother country. The American Revolution was not bloody. Surely there was little internal bleeding, that is, little civil war, and, on the whole, the revolution left few internal scars. Many loyalists left the United States, but among those who did not, few were "irreconcilables."

The United States never looked back behind its revolution, never regretted or questioned it; rather, the new country built on that revolution. Once ties to England were eliminated, there were inevitable, consequential political changes, but not many social or cultural changes. Political and legal institutions continued, minus their English links and cleansed of their English character. In fact, much of English political and legal culture was retained, including the common law, and various English institutions were adapted to serve America's unique needs. The revolution encountered little resistance from any pre-existing institutions or their supporters. In the history of the United States, then, the revolution and its rhetoric remained a positive influence and a source of pride. Ultimately, the revolution was incorporated into a national, constitutional ideology.

France's revolution was different. It was wholly internal. The revolution was resisted by powerful, deeply-rooted institutions and met powerful internal opposition. The revolution was bloody, and culminated in a reign of terror that rent French society. And the French Revolution did not end: the ideological struggle it reflected and perspectives on the desirability, purpose, and character of the revolution have continued to divide France virtually until the present day.

What happened to rights in each country following its revolution was shaped by the place of rights in the particular revolution.

Rights and the American Revolution

The idea of rights was in the American air before the Revolution, and it remained there after the Revolution. The idea of rights, however, did not lead to the Revolution, did not depend on the Revolution, and, in fact, did not have much to do with the Revolution. Jefferson did invoke the notion of rights to justify the colonists' demands for independence and "self-determination," but he did not really need to talk of rights at all. He could have satisfied the requirements of "a decent respect to the opinions of mankind" with the same declaration, with the same list of grievances, without the ten lines of rights rhetoric.

Presumably, Jefferson and the others inserted the rights paragraph because they did not wish to be considered "rebels"; the rights rhetoric, they thought, supported their claim of a *right* of revolution or a *right* of secession. In fact, the idea of rights that Jefferson articulated does not provide particularly persuasive authority for the kind of revolution

that the colonists carried off. A right of secession and a people's right of self-determination do not derive readily from Locke's theory of the individual's inherent right to life and liberty. Mankind, to whose opinion Jefferson paid decent respect, did not need Jefferson's theory of rights; the many who supported the Revolution did not do so because they were persuaded by that theory.

The idea of rights was not necessary to justify the American Revolution; it was indispensable to American constitutional development. The Framers' generation was committed to the notion of rights which Jefferson had articulated in the Declaration (even though they continued and even expanded slavery). After independence, they built their new polities on that idea.

Three streams fed the Framers' ideology— English constitutional history; European ideas, notably those of Locke and Montesquieu; and their own experiences and ideas grown in the American soil.

English settlers brought with them the English Constitution, English constitutional history, English institutions, and English law. Their heritage included resistance to arbitrary governmental power. Magna Carta, the Petition of Right, the Glorious Revolution, and the English Bill of Rights of 1688-89 marked movement toward parliamentary supremacy in relation to the monarchy. In England, the social contract was between the people's representatives in Parliament and the King, and rights under that contract were inherited by English subjects. English subjects had the right to be represented in Parliament and to be governed by law enacted by Parliament. The colonists valued the rights they had as English subjects and, indeed, insisted upon being accorded those rights, for example, when they objected to "taxation without representation."

America built on this constitutional history. Beginning where the Glorious Revolution had put England, the Americans gave to their legislatures the principal powers of government. Neither the Crown nor the royal governors had been a good advertisement for executive power, and in America neither state governors nor the President came with a legacy of entrenched royal prerogative. Consequently, both the states and later the United States (like England but unlike France) avoided serious constitutional struggle between the executive and legislative branches. There was no such struggle when the American constitutions were written, and there has been none since then.

The colonists, however, moved beyond their English heritage. The experience of the American colonies under British rule persuaded them that they needed protection for rights against the legislature as well as against the executive. Out of the colonies' recent history came a sense of "a plague on both your Branches" that led to a strong commitment to separation of powers and to checks and balances even against the legislature. The colonies found support for such checks and balances in the idea of rights, not strictly Locke's, but their own version reflecting

their own history and experience. America was "a new nation," and in some sense had become a new nation while it was still a British colony. The political character of the new nation resulted from English charters that were adapted to the circumstances of the New World and from American "charters" beginning with the Mayflower Compact. Religious dissenters brought with them a conception of rights (including rights of conscience) not rights granted by Parliament by law, but natural, inherent rights. Invoking Otis and Paine,[3] American colonial publicists moved to the idea of social contract out of *individual* rights. The Americans came to see rights not as concessions wrung from monarchs by nobles and by parliaments representing expanding land-owning and merchant classes, but as inherent rights held by individuals prior to government and law, and not given away but retained under government.

The revolution served to confirm these ideas about rights rather than to give them any radical new turn. The move to independence, to revolution "as of right," was blended with the idea of individual social contract, a contract among individuals, and between the individual and the government. The colonists had drafted bills of rights in that spirit—not that of the English Bill of Rights with its rights of Parliament—even before the Declaration of Independence. (Compare the declaration and resolves of the First Continental Congress, in 1774; the address to Inhabitants of Canada and a Declaration of the Causes and Necessity of Taking up Arms, in 1775; and the Virginia Bill of Rights in 1776.[4]) The Declaration of Independence confirmed and generalized what others had said, and rendered their ideas unforgettable. In that Declaration Jefferson penned these famous words:

> We hold these truths to be self-evident, 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. That to secure these rights, Governments are instituted among Men, deriving their just power from the consent of the governed.

The commitment to individual rights in these lines is striking. Rights are not conceded by or extracted from kings or enacted by Parliaments; each individual is endowed with rights by the Creator. With life came rights of liberty and autonomy. Liberty and autonomy enable individuals to decide to enter a social contract and to institute government. The purpose of government is to secure these rights.

---

3. James Otis' Speech Against the Writs of Assistance, from 2 The Works of John Adams (C.F. Adams ed.), reprinted in H. Commager, 1 Documents of American History 45 (9th ed. 1973); T. Paine, The Rights of Man (1791/92).

4. See Commager, supra note 3, at 82, 91, 92, 103.

Because of the early American preoccupation with rights, rights guarantees became a condition of government for every state. Later, a bill of rights became a condition for union, for approving the United States Constitution, and rights became supreme constitutional law.

America's was not much of a revolution by world standards. There was little to tear down, and no resistance by powerful domestic forces or established institutions. Not much social or cultural change followed from this revolution; that revolution was still to come. In fact, it was probably the mildest revolution in history. It destroyed little, changed little (cf. France, Russia)—for better and for worse. Some might say it was a paper revolution, a conceptual revolution. But it inspired and made possible a radical political, ideological revolution. The Revolution cut the colonies' ties to the King, to Parliament, to the English Constitution, and to English law as English law. The former colonists repudiated the notion that their polity was based upon an inherited social contract; their polity, they declared, was the creation of their own new social contract based on their own natural rights. By their own radical ideas, they transformed the institutions they had inherited. They converted the rights which they had enjoyed as Englishmen into universal principles. Not much else was needed for the Revolution to be complete. Institutions and forms reflective of the colonists' unique view of rights and government had already been conceived; many were already in place.

Out of this ideological revolution emerged the United States' unique brand of constitutionalism. It required a written constitution, which was to serve as a new social contract. The new American social contract was supreme law—supreme even to legislatures, to the people's political representatives.

The radicalism of America's constitutionalism becomes apparent when one compares the young United States with England, its mother in law. The United States was committed to limited government. England's government was limited only by the rule of law and established procedures. The Americans were committed to liberal government designed for few and limited purposes; English constitutional history knew no commitment to limitation in principle on the purposes of government. The states of the United States were committed to the separation of powers, articulated most clearly and dogmatically in Adams' Massachusetts Constitution of 1780;[5] in England, separation of powers was long in flux as that country moved steadily toward parliamentary supremacy and with that movement England was also abandoning checks and balances. In America rights were natural, inherent, antecedent to gov-

5. Massachusetts Bill of Rights of 1780, art. XXX, reprinted in Commager, supra note 3, at 110.

ernment; in England, rights were derived from law, from the common law and from Parliament, and even these rights that had been wrested from the King in the Magna Carta and later charters were subject to Parliament in principle. Perhaps the most radical idea of the American Revolution was epitomized later in the first clause in the Bill of Rights: "Congress shall make no law . . . ."

