

Cambridge University Press

978-1-107-03836-3 - Human Rights in the Constitutional Law of the United States

Michael J. Perry

Excerpt

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INTRODUCTION: HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES

In the period since the end of the Second World War, there has emerged what never before existed: a truly global morality – specifically, a global *political* morality.¹ That morality, which I call “the morality of human rights,” consists both of a fundamental imperative, which serves as the normative ground of human rights, and of various human rights – of various rights, that is, recognized by the great majority of the countries of the world as human rights.

Some of the morality of human rights is entrenched – more precisely, some of the rights internationally recognized as human rights are entrenched – in the constitutional law of the United States. Because, as I explain in Chapter 2, a human right is, whatever else it is, a moral right, I refer to the set of internationally recognized human rights that are entrenched in the constitutional law of the United States as “the constitutional morality of the United States.”²

A basic understanding of the morality of human rights greatly enhances our understanding of the constitutional morality of the

¹ By a “political” morality, I mean a set of moral convictions and commitments about what laws to enact (or to maintain on the books), what policies to pursue, and the like.

² Just as only some of the rights internationally recognized as human rights are entrenched in the constitutional law of the United States, only some of the rights entrenched in the constitutional law of the United States are internationally recognized as human rights. Therefore, not every right entrenched in the constitutional law of the United States is part of the constitutional morality of the United States. Two examples: the Second Amendment right to bear arms and the Seventh Amendment right to trial by jury. Cf. Geoffrey R. Stone, “Arms and the Citizen,” *The Indian Express*, Dec. 19, 2012, <http://www.indianexpress.com/news/arms-and-the-citizen/1047197/0>: “[O]nly 1 per cent of all the other nations of the world recognize a constitutional right to keep and bear arms. The idea that individuals have a fundamental right to purchase and possess firearms has been resoundingly rejected by [the overwhelming majority of the world’s] nations. There are few, if any, questions about which the world’s nations are in such universal agreement.”

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United States. My aim in Part I of this book is to provide that basic understanding. I begin, in Chapter 1, by sketching the internationalization of human rights: the growing international recognition and protection, in the period since the end of the Second World War, of certain rights as human rights. Then, in Chapter 2, I explain what it means to say, in the context of the internationalization of human rights, that a right is a “human right.” Finally, in Chapter 3, I discuss the normative ground of human rights: the fundamental imperative, articulated in the very first article of the foundational human rights document of our time – the Universal Declaration of Human Rights (1948) – that governments “act towards all human beings in a spirit of brotherhood.”

With Part I behind us, we are ready to turn, in Part II, to the constitutional morality of the United States. The three international human rights with which I am concerned in this book – each of which, as I explain in due course, is entrenched in the constitutional law of the United States and is therefore part of the constitutional morality of the United States – are the right not to be subjected to “cruel and unusual” punishment, the right to moral equality, and the right to religious and moral freedom. (At the beginning of Part II, I identify the conditions whose satisfaction warrants our concluding that a right is entrenched in the constitutional law of the United States.) I elaborate each of those three rights in Part II, and I pursue three inquiries:

- Does punishing a criminal by killing him or her violate the right not to be subjected to “cruel and unusual” punishment?
- Does excluding same-sex couples from civil marriage violate the right to moral equality or the right to religious and moral freedom?
- Does criminalizing abortion violate the right to moral equality or the right to religious and moral freedom?

I also pursue, in Part II, a fourth inquiry: In exercising judicial review *of a certain sort* – judicial review to determine whether a law (or other public policy) claimed to violate a right that is part of the constitutional morality of the United States does in fact violate the right – should the Supreme Court of the United States inquire whether *in its own judgment* the law violates the right? Or, instead, should the Court proceed deferentially, inquiring only whether *the lawmakers’ judgment*

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that the law does *not* violate the right is a reasonable one? In short, how large or small a role should the Court play in protecting (enforcing) the constitutional morality of the United States?

I HAVE LONG BEEN ENGAGED BY, and have before written about, questions such as those I address in this book: questions about the implications of constitutionally entrenched human rights – and the question about the proper role of the Supreme Court in adjudicating such questions. (The title of my first book, published over thirty years ago, in 1982: *The Constitution, the Courts, and Human Rights*.) Indeed, I have before written about each of the three constitutional controversies at the heart of this book: capital punishment, same-sex marriage, and abortion. Because I am not satisfied with my earlier efforts, I revisit the controversies here.

ACKNOWLEDGEMENTS

I am grateful, for his counsel, to my editor at Cambridge University Press, John Berger, and, for their helpful comments, to the readers for the Cambridge University Press. For extensive written comments on the penultimate draft of this book, I am grateful to Daniel Conkle, Indiana University (Bloomington) College of Law. For helpful comments as I was preparing the final draft, I am grateful to Jason Mazzone, University of Illinois College of Law, and to Rafael Domingo Osle, University of Navarra (Spain) School of Law. For discussion of issues concerning capital punishment as I was drafting Chapter 4, I am grateful both to Cathleen Kaveny, University of Notre Dame School of Law and Department of Theology, and to John Stinneford, University of Florida College of Law. For discussion of issues concerning abortion as I was drafting Chapter 9, I am grateful to Gerry Whyte, Trinity College (Dublin) Faculty of Law. Finally, I am indebted to my students – both my students at Emory Law and my students at University of San Diego School of Law, where I taught for three consecutive fall semesters during the time I was drafting this book. My students are, for me, indispensable conversation partners.