Building upon its radical views of constitutionalism and rights, the United States has slowly established its unique constitutional system. A critical part of this constitutional system today, a direct outgrowth of the colonists' concern with rights, is the United States' rights-centered, rights-ridden constitutional jurisprudence, explored below.

Rights and the French Revolution

The relationship between the French Revolution and the idea of rights was quite different and led to a different story. At the time of the Revolution the idea of rights was in the air in France, arising from the writings of their own philosophers and publicists and of Locke and Thomas Paine across the Channel. The United States Declaration of Independence and the Bills of Rights of Virginia and Pennsylvania confirmed for the French the importance of the idea of rights. France adopted its Declaration of Rights within two months of the fall of the Bastille. Later the Revolution adopted a rights slogan, liberté, égalité, fraternité.

Slogans and even declarations, however, are often rhetorical, not necessarily statements of commitment to political programs, not necessarily constitutional dogma, not necessarily supreme law. The Declaration of Rights and the theory it reflected declared universal principles and were adopted by the National Assembly, perhaps even acquiesced in by the King. The French Revolution itself, however, was independent of the idea of individual rights. The Revolutionaries overthrew the *ancien régime*, but did not do so pursuant to a new social contract accepted by all.

Unlike the American Revolution, the French Revolution took place in an ancient country with ancient institutions. In a radical sweep, the Revolution replaced sovereignty in the king with sovereignty in the Nation, but *la nation* was not a new conception and the Revolution did not produce a new, different nation. The United States Declaration was announced for a new nation in formation; the French Declaration was announced for an old nation in transformation. Whereas the bills of rights of the various American states had declared what the former colonists had or would have with independence, the French Declaration declared what the French people wanted, but what they did not have and could not have without radical upheaval. In order for the ideas of the Declaration to be realized, old institutions had to be destroyed, or at least significantly modified, and new institutions had to be created.

Steps toward larger parliamentary power met fierce, powerful resistance from the monarchy, nobility, and the church, institutions that were supported by the courts. Political, social and economic tensions and the clash of competing forces led to the Reign of Terror, to civil war, to the Directorate, and then to Napoleon. In these struggles, individual rights hardly mattered.

In a large sense, the French Revolution was not consummated, and the idea of rights never realized, for more than 150 years. From 1793 until the middle of our century, France remained deeply divided in ideology. Whereas England put her Glorious Revolution behind her and built a national consensus on its fruits, whereas the United States looked back at her Revolution with pride and satisfaction, France continued to refight its Revolution.

To generations of "revolutionaries," the history of France demonstrated the need for security against monarchy and the executive establishment, and, following England, they sought such protection in a powerful parliament. French constitutional history became a history of struggle for power between the executive and the parliament, a struggle that has continued into the present day. The influence of the United States and its commitment to rights did not last. Perhaps because the English were geographically and culturally nearer, their influence remained stronger and longer. Liberal, republican spirits looked to Westminster; in France, too, Cromwell prevailed.

During the first one hundred and fifty years following the French Revolution, rights were not the battle cry even of its progressive descendants. (Often rights were attacked from "the right" and from "the left.") The Declaration of Rights was occasionally invoked in rhetoric, but, after the short-lived Constitutions of 1791 and 1793, it was relegated to a pantheon; it did not acquire a living place in the life of France and it did not become law. Although the French Declaration of Rights had influence around the world, it had little at home.

The French people left the development and care of rights to the political process. In France, as in England, rights depended on law, on parliament. France gradually moved toward democracy and toward the promotion of rights, but for the French, rights were created and secured *through* law; rights were not something that could be enforced *against* the law. Those who wanted security against Parliament sought it in Executive power, not, as in the United States, in the idea of rights enforceable by the judiciary. To the French mind, courts were tainted by their historical association with oppressive monarchs; an independent judiciary was not foreseeable.

The Influence of Ideas

The divergence of the constitutional and "rights" histories of the United States and France is due in large part to differences between

the contexts of their revolutions and the place of rights in them. There were differences also in the influence of ideas concerning the nature of rights and government. Those ideas, and the choice among those ideas, of course, were rooted in history, culture, and institutions.

Different intellectual traditions influenced France and the United States. The Americans commonly fused democracy with individual rights, but those ideas are different and may sometimes be in conflict. The notion of "democracy" speaks to popular sovereignty, consent of the governed, majority rule, and even utilitarianism, that is, the greatest good of the greatest number. Individual rights sometimes do not fit well within the scheme for democracy. Such rights operate as constraints upon the government even when it acts for the good of the majority or for the common good.

The French followed Rousseau.[6] They were concerned with equality and community and with the general will, but not with rights; there are no rights against the general will. The American followers of Locke (more precisely, of Locke as modified by Jefferson) insisted on rights first, even against the general (majority) will. France was concerned for parliamentarism; the United States for constitutionalism. Leaders in the United States spoke of "constitutional democracy," at bottom an oxymoron. Later, the United States came to democracy, slowly, through the idea of individual rights, and democracy remains subject to rights. In France, as in England, the people had rights only by law, by the grace of Parliament, the spokesman for the general will. The people had no rights against Parliament, no right to challenge Parliamentary supremacy.

Another difference between the United States and France lay—perhaps—in their conceptions of the polity. In the United States, the source of authority and of the legitimacy of government was "We the People," which seems closer to notions of popular sovereignty and the consent of the governed. Increasingly, the phrase came to mean "the inhabitants," that is, particular living people; it did not necessarily contradict the idea of individual rights. France, on the other hand, spoke of *La Nation*. It was important that the nation replaced the crown as the source of sovereignty. But *La Nation* is an abstraction that may have stood above and distinct from individuals. (In some countries emphasis on the nation suggested subordinating the individual to the state, or even totalitarianism.)

From the beginning, there was also a difference between the rights to which the two countries were committed. Lord Acton once said that "[L]iberty was the watchword of the middle class, equality of the

6. See infra note 32.

lower."[7] The cry of liberty animated the American Revolution, by Acton's definition a bourgeois revolution for a bourgeois value. Although Thomas Jefferson did declare a right of equality in the Declaration, the United States was and remained a slave society. When the United States Constitution was later drafted, the word "equal" was not in it. Lincoln perhaps recognized this when he said that this nation had been "conceived in liberty," but that equality—equal rights—was only a proposition to which we were dedicated.[8] The United States idea of rights remained rooted in liberty (even before slavery was abolished). In fact, liberty has often proved to be an obstacle to equality and fraternity in the United States. The right of equality came very slowly in the United States; even the liberty to discriminate was outlawed only recently.[9] The right to fraternity—as in social welfare—came even more slowly, largely because of the Supreme Court's commitment to "liberty," to "freedom of contract" in cases such as *Lochner v. New York*.[10]

The French Revolution was more proletarian, more concerned for equality. In time concern for equality led to democracy and to an activist Parliament. *Egalité* also proved to be conducive to *fraternité*; France was an early welfare state. In France socialism became a vibrant ideology, a form of utilitarianism to which liberty rights are sometimes subordinated.

In sum, both the French Revolution and the American Revolution, like many revolutions in more recent days, were conceived in rights, or at least were justified by them. But the relation of rights to revolution was different in France and the United States, and the fate of rights in each country after its revolution was also, and perhaps for that reason, different.

In the United States the idea of rights was pre-revolutionary, and the use of rights in revolutionary rhetoric and ideology was incidental. The fate of the rights ideology depended on the success of the Revolution and on escape from the British constitution, but the lasting, long-term life of the idea of rights in the new nation was hardly affected by the Revolution. The idea of the social contract implicit in America's rights ideology served the new nation well at the beginning, but had no further use. There has been no reversion to revolution, to Jefferson. The Declaration of Independence was not law, and even now, more than two

---

7. Acton, History of Freedom and Other Essays 88 (Figgis and Lawrence eds. 1916).

8. "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Gettysburg Address, Nov. 19, 1863.

9. Civil Rights Act of 1964, 28 U.S.C. § 1442, 42 U.S.C. §§ 1971, 1975a et seq., 2000a et seq.; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348 (1964).

10. 198 U.S. 45, 25 S. Ct. 539 (1905).

hundred years later, the United States still has not fully realized its promises—equality, retained rights, consent of all the governed.

In the United States the idea of rights was never in jeopardy. American political culture was receptive to the idea. Freedom and the minimal liberal state were conducive to enterprise and to economic growth. Whereas democracy and representative government grew gradually, rights were fundamental. The rights idea became entrenched and domesticated, became "positivized," and remained as supreme law. Later, judicial supremacy was confirmed as an integral part of America's rights system and securing rights became the courts' principal constitutional activity.

Developments in the mid-twentieth century served to change and to extend America's rights landscape. Under the New Deal, the United States became a welfare state, by grace of Congress, by Presidential leadership, and by constitutional reinterpretation. Governmental power therefore grew, but so did rights. These were not Jefferson's natural rights, however, but perhaps the rights of a new social contract, one based on a mutual commitment to human welfare. The post-War era also brought other major rights developments, but they grew out of the old, established, rights-tree. Today the United States is a constitutional democracy, with majority rule by representative government, that is still subject to individual rights; the United States is also a welfare state, guaranteeing at least a minimum of social welfare entitlements.

The French experience with rights was different. In France, rights slogans toppled the *ancien régime*, but destruction of the old regime did not depend on rights. The post-revolutionary struggle in France was not for rights, but for democracy; it was the struggle of Parliament with the executive, in essence a parallel of earlier British constitutional history. In France, rights became the responsibility of the political process. Rights did not have constitutional sanction, and the inherent rights of the Declaration became only "droits de créance," legislative entitlements. In changing France, progressive forces did not seek individual rights but pressed for increasing manifestations of the welfare state.

Only after the tragic history of World War II did France return to its commitment to the notion of constitutional rights. When she did, the Declaration was available, France's *own* Declaration, that is, purged of traces of any American origins. At that time the International Human Rights Movement may have had greater influence upon the French than did the idea of rights embedded in the jurisprudence of the United States. Not surprisingly, each country's rights commitment has played out somewhat differently in the years since the War.

II. Rights and Constitutions Today

Both the French and the American Revolutions led to written constitutions. The French have had many. Although the first three French

constitutions incorporated a Declaration of the Rights of Man and of the Citizen, succeeding constitutions did not. Not until 1946, following the ravages of the Second World War, did France again make the Declaration part of its constitution. France's contemporary constitutional regime, then, is now only some forty years old, but it has already experienced significant growth, and the idea of constitutional rights seems to have settled in.

The United States, by contrast, is constitutionally "ancient." The United States has both the oldest written constitution and the oldest constitutional bill of rights. In the United States, World War II did not lead to the development of a new constitution or usher in radical formal amendments to the existing constitution. But American constitutional rights, too, one might say, has had its face lifted and given a new look.

My purpose in this section is to explore the relationship between the current status of rights in the United States and France and when, and how, rights became constitutionalized in the two countries. I shall suggest that the time and manner of the constitutionalization of rights has shaped the contents of those rights as well as the means for implementing them. I then muse lightly on what we might learn from the "rights histories" of these two countries and what they might learn from each other.

Both the United States and France have come to think of constitutions as safeguards of rights, and "rights" are indeed mentioned in almost all constitutions today. But if, as the French Declaration declares,[11] a society in which "rights are not guaranteed," has no constitution, a society has a constitution only if its constitution imports and secures "constitutionalism." Unfortunately, not all constitutions import constitutionalism.

Today constitutionalism embraces several principles, among them: popular sovereignty, consent of the governed, accountability of officials to the people, the rule of law, the constitution as supreme law, government limited by some separation or diffusion of powers and by checks and balances. Most importantly, constitutionalism implies respect for individual rights and contemplates some means of assuring that respect, for example, constitutional review by an independent judiciary.

Today both the United States and French constitutions import constitutionalism. This has not always been so: until recently, the constitutions of the two countries did not show commitment to constitutionalism, equally and in full measure.

---

11. French Declaration, art. 16, supra text accompanying note 1.

Constitutions and Rights: The United States

The United Stated adopted a constitution and embraced constitutionalism early in its history. Interesting to note, constitutionalism is not plainly reflected on the face of that constitution. Unlike most countries, which have have elegant constitutions but are defective in constitutionalism, the United States has a sturdy constitutionalism but a defective constitution.

The United States Constitution does *imply* popular sovereignty, in that it is ordained by "We the people." It declares itself to be supreme law. It reflects some notion of separation of powers and of checks and balances. But none of these elements was clearly expressed or fully developed in the original document. What is more, the original constitution was virtually silent about individual rights. When the Constitution came into effect two hundred years ago, the word "rights" was not in it. Some provisions did guarantee certain rights, for example, the right to jury trial. These isolated provisions, however, did not reflect a clear theory of rights or add up to a comprehensive catalogue of rights. The most important rights by any theory or standard were not mentioned at all: "liberty" is mentioned only in the preamble, and then only as an aim of union, not as a right. "Equality" is not mentioned at all. Several important dispositions, moreover, are inconsistent with basic rights. For example, the Constitution accepted the institution of slavery, mandated that a slave should be counted as three-fifths of a person, and prohibited placing restrictions on the importation of additional slaves, at least for the first twenty years of the new republic.[12]

The Constitution's failure to mention rights and its silence on liberty and equality are particularly striking since America's national birth certificate, the Declaration of Independence, declared that the purpose of government is to secure rights and highlighted equality and liberty.

Scholars have long pondered why the Framers failed to include guarantees of individual rights and other elements of constitutionalism in the United States Constitution. Some have explained that failure by stressing differences between a declaration of independence and a constitution, between a manifesto with its promises and aspirations and a blueprint struggling with the "nitty-gritty" and sober business of daily governance. Others have stressed the changed mood, between elated resistance at Lexington-Concord and reactions to Shays's rebellion, as well as the different cast of characters at the second Philadelphia Convention.

I have offered a simpler explanation: The Constitution is not the direct descendant of the Declaration, but is at best only a collateral heir. Independence brought two separate developments. The thirteen

12. U.S. Const. art. I, § 2, cl. 3; art. I, § 9, cl. 1.

former colonies became independent states, drafted new state constitutions and established new state governments, and they did so in the spirit of the Declaration of Independence and the political ideology it articulated. Several constitutions contained a full Bill of Rights. At the same time the newly independent states moved to form a union. In 1781 they adopted the Articles of Confederation.

The state constitutions were direct descendants of the Declaration of Independence and reflected its basic principles; the United States Constitution descended from the Articles of Confederation. Like the Articles before it, the Constitution was concerned not with governance, but with union. The purpose of the second convention in Philadelphia, later called the Constitutional Convention, was to amend the Articles in order to create a "more perfect union." The delegates to the convention went beyond their mandate and created a government instead of an improved confederation. But this new government was designed to be only a small superstructure over the various state governments, and was given only as much governing power as was required for union. The state governments remained intact and retained primary responsibility for governance. Relations between individuals and government, a responsibility that implicates rights, was left principally to the state governments under their constitutions.