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I was privileged to discuss the material in Chapter 7, on the right to religious and moral freedom, and in Chapter 8, on same-sex marriage, in several venues. I am grateful, for their helpful comments, to the discussants in each of those venues: in March 2011, a one-week intrasession course at University of Dayton School of Law, co-taught with Richard Saphire; in May 2011, a symposium at Bar Ilan University, Tel Aviv, Israel, on Religious Law and State's Affairs; in September 2011, two faculty workshops at Washington University in St. Louis, one at the School of Law, the other at the John C. Danforth Center on Religion and Politics; in October 2011, a conference at Yale Divinity School on Same-Sex Marriage and the Catholic Church: Voices from Law, Religion, and the Pews; in November 2011, a faculty workshop at Pepperdine University School of Law; in March 2012, the Overton and Lavona Currie Lecture in Law and Religion at Emory University School of Law; in September 2012, a conference at the Fondazione Studium Generale Marcianum, Venice, Italy, hosted by the Alta Scuola Società Economia Teologia, on Political Representation in a Plural Society: People, Religion and Parties between East and West; in November 2012, the Stanford Interdisciplinary Conference on Conscience at Stanford University; and in February 2013, a lecture in the 2012–13 Lecture Series sponsored by the Buechner Institute, King College, Bristol, Tennessee.

An earlier version of Chapter 3, on the normative ground of human rights, appeared both in Charles Taliaferro, Victoria S. Harrison, and Stewart Goetz, eds., *The Routledge Companion to Theism* (2013) and in Mark Goodale, ed., *Human Rights at the Crossroads* (2013). An earlier version of material in Chapters 7 and 8, on the right to religious and moral freedom (Chapter 7) and the implications of the right for the controversy over same-sex marriage (Chapter 8), appeared in *Journal of State and Religion* (2012); a somewhat later version of the material appeared in J. Patrick Hornbeck II and Michael Norko, eds., *More Than a Monologue: Sexual Diversity and the Catholic Church, Volume 2: Inquiry, Thought, and Expression* (2013).

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Part I **THE MORALITY OF HUMAN
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THE INTERNATIONALIZATION OF HUMAN RIGHTS

A basic understanding of the morality of human rights, as I said in the Introduction, greatly enhances our understanding of the constitutional morality of the United States. My aim in Part I is to provide that basic understanding. I begin, in this chapter, by sketching the internationalization of human rights: the growing international recognition and protection, in the period since the end of the Second World War, of certain rights as human rights. In the next chapter, I explain what it means, in the context of the internationalization of human rights, to say that a right is a “human right.”

THE NAME OF MY STATE OF ORIGIN – Kentucky – has been said to derive from a Native American word meaning “a dark and bloody ground.” An apt name for my century of origin is a dark and bloody time – indeed, *the* dark and bloody time: the twentieth century “‘was the bloodiest in human existence,’ . . . not only because of the total number of deaths attributed to wars – 109 million – but because of the fraction of the population killed by conflicts, more than 10 times more than during the 16th century.”¹

The list of twentieth-century horrors includes much more than wars, however. As the century began, King Leopold II of Belgium was presiding over a holocaust in the Congo; it is estimated that between 1880 and 1920, because of a system of slave labor, the population of the Congo “dropped by approximately ten million people.”² From

¹ Kim A. McDonald, “Anthropologists Debate Whether War Is Inevitable among Humans,” *Chronicle of Higher Education*, Nov. 22, 1999 (quoting Carolyn R. Nordstrom, professor of anthropology at the University of Notre Dame).

² Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* 233 (1998). The causes – all of them related to the system of slave labor – were

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1915 to 1923, the Ottoman Turks, who were Muslim, committed genocide against the Armenian minority, who were Christian.³ Not counting deaths inflicted in battle, the Soviet Union's Joseph Stalin was responsible for the deaths of over forty-two million people (1929–53); China's Mao Zedong, over thirty-seven million (1923–76); and Germany's Adolph Hitler, over twenty million (1933–45), including over ten million Slavs and about five and a half million Jews.⁴

One need only mention these places to recall some more recent atrocities: Cambodia (1975–9), Bosnia (1992–5), Rwanda (1994), and, in the early years of the twenty-first century, the Darfur region of Sudan.⁵

several: murder, starvation, exhaustion, exposure, disease, and a plummeting birth rate. See 225–34. As Hochschild observes, this was “a death toll of Holocaust dimensions,” 4. The holocaust in the Congo was not an isolated event. See, e.g., Giles Foden, “Rehearsal for Genocide,” *New York Times Book Review*, Apr. 20, 2003; Ross A. Slotten, “AIDS in Namibia,” 41 *Social Science Medicine* 277 (1995): “In 1884, Namibia formally became a German colony and was known as German South West Africa. During the time of annexation, the Herero and Nama peoples were the largest tribes, inhabiting the most desirable land, which the Germans gradually expropriated between 1893 and 1903. This expropriation led to many battles, culminating in the intentional genocide of 60% of the population. To this day, the Hereros and Namas have not recovered their original numerical strength.”