The primary emphasis in the United States Constitution, then, was not on governance, but on union. For this reason, the Constitution did not articulate a theory of government. It did not contain a Bill of Rights or articulate a commitment to rights. Most of the Framers did not believe it necessary to establish rights against a government of such limited powers. Rights had to be protected only against state governments, which enjoyed plenary governmental power, and that protection was provided by the state constitutions. Therefore, the United States Constitution set out only the handful of rights that required protection against the new small government of the United States, principally those that might be implicated by federal criminal law: the right to a writ of *habeas corpus*, and to trial by jury in the courts of the new government, and freedom from *ex post facto* laws and bills of attainder. The Constitution also set out a few rights against the states—those implicated in a more perfect union of republican states (for example, the prohibition of titles of nobility, the rights of citizens of one state in the territory of another state), and those where one state's violation of rights might be of particular concern to other states (for example, the prohibitions on bills of attainder, *ex post facto* laws, and the impairment of contracts).[13]

13. Perhaps the failure to include a Bill of Rights reflects also a tendency of the

Despite the efforts of the Framers to fashion a new central government of strictly limited powers, many opposed adoption of the Constitution because it did not contain a bill of rights. They were promised that a bill of rights would be added to the Constitution by amendment. In 1789 Congress adopted ten amendments which later came to be known as "the Bill of Rights." It consisted of a string of individual amendments. They were not incorporated into the structure and fabric of the Constitution. They contained no theory or justification for rights (like that found in the Declaration). They indicated no institutions or remedies for securing respect for those rights.

The Bill of Rights was seriously defective, even by the Framers' lights. The guarantees provided fell far short of the promises and commitments of the Declaration. Slavery was left intact. The right to equal protection of the laws is not there. Life, liberty and property were protected against deprivation "without due process of law," that is against lawlessness, but not against law; in other words, against executive and judicial action, but not against arbitrary legislative action. The Bill of Rights did not assure the consent of the governed by providing for the right to vote. The Ninth Amendment provides that rights not enumerated are also retained by the people, but no one has claimed that the Amendment fills the lacunae I have noted. In any event, whatever the unmentioned rights which the Framers of that Amendment had in mind, the Amendment serves not to "disparage or deny them," but has not given those rights constitutional protection. Moreover, even as regards the enumerated rights, the Amendments fail to obligate the government, or even to empower that government, to secure those rights against invasion by public authority or by private persons. In sum, the constitutionalization of rights accomplished by the Bill of Rights guaranteed only a limited number of the rights promised by the Declaration of Independence and failed to assure protection for even the rights that were enumerated. Needless to say, the Bill of Rights did not address at all the welfare rights that have been recognized in the twentieth century.

During the two hundred years since the Bill of Rights was adopted the United States has been transformed. The central government has become a full and powerful government, overshadowing those of the

---

Framers to underemphasize the radical elements of their Constitution. I have suggested elsewhere that the Framers seemed disposed not to emphasize the change from the Articles to a constitution, from a confederation to a government. Hence they retained the name "the United States," called the legislature "the Congress," (as it was under the Articles), gave the new executive the title of "President." See Henkin, Constitutional Fathers—Constitutional Sons, 60 Minn. L. Rev. 1113, 1125-26 n.37. Perhaps the Framers were also disposed against including a Bill of Rights so as not to highlight the fact that they had created a new government, and one that might prove to be a powerful government.

states. But the United States has not adopted a new constitution nor has the existing Constitution been amended to reflect those transformations. Some of the deficiencies of the Bill of Rights have been cured by amendment; most have not been. Slavery was abolished but, for the rest, the only major rights amendment to the Constitution, the Fourteenth Amendment, was essentially addressed to the states and nationalized protection for rights against the states; the Bill of Rights, limiting the federal government, has remained untouched by amendment. Even after the Civil War and the end of slavery, no provision guaranteeing the equal treatment of citizens was added to the Bill of Rights. To this day, nothing on the face of the Constitution forbids the central government from discriminating against persons on account of race, religion, or gender. Later constitutional amendments prohibit the United States (and the states) to deny suffrage on account of race or gender, but an affirmative grant of the right to vote and a general commitment to democracy have never been explicitly incorporated into the Constitution.[14]

In part, perhaps, because of its defects, the Bill of Rights did not figure prominently in constitutional jurisprudence during the larger part of American history. The Framers had thought that the Bill of Rights was unnecessary, and for the first one hundred and fifty years under the new Constitution the Framers' views seemed to hold true: Congress exercised few powers that implicated individual rights. The Alien and Sedition Laws raised issues under the First Amendment but those laws were short-lived and were never reviewed by the Supreme Court.[15] Only one case implicating the Bill of Rights reached the Supreme Court before the Civil War, namely, *Dred Scott*,[16] and very few cases under the Bill of Rights reached the Court during the seventy years immediately following that war.

During those seventy years, too, the federal courts construed the Fourteenth Amendment as well as the Bill of Rights narrowly. They ruled that the Fourteenth Amendment did not make the Bill of Rights applicable to the states.[17] They effectively eviscerated the Privileges and Immunities Clause and reduced equal protection by embracing the "separate but equal" doctrine; they enlarged the scope of protection under the due process clause by developing "substantive due process," but

14. U.S. Const. amend. XV (1870); U.S. Const. amend. XIX (1920).

15. See generally J.M. Smith, Freedom's Fetters (1956).

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

17. See Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672 (1947); Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149 (1937). Incorporation of the First Amendment came early (Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 25 (1925); see Palko v. Connecticut). Most other provisions were incorporated by 1968 (Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968)).

used it principally to protect so-called "liberty of contract,"[18] to frustrate social legislation and hold back the emergence of the United States as a welfare state for decades. Neither the First Amendment nor the Fourteenth Amendment afforded much protection to freedom of expression in the years following World War I.[19] The courts reduced Congressional power to safeguard rights by applying the "state action" requirement broadly and interpreting the enabling clauses of the Fourteenth Amendment narrowly.[20]

Not until the advent of the New Deal did the United States experience significant new developments in its conception of rights. Even then, despite national economic crisis, developments did not come easily. Welfare rights, which had come to France early and grown steadily, came in the United States with great difficulty. The courts found constitutional obstacles in principles of federalism, in "liberty of contract."[21] A constitutional amendment was required to support a progressive income tax on which the welfare state depends. Slowly, some rights were added by statute after the Supreme Court finally recognized broad powers of Congress under the enabling clauses of the Civil War Amendments, the Commerce Clause, and the Taxing and Spending powers.[22] At the same time, the Supreme Court began to strengthen procedural due process guarantees and provide some protections for freedom of expression.[23] It began to take a sharper look at the "separate but equal" doctrine and to scrutinize "suspect classifications"[24] and invasion of important rights such as freedom of religion and expression.

The United States in the Age of Rights

A marked advance for human rights came with the Second World War, which ushered in what might well be called "the Age of Rights"; United States rights ideas had significant influence on those develop-

18. In re Slaughter-House Cases, 83 U.S. 36 (1872); Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896); *Lochner*, 198 U.S. 45, 25 S. Ct. 539 (1905).

19. For the history of the development of free speech in the United States, see Z. Chafee, Free Speech in the United States (1941).

20. *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18 (1883).

21. Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529 (1918); *Lochner*, 198 U.S. 45, 25 S. Ct. 539 (1905).

22. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578 (1937).

23. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914) (right not to have evidence obtained by illegal search or seizure used against defendant in federal criminal trials); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932) (in some cases right to counsel essential to due process).

24. Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944).

ments. President Roosevelt's "Four Freedoms"[25] became a watchword for the Allied war effort and for the international human rights movement that accompanied allied victory. The idea of rights was reflected in the UN Charter. The Universal Declaration of Human Rights, developed under the leadership of Eleanor Roosevelt with the collaboration of René Cassin of France (and others), bears strong traces of the eighteenth century rights ideas of France and the United States and of intervening developments in regard to rights in both countries. The international human rights movement was infused also by other ideas, notably the spreading commitment to society's responsibility for individual social and economic welfare, and to the principle of self-determination.

Influence may take different forms and is difficult to trace; often it is reciprocal. If United States ideas influenced the growth of international human rights, the United States in turn was not immune to the implications of the international human rights movement. That movement, and domestic changes resulting from the War, helped reshape the conception of rights in the United States.

Rights in the United States felt the impact of Hitler and the War only indirectly. The war experience highlighted the need to address racial discrimination in the United States, but, in general, the United States emerged from the War with the impression that its constitutionalism was healthy, beyond need for change, and immune from external influence. But the international responsibilities thrust upon the United States after the War, as well as new developments in global communication and intercourse, made the United States susceptible to influence from abroad in fact. This influence, I believe, helped change the face of rights in the United States in the post-War era. By a process that might be described as judicial genetic engineering, the Supreme Court "corrected" most of the congenital defects in the United States Constitution, and constitutionalism in the United States was developed if

---

25. Annual Message to the Congress, Jan. 6, 1941, in Development of United States Foreign Policy: Addresses and Messages of Franklin D. Roosevelt 86-87 (1942).

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.
>
> The first is freedom of speech and expression—everywhere in the world.
>
> The second is freedom of every person to worship God in his own way—everywhere in the world.
>
> The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.
>
> The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

not transformed. The Court enhanced personal liberty, made strides toward establishing equality, improved our democracy, and confirmed the broad powers of Congress to promote fraternity.

Since World War II the United States has seen a dramatic transformation in the character, content, and scope of rights. Rights became not only the rights of gentlemen but the rights of all. To the established commitment to political rights, was added concern for individual autonomy, dignity, self-realization, and privacy. The court expanded the protections of the Bill of Rights in the criminal process and made virtually all of those provisions applicable to the states by "incorporation" in the Fourteenth Amendment. The Constitution was reinterpreted to transform the United States commitment to equality. In *Brown v. Board of Education*,[26] the Supreme Court abandoned "separate but equal." Other classifications based upon race were declared suspect, to be sharply scrutinized. Some stereotypes as to the relevance of gender were discarded and distinction based upon gender became nearly suspect.[27] The Supreme Court filled a major gap in the Bill of Rights when it concluded that equal protection of the laws, required by the states of the Fourteenth Amendment, was required also of the federal government by the due process clause in the Bill of Rights. From the idea of equality the Supreme Court developed a requirement of "one person, one vote" and effectively universal suffrage.

The new rights mood in the United States took hold of Congress. Unleashed by the Court, invoking the Commerce Power and other enlarged powers, Congress enacted the Civil Rights Act and the Voting Rights Act, legislated to prohibit private discrimination, promote freedom of information and protect the environment. Through programs such as the Great Society, Congress recognized new economic-social rights and various entitlements for minorities, the elderly, and the poor.

The explosion of rights in the United States might not have been possible without the coming of age of judicial review. John Marshall had asserted that power early but it was not confirmed and established and judicial supremacy and finality were not secured until this century. Once, its principal constitutional function was to assure the proper division of authority between the central and state governments and the allocation of powers among the branches of the United States government. Now, the principal use of judicial review is for monitoring respect for rights, by the states and by the United States government, by the executive as by legislatures.

The courts have not always been the bulwark of rights. In *Dred Scott*, the *Civil Rights Cases*, *Plessy v. Ferguson*, *Korematsu*, the post-

26. 349 U.S. 294, 75 S. Ct. 753 (1955).

27. See for example Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973).

war "sedition" cases, and others, the Supreme Court did not champion individual rights.[28] Throughout much of its history the Court has followed a policy of judicial reticence and restraint and had developed an entire jurisprudence for not addressing constitutional issues. The courts, moreover, are only responsive and the security of rights depends initially and perhaps ultimately on political institutions and on the people's commitment to a rights culture. Nevertheless, in all, today most Americans would agree with Chief Justice Hughes that "the judiciary is the safeguard of our liberty and of our property under the Constitution."[29]

Constitutional rights are alive and quite well in the United States today. Constitutionally recognized rights have expanded greatly since 1789, and some now think the United States is "rights-ridden." Yet our contemporary jurisprudence of constitutional rights, one might say, still suffers from the genetic defects of its textual source, the Bill of Rights. That text, which remains our holy writ and continues to frame judicial thinking about rights, has not been changed since it was added to the Constitution. Consequently, the Constitution still contains no statement of the theory underlying or the justification of rights. Despite the Ninth Amendment, rights other than those enumerated in the original Bill of Rights still have no explicit constitutional protection. Basic civil rights and the national commitment of more than a half a century to Freedom from Want[30] have not been constitutionalized. The Constitution still does not require or even empower the government to insure respect for rights even by its own officials, surely not by private actors. Many advances in rights still have no firm basis in constitutional text. Textually, life, liberty, and property remain unprotected against deprivations by arbitrary law; textually, there still is nothing in the Constitution to forbid the federal government from engaging in discrimination based upon race, religion, or gender; textually there still is no right to vote. Finally, the Constitution continues to lack a clear textual basis for judicial review and for the role of the courts as the guardian of rights.

In short, despite the transformations in American society in the last two hundred years, and despite the rights explosion of the Age of Rights, a development that brought with it the recognition of important social welfare rights, the United States still faces the world with a Constitution that reflects and is limited by an eighteenth century idea

---

28. *Dred Scott*, 60 U.S. (19 How.) 393 (1857); *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18 (1883); Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896); *Korematsu*, 323 U.S. 214, 65 S. Ct. 193 (1944); Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857 (1951).

29. Speech at Elmira, May 3, 1907, in Charles E. Hughes, Addresses 139-41 (1908), quoted in The Autobiographical Notes of Charles Evans Hughes 144 (Danelski & Tulchin eds. 1973).

30. See supra note 25.

of inherent rights and of the liberal state. To the extent that the explosion of rights has come about through the reinterpretation of this ancient text, it remains intellectually vulnerable and at the mercy of changing judicial ideology. To the extent that the explosion has come through legislation, it remains politically and perhaps also constitutionally vulnerable and at the mercy of political ideology and societal change.

Constitutions and Rights: France

Prior to World War II, France did not enjoy constitutional rights in significant degree. Although the French Declaration of Rights had inspired the world, it was only a brooding presence in France, and sometimes the object of scorn. Through empires, monarchies, and republics, France struggled towards representative democracy. Following Rousseau rather than Locke, Westminster rather than Washington, France sought protection against executive abuses in a strong parliament and in the supremacy of law. In France, law defined and protected rights. France had and sought no protection against parliament, neither in the courts nor by an independent press. To the contrary, the press sought protection in law, in parliament.

In pre-World War II France, there was little tension between rights and law; rights were achieved and guaranteed through the law. Inherent rights, recognized by the Declaration of the Rights of Man and of the Citizen, were not constitutional and were not law. In its civil law tradition rights could not be "inherent," pre-political; all law was positive law, all rights were *droits de créance*, rights ordained by law.

Non-inherent, non-constitutional rights were not supreme but they had some advantages over the United States Bill of Rights system. In France, rights were not limited by an original conception of natural, pre-societal, rights: rights could be civil as well as political, positive as well as negative, rights of *fraternité* as well as liberty rights. France was not limited by a "state action" requirement: the law could guarantee rights not only against the government (the executive), but also against private actors. Rights-through-law developed not only the limitations on but also the affirmative obligations of political society. France outlawed slavery in 1794 (in the midst of the Terror) and the constitution of 1795 also prohibited slavery. The 1830 constitution abolished censorship and the 1848 French constitution expressly prohibited slavery and press censorship and limited the death penalty.[31] It not only guaranteed the freedom to work, but it also assumed the political obligation to prepare individuals for work and to help them obtain it. With increasing in-

31. Decree upon Slavery, Feb. 4, 1794; French Constitution of 1795, Rights art. 15; French Constitution of 1830, art. 7; French Constitution of 1848, chap. II, art. 5 (death penalty), art. 6 (slavery), art. 8 (censorship).

dustrialization, French law addressed the problems of inhuman labor conditions. Building upon rights of equality and fraternity, French law began to guarantee various economic and social entitlements. France was a welfare state "*avant la lettre.*" Rights through law also provided for the enforcement of rights, notably through the *Conseil d'état*, which over time developed a jurisprudence that protected individuals against abuses by the executive branch of the government. But Parliament was supreme, law was supreme. The "general will" could not be wrong, could not violate rights.[32]

Then, with the tragic events of 1940, public confidence in Parliament, in the "general will," was shaken. Early defeat, German occupation, and the sad story of Vichy, brought home the need for protection against the political process, against corruption of the general will, even against Parliament itself.