³ See Israel W. Charney, ed., *Encyclopedia of Genocide* 61–105 (1999). See also Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (2003).

⁴ See Charney, *Encyclopedia of Genocide*, 29 (Table 5) and 439: “[The Nazi] genocides likely cost the lives of about 16,300,000 people: nearly 5,300,000 Jews, 260,000 Gypsies, 10,500,000 Slavs, and 220,000 homosexuals, as well as another 10,000 handicapped Germans.” See also Ian Kershaw, “Afterthought: Some Reflections on Genocide, Religion, and Modernity,” in Omer Bartov and Phyllis Mack, eds., *In God's Name: Genocide and Religion in the Twentieth Century* 377 (2001): “The Nazi genocide against the Jews – the Holocaust, as it now called – is estimated to have resulted in the murder of about five and a half million Jews in Nazi-occupied Europe, around half the number targeted in the notorious Wannsee Conference of January 1942.”

In *Bloodlands: Europe between Hitler and Stalin* (2010), historian Timothy Snyder writes: “Today there is widespread agreement that the mass killing of the twentieth century is of the greatest moral significance for the twenty-first. How striking, then, that there is no history of the bloodlands” (xix). Thanks to Snyder's extensive, searing account, we now have that history. For an informative review of Snyder's book, see Anne Applebaum, “The Worst of the Madness,” *New York Review of Books*, Nov. 11, 2010.

⁵ For a narrative of the failures of the United States to respond to genocides, see Samantha Power, *A Problem from Hell: America and the Age of Genocide* (2002).

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Sadly, there is so much more.⁶ For an exhaustive and exhausting account of the grim – indeed, horrific – details, one can consult the two-volume *Encyclopedia of Genocide*, which reports:

In total, during the first eighty-eight years of [the twentieth] century, almost 170 million men, women, and children were shot, beaten, tortured, knifed, burned, starved, frozen, crushed, or worked to death; buried alive, drowned, hanged, bombed, or killed in any other of the myriad other ways governments have inflicted deaths on unarmed, helpless citizens and foreigners. Depending on whether one used high or more conservative estimates, the dead could conceivably be more than 360 million people. It is as though our species has been devastated by a modern Black Plague.⁷

The twentieth century was not only a dark and bloody time, however. Beginning in the middle of the twentieth century, a growing number of countries around the world responded to the savage horrors of the twentieth century by recognizing certain rights as human rights and enshrining them in constitutions and/or treaties, thereby rendering the moral landscape of the twentieth century a touch less bleak.⁸

The first major event in the internationalization of human rights took place on June 26, 1945, shortly before the end of the Second

⁶ See, e.g., Mark Danner, *The Massacre at El Mozote: A Parable of the Cold War* (1994); Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (1997); Philip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* viii (2002): “Through 1944, when lynchings first began to decline strongly, [the Tuskegee Institute] recorded 3,417 lynchings of blacks . . . Not until 1952 did a year pass without a single recorded lynching.” See generally Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (1999).

⁷ Charney, *Encyclopedia of Genocide*, 28. On genocide in particular, see Roger W. Smith, “American Self-Interest and the Response to Genocide,” *Chronicle of Higher Education*, July 30, 2004: “[G]enocide – intentional acts to eliminate in whole, or in substantial part, a specific human population – has claimed the lives of some 60 million people in the 20th century, 16 million of them since 1945, when the watchword was ‘Never again.’ Genocide has, in fact, been so frequent, the number of victims so extensive, and serious attempts to prevent it so few, that many scholars have described the 20th century as ‘the age of genocide.’” See generally Daniel Jonah Goldhagen, *Worse than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (2009).

⁸ For a brief account of the “historical antecedents” of international human rights, see Thomas Buergenthal, Dinah Shelton, and David P. Stewart, *International Human Rights* 1–28 (4th ed. 2009).

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World War:⁹ the signing of the Charter of the United Nations, which entered into force four months later, on October 24. These are the salient Charter provisions for present purposes:

- The Preamble: “We the peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”
- Article 1(3): “The purposes of the United Nations are . . . to achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”
- Article 13(1): “The General Assembly shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”
- Article 55(3): “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”
- Article 56: All Members pledge themselves to take joint and separate action in cooperation with the [United Nations] for achievement of the purposes set forth in Article 55.
- Article 62(2): “[The Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”
- Article 68: “The Economic and Social Council shall set up commissions . . . for the promotion of human rights.”

⁹ Although the European phase of the Second World War ended in May 1945, the Pacific phase continued into the summer. In August 1945, the United States inaugurated nuclear warfare by dropping two atomic bombs on Japan: the first (“Little Boy”) on Hiroshima, on August 6; the second (“Fat Man”) on Nagasaki, on August 9.