France in the Age of Rights

After the end of the War in 1945, France began to rebuild its society and its government. France's war experience had largely destroyed old resistance to republican democracy. The war in general, and Vichy rule in particular, also brought a renaissance of the idea of constitutional rights.

France adopted a new constitution in 1946. In the Preamble, the French people "solemnly reaffirms the rights and freedom of man and of the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic." The Preamble also proclaimed as "most vital in our time," a number of "political, economic and social principles," including equal rights for women, and rights of labor, health care, and education.

The 1946 Constitution was replaced by that of 1958, but the French commitment to rights remained primary. The Preamble of the new constitution begins "[T]he French people hereby solemnly proclaims its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble of the Constitution of 1946." In addition, the new constitution specified a series of rights including what appears to be a commitment to establish the writ of habeas corpus (which had been unknown in France).[33]

---

32. The French Declaration of the Rights of Man adopted Rousseau's concept of the general will: "The law is the expression of the general will" (art. 6). See generally J. Rivero, Les Libertés Publiques (1974); J. Morange, Libertés Publiques (1985).

33. French Const. of 1958, art. 66. Whether this commitment has been realized is still debated.

The 1946 Preamble incorporates the Declaration and the "fundamental principles recognized by the laws of the Republic"; the 1958 Constitution incorporates the Preamble of 1946. Scholars have struggled to comprehend the sum of those incorporations and their import for constitutional rights in France. Some have pointed out that "solemnly reaffirms," and even "solemnly proclaims its attachment to," seem precatory rather than prescriptive, more manifesto than law. The references to the Declaration leave uncertain whether they reaffirm the theory and rhetoric of the Declaration, including its commitment to the "natural, inalienable, sacred rights of man," as well as its detailed provisions, and whether the constitutional framers intended that the provisions of the Declaration be interpreted and applied as legal prescriptions. The "fundamental principles recognized by the laws of the Republic," incorporated into the new constitution along with the Declaration, are neither identified nor defined. But an activist, imaginative, *Conseil d'etat* has combined those "incorporations" into constitutional rights for the purpose of monitoring the French bureaucracy. And an active, imaginative *Conseil constitutionnel* has begun to articulate its own theory of constitutional rights in monitoring bills of the French Parliament that are about to become law.[34]

The Declaration, modernized and extended by the "fundamental principles recognized by the laws of the Republic," has become a constitutional Bill of Rights, but the scope and content of constitutional rights in France remain to be defined and developed. It may be that, whether as "fundamental principles recognized by the laws of the Republic," or as "political, economic and social principles" "most vital in our time," France has constitutionalized not only the natural rights of the Declaration, that is, civil and political rights, but also economic and social rights, formerly only *droits de créance*. If so, as Professor Rivero has put it, "[h]uman rights lost in theoretical purity what they gained in scope." Such an enlarged conception of constitutional rights doubtless creates intellectual as well as political tensions: On the one hand, state power must be limited in order to preserve individual freedom; on the other, the state must have power to provide for the security and welfare of its citizens. Freedom and material security are diverging aspirations that perhaps balance each other, and their proper synthesis may be essential for "human dignity."[35]

Perhaps the most radical development in French constitutional jurisprudence has been the advent of constitutional review. That American

34. See generally J. Rivero, Le Conseil constitutionnel et les libertés (2d ed. 1987).

35. J. Rivero, The French Conception of Human Rights, in L. Henkin & J. Rivero, Human Rights: France and the United States of America 3 (May 1984) (available from the Columbia Center for the Study of Human Rights).

contribution to constitutional rights has become almost irresistible internationally, even in the Soviet Union; France has not been immune from that influence. French scholars rightly stress the differences between French constitutional review and that of the United States, but the idea of an independent constitutional monitor designed to make the Constitution the supreme law is clearly, and admittedly, an American inspiration.

Constitutional review in France today is probably not what the framers of the French Constitution contemplated. Principally, it appears, the French organ of constitutional review, the *Conseil constitutionnel*, was designed to monitor the principles of "separation of powers" established by the 1958 Constitution so as to protect the Executive against usurpation by Parliament. In the age of rights, however, the *Conseil* moved to become a rights tribunal. The influence upon the *Conseil* of the example of the United States Supreme Court, of that court's activism, and of the United States' rights jurisprudence cannot be proven but need not be dismissed as insubstantial.

French constitutional review is unique. The *Conseil* is not a court, and not all of its members are lawyers. The *Conseil* is not outside the political process; it injects constitutional correctives into the political process. The *Conseil* does not frustrate the general will: "the law voted . . . does not express the general will unless it is in conformity with the Constitution."[36] The *Conseil* does not review a law after it is enacted in response to individual complaint and in the context of a particular case or controversy; the *Conseil*, usually at the behest of opposition members of parliament,[37] passes upon the constitutionality of proposed legislation *before* it becomes law; the *Conseil* is part of the legislative process. Parliament is constitutionally prohibited from completing the enactment of a law that in the *Conseil*'s opinion would be unconstitutional.

Constitutional rights in France are still young and developing. The *Conseil* is basing its constitutional jurisprudence upon an old text which was only recently resuscitated and which will require new interpretations. The *Conseil* may look to the "original intent" of the old text, or it may interpret it as a "living constitution." Joining the Declaration to "fundamental principles recognized by the laws of the Republic" and to "political, economic and social principles" "vital in our time" surely projects a constitutional jurisprudence of uncertainty and promise.

Constitutional rights in France will doubtless continue to reflect the French tradition of rights-through-law. That tradition was significantly

---

36. Con. Const. D.C. 85-197 (August 23, 1985).

37. By constitutional amendment in 1974, the right to refer legislation to the *Conseil* was extended to any sixty members of either house of parliament. See generally Beardsley, Constitutional Review in France, 1975 Sup. Ct. Rev. 189 (1975).

reaffirmed by the Preamble's incorporation of "the fundamental principles recognized by the laws of the Republic." Parliament, as it did prior to World War II, continues to define and to regulate liberties. For example, French law recognizes the right to a free press, but that law also provides for significant state involvement in the nation's communications media. France's inquisitorial system of criminal justice involves the government in insuring enjoyment of rights in ways that the United States would not find acceptable. The courts are independent, but their independence is guaranteed by the President. The courts are not supreme but are bound by law.[38]

The tradition of rights-through-law has strengths but also deficiencies, not least the form of constitutional review that it has generated. Although foreign to the American tradition, constitutional review as part of the legislative process, prior to the enactment of legislation and at the behest of political opposition in Parliament, is an interesting variation, but the unavailability of review at the initiative of individual citizens is surely a handicap. Of even greater concern is the fact that the *Conseil* cannot scrutinize and invalidate laws that have already been enacted; positive law is supreme law, and law that is already on the books, whether old or new, is invulnerable to constitutional scrutiny. Even if the *Conseil* succeeds in frustrating a bill that resembles or affects enacted legislation, the constitutional efficacy of existing legislation is not called into question.

Another potential threat to the tradition of constitutional rights in France is the emergency power granted to the President under the 1958 Constitution.[39] The scope of this power still remains to be determined. The President is authorized to take "the measures required by the circumstances," including presumably the suspension of rights. Given the nature of the *Conseil*'s power of review, that body would not be able to review the constitutionality of the President's action (though it might address that action in reviewing some responsive measures by Parliament). There are no signs that the emergency power in France might again be used, or might ever be abused, but its inclusion in the Constitution cannot be reassuring, in a world in which the governments of innumerable countries have used such powers to undermine or circumvent even the most elaborate systems for the protection of human rights. The United States has reason to take pride in the fact that its Constitution grants neither the legislative nor the executive branch an emergency power, that there is no power to suspend the Constitution or any constitutional rights, or the Congress, or the courts. The only right that may be suspended, according to the United States Constitution,

38. French Const. arts. 64, 65.
39. Id. art. 16.

is the privilege of the writ of *habeas corpus*, and only in carefully limited and defined circumstances, and only by act of Congress.

Rights in the United States and France: Rapprochement

The idea of rights is now alive and well in both the United States and France. Ideas common to the Declaration of Independence and the French Declaration of the Rights of Man are now reflected in the constitutional texts, the jurisprudence, and the politics of both nations. In both nations, the nature, scope, and content of rights have changed. The United States conception of rights is no longer strictly that of Locke and Jefferson: natural rights are now framed in and limited or shaped by the constitutional text. France no longer stands firmly with Rousseau: the general will now speaks through the Constitution even louder than through parliamentary majorities, and the common good represented by the general will now includes respect for individual rights as provided in the Constitution. In the United States, though the courts have given no effect to the Ninth Amendment and recognize only rights included in positive constitutional law, they have effectively read some inherent rights into the constitutional text, for example, when they invoke "substantive due process" to recognize and protect rights of autonomy and of privacy. For its part, the French *Conseil* might yet conclude that the constitutional Preamble incorporated not only the Declaration's specific provisions but also its underlying natural rights theory, or might find inherent rights in the "fundamental principles" of the laws of the Republic, and the "political, economic and social principles" "most vital in our time." Like France, the United States increasingly relies on *droits de créance*, rights established or guaranteed by civil rights laws and welfare legislation, federal and state.

The content of the rights recognized in the two countries is also similar in broad outline. In both countries, the right to liberty and the right to property are respected. Both countries are committed to equality before the law, but in principle only the equality cited by Anatole France;[40] neither country recognizes a constitutional obligation to eliminate, offset or compensate for inequalities between individuals or to equalize wealth or other advantages. Both countries now recognize and realize welfare rights: in France such rights are constitutional, while in the United States they are only legislative entitlements. Both countries have developed institutions to secure rights against encroachment, but in France there is as yet no security against legislation already enacted.

40. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. France, Le Lys Rouge, chap. 7 (1894).

Important differences between the two countries remain, the result of different constitutional texts, different histories, different cultures. The French Constitution reaffirms rights by incorporating an eighteenth century text, but the result may be significantly more modern. The French Declaration makes explicit rights which American courts inferred from or read into the Bill of Rights much later, for example, the presumption of innocence in criminal trials, the right to equal protection of the laws, voting rights. And since it was incorporated in a constitution in 1946, the text can perhaps be read as a contemporary text, interpreted in the light of the contemporary intent of the contemporary framers of the 1946 Constitution.

In the United States, the origins of rights as pre-constitutional continue to shape constitutional jurisprudence. Constitutional rights are still essentially negative rights, freedom from government. There is no constitutional obligation, surely no legally enforceable obligation, on any branch or level of government to act to protect individual rights or even to guarantee individual security. Affirmative rights, including the social welfare rights of the twentieth century, remain outside the scope of constitutional protection, are contingent upon the political process, on legislatures not on the courts. Therefore, they ebb and flow according to the prevailing political ideology, the varying political power of competing claimants, they depend on competition for resources, on willingness to tax and be taxed.

In the United States, however, rights are guaranteed not only by the national government but also by the governments of the various states. The states are subject to large Congressional control, and to judicial scrutiny, both in their own courts and in those of the United States. State constitutions, however, are more fluid and up-to-date than the United States Constitution. Throughout their histories, the states have struggled continually to distribute responsibility for rights between their constitutions and the political process, between their citizens (as by the use of the referendum) and the legislature, and between the legislature and the courts. All states have long had a commitment to a right to public education, and some have recently begun to recognize other social welfare entitlements as constitutional rights.

Because France has accorded constitutional status to affirmative economic and social rights as well as to negative political and civil rights, the range of constitutional rights recognized in France is now broader than that recognized in the United States. The French Parliament, more than the United States Congress, remains actively involved in defining and regulating rights. In France, more of the decisions regarding the proper balance between rights and public order are made by Parliament, few by the *Conseil*, none by the courts.

The stark differences between the American and French mechanisms for constitutional review reflect even more important differences in political and legal philosophy. The United States system of judicial review

makes the courts the supreme and ultimate arbiters of constitutional rights, subject only to constitutional requirements of "case or controversy" and the judges' own sense of institutional prudence. In fact, the political and constitutional culture of the United States has largely "internalized" the Constitution, and few acts of Congress are now invalidated. But the judicial guillotine stands waiting in the wings.

In France, by contrast, even the post-War constitutions have reflected the historic ambivalence toward constitutional rights and particularly toward their enforcement. The Declaration of Rights has come into its own, and with other "fundamental principles" serves as a guide to Parliament and the agencies of government, but its enforcement is subject to severe limitations. Rights are enforced against the bureaucracy by the *Conseil d'état*, but the enforcement of rights through constitutional review by the *Conseil constitutionnel* remains confined within the legislative process. The *Conseil* has no power to respond to individual complaint. It can do nothing to protect individuals against existing law.

The *Conseil*'s power of constitutional review is limited by the political process and by the political prudence of the members of that court. French constitutional review still remains to be tested, and its place in French constitutional culture may not yet be secure. Unlike the Supreme Court of the United States, the *Conseil*, it appears, has yet to acquire the national acceptance and reverence that would help it to withstand political buffeting. The place of the *Conseil* in the constitutional hierarchy and in constitutional philosophy is still to be worked out and fought out. In any event, as presently conceived, the *Conseil* will not be "supreme" as the United States Supreme Court is supreme.

A nation's attitude toward rights varies with its attitude toward democracy. Different histories gave the two countries different perceptions on rights, democracy, and the relation between them. France came into the post-War period without a living tradition of constitutional rights, but with a living tradition—rudely interrupted—of political rights and of rights-through-law. Rights were realized *through* democracy; freedom was by law, not from law. Rights were granted and protected by a democratic parliament, and even today Parliament continues to be the principal source and basis of rights in France. Law was not a limitation on freedom but the articulation and safeguard of freedom.

In the United States, rights came first, government later; rights came first, democracy came later. Democracy came through the idea of rights, and rights limited democracy: "Congress shall make no law." Those committed to liberty continued to view law as a potential threat, perhaps because suffrage was limited, the nation's lawmaking bodies, both federal and state, were not democratic, and because majorities could not be trusted to respect minorities. Even after the attainment of universal suffrage, Americans have continued to regard rights as a necessary limitation upon law.

Between the systems of constitutional rights in the two countries there are also differences in detail, differences based more upon tradition than philosophical principle. The United States is more "liberal," more tolerant of free speech and press. France, for example, is less allergic to "prior restraint." It has no *Sullivan*[41] principle to protect critics of government officials. (The United States is even more tolerant than France of sexually explicit material!) In some respects the United States is more strict in monitoring the relationship between church and state. For example, the United States, unlike France, generally prohibits financial support for religious schools.[42] On the other hand, the French do not open their national assembly with a prayer and do not require witnesses to take an oath on the Bible. France gives more play to "affirmative action" than the United States Supreme Court presently seems inclined to tolerate.[43] In the criminal process there are significant differences regarding the scope of the privilege against self-incrimination, of the right to counsel, and the use of unlawfully obtained evidence.

Several years ago I summed up the relationship between the two traditions as follows:

> France and the United States represent two strands in a single eighteenth century conception of rights. They have much in common, and some important differences. In both, individual rights are part of a comprehensive theory of government. It includes representative government, with separated branches. It includes as well inherent individual rights, as ends in themselves, not merely as instrumental to some overriding conception of the good society. Important rights cannot be wholly sacrificed even for the general, public good. Rights include liberty, equality, property, and substantial freedom of enterprise.
>
> In the United States rights are essentially freedoms—including freedom from the people's representatives in government, freedom even from the law if it is excessive. In respect of freedom, it is the individual against the society, in adversary relationship. One depoliticized public institution—the courts—has become sufficiently independent of the rest of the government to serve as the bulwark of the individual's rights. Other extra-governmental, antigovernmental institutions help safeguard rights—e.g., the press. Other individual benefits, including ec-

41. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964).

42. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971); Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947).

43. City of Richmond v. J.A. Crosin Co., 109 S. Ct. 706 (1989) (city's minority business utilization plan violated equal protection clause); see for example, Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).

onomic and social assistance, are not yet part of the conception of rights, perhaps because we still hear ancestral voices declaiming the limited purposes of government. The welfare system is underdeveloped—the product of the political process, and subject to its limits and budgetary restraints. There is tension between the aspiration to freedom, resisting governmental intervention, and the aspiration to security and welfare, inviting more government.

In France, freedom is primarily not freedom from law but freedom through law. Its deepest commitment is to rights protected and nurtured by Parliament. The law and the institutions it has established protect the individual against the executive. The law also nurtures individual rights and helps realize them in fact. And it includes, as affirmative obligations of government, as individual rights, the economic and social benefits of the welfare state. Any ambivalence about government intervention seems muted.

The single page of the French Declaration, Lord Acton wrote, proved stronger than the armies of Napoleon. In our day, too, the influence of the French Declaration has been strong: on the Universal Declaration of Human Rights, on international covenants, and on the constitutions of many states in Latin America, Africa, and Asia. French influence has included its conception of rights as protected by law, including, therefore, in principle, comprehensive legislative programs to promote and ensure civil and political rights. France has also helped bring into the world's constitutional idiom economic and social rights inspired by socialism. But, of course, France has not been an influence for subjecting the parliament and the law to effective constitutional restraints. That rights can be suspended by the President in emergency has found response; alas, in many countries (unlike France), it has not remained a hypothetical power. Even in France and her political progeny, however, the American conception of rights as superior law, protected also against the parliament by independent, nonpolitical, judicial institutions, has captured imaginations.[44]

Rights Ahead

Whether the French and American systems of constitutional rights continue to converge will, of course, depend upon the future development of constitutional rights within each system. The full implications of the

44. Henkin, Rights: Here and There, 81 Colum. L. Rev. 1582, 1596-97 (1981).

incorporation of the French Declaration remain to be explored, and what the Declaration will mean for the future of French constitutional jurisprudence may well turn upon the imagination and the activism of the *Conseil* and its growing strength within the French system of government. If France takes the Declaration seriously as an instrument of positive law, it may take France where the United States might not follow. For example, for the Declaration "[L]iberty consists of being able to do everything which does not harm others. The exercise of the natural rights of each individual has no limits other than those which guarantee the exercise of these same rights to the other members of society. . . ." "The law may only prohibit actions which are harmful to society."[45] These provisions may be read to exclude paternalism, to guarantee a right to die, to smoke, or to dispense with wearing safety helmets or seat belts. Again, the Declaration seems to reflect a strict notion of the proper purposes of punishment: the law may establish only punishments that "are strictly and evidently necessary."[46] The Declaration seems to require that just compensation be paid *in advance* of the taking of property for public use. Does the requirement in the Declaration that all citizens be taxed "according to their means" require a particular kind or degree of progressive taxation?[47]

At a time of joint celebration, it is not inappropriate to ask whether France and the United States might learn from each other. Historically, both France and the United States have been proud, independent, even "isolationist," each reluctant to follow or to admit that it is following or borrowing from others. Yet, as regards constitutional rights, each can learn from the other, and both could learn from contemporary international developments. It need not require formal constitutional amendment, only traditional techniques of constitutional adaptation and interpretation. If France can constitutionalize economic-social rights, the

---

45. French Declaration of the Rights of Man and of the Citizen, arts. 4, 5.

Jefferson also noted, "Laws provide against injury from others; but not from ourselves." 2 The Writings of Thomas Jefferson 100 (P. Ford ed. 1894). Compare The Constitution of 1791 Title I, art. 3. These seem to prefigure John Stuart Mill's later articulation of the "harm principle."

46. French Declaration, supra note 45, art. 8.

47. French Declaration, supra note 45, art. 17 (compensation for taking of property) and art. 13 (taxation according to means).

There is some evidence that the French Declaration was not completed and that some of the framers intended additional provisions. The 1791 Constitution, and the Declaration of 1793 adopted by the National Convention and placed at the front of the 1793 Constitution, contain also what may be the first articulations of economic and social rights. Title I of the 1791 Constitution "guarantees as natural and civil rights" "a general establishment of *public relief*" and "a *system of public instruction*" (art. 3) (emphasis in original). The 1793 Declaration declares as rights public assistance for the needy (art. 21) and education (art. 22).

United States can consider entrenching such rights, if only in state constitutions or by adhering to international agreements. The French system of constitutional review before a law is finally enacted offers a number of advantages; it could not be adopted by the United States without major adjustments in its constitutional jurisprudence, but the states might experiment with it, as some have authorized their courts to issue advisory opinions. France in effect grants members of Parliament "standing" to question the constitutionality of impending legislation; it may be time for the Supreme Court to regularize and refine the rules regarding the standing of members of Congress to challenge legislation or the actions of the other branches of government.[48] Following the French (and other) examples, the United States could take steps toward regularizing the obligation of the national and state governments to support, protect, and promote rights.

France could learn from the United States. It might look to United States jurisprudence on liberty, especially on freedom of expression. It might consider some of the elements of the United States adversarial system, for example, the right to counsel and the privilege against self-incrimination. The emergency power that the French President enjoys under the present Constitution cries for some constitutional limitation. The *Conseil* is not a complete answer to the need for constitutional review. Following the lead of the United States, France would do well to provide for review of laws that have already been enacted, if only by some agency that would advise Parliament on the compatibility of existing law with constitutional rights so as to promote repeal or modification.[49]

Two hundred years ago both nations undertook new initiatives in government. Both committed themselves to individual rights and to the consent of the governed. The United States maintained its commitment to rights, while progress towards democracy tarried. France, on the other hand, steadily developed democratic institutions and representative government; rights followed slowly and, in constitutional terms, recently. The United States has moved from rights to democracy, France has moved from democracy to rights. Today, the rights systems of the two countries have largely converged.

France, it appears, has now finally put its Revolution behind her. It is on a steady course of constitutional democracy, democracy subject to rights. With the latest movement to further integration in the European

48. See Goldwater v. Carter, 444 U.S. 996, 100 S. Ct. 533 (1979); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

49. The present President of the *Conseil*, M. Robert Badinter, has suggested giving a citizen the right to challenge the constitutionality of a statute. Interview, Le Monde, March 3, 1989, at 1.

Community,[50] emphasis on *La Nation* may now perhaps give way to attention to *L'Europe*, itself perhaps an offspring of the Revolution and a confirmation of its coming of age.

The United States has made no movements to any "more perfect union" with other countries and none seems to be obviously needed. But it too has yet to complete the lessons of cooperation. This year marks not only the two hundredth anniversary of the Bill of Rights and of the French Declaration but also the fortieth anniversary of the Universal Declaration which indeed helped make the idea of the rights of man virtually universal. The influence of the French Declaration and the United States Bill of Rights upon this development has been substantial, more substantial no doubt than the influence of the armies of Napoleon and of the United States. But if the idea of rights is to have even the measure of realization it has had in France and in the United States, both countries will have to lead to that end. Both have to continue to eliminate deficiencies in the example they set for others. Both have to assume leadership in the international human rights movement. The United States in particular must adhere to international human rights instruments, cooperate in strong peaceful measures against gross human rights violations, and dedicate itself to help others realize in the coming century the eighteenth century commitment to human dignity.

---

50. Single European Act, done at Luxembourg, Feb. 17, 1986, and at the Hague, Feb. 28, 1986, in force on July 1, 1987, O.J. L169, p. 29, E.C. Bull. Supp. 2186.