On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts

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ON HUMAN RIGHTS: THE USE OF HUMAN RIGHT PRECEPTS IN U.S. HISTORY AND THE RIGHT TO AN EFFECTIVE REMEDY IN DOMESTIC COURTS

Jordan J. Paust*

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I. INTRODUCTION

Early in the history of the United States, human rights, then often termed the "rights of man," were understood to be those natural, unalienable rights of all persons that no government on earth could deny — rights that are a part of law, whether written or unwritten, and that free and democratic governments are formed to further and to protect. As Alexander Hamilton recognized in 1775, "the sacred rights of mankind ... are written, as with a sunbeam, in the whole volume of human nature ... and can never be erased or obscured by

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Special thanks is owed to the following former research assistants for their many contributions in researching and verifying the citations in this article: Margaret Harris, J.D. 1981; Sharon Heldt, J.D. 1982; Debra Altizer, J.D. 1984; Nora Hernandez, J.D. 1985; Nelda Harris, J.D. 1985; Cheryl Hanks Love, J.D. 1987; Deborah Snowhill Williams, J.D. 1988.

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Yet, as Hamilton must have known, some of mortal stature would try.

In what may have been the most recent effort to ignore the pervasive expectation of early Americans among others that human rights are indeed the right of each human being, a circuit court judge has stated, incorrectly:

It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. . . . Clearly, cases [involving human rights] . . . were beyond the framers' contemplation.2

One of the purposes of this article is to dispel any such illusion by documenting the actual use of human right precepts in U.S. history, including use in the volumes of judicial opinion. As Hamilton seemed early to affirm, some may choose to ignore actual trends in the use of human rights and to hide them, but they cannot erase human history even at the hand of a federal judge.

The first section of this article documents the actual use of human right precepts and is organized into two subsections: (a) general use in U.S. history (1728-1948), and (b) use by the judiciary as constitutional rights and standards. In the first subsection, an effort is made to document relevant human right expressions of the Founders of our Republic and of others throughout our history until the adoption in 1948 of the Universal Declaration of Human Rights.3 The Declaration has become the primary instrument at the international level providing a

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2. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 469 U.S. 811 (1985). The phrase "international human rights" would have been somewhat strange in 1789 for a reason that Judge Bork may not have appreciated. First, human rights were not merely "international" or "domestic," but both at once; see also infra note 178; pts. II.B and III herein. As noted above, they were expected to be natural, unalienable rights of all humankind and rights that are a part of law (whether written or unwritten). And for the Founders, what we term international law was directly incorporable (whether customary or treaty-based) for both public and private rights and duties (to be civilly or criminally sanctioned). See infra text accompanying notes 501-504. Today, most would consider these to be customary and/or treaty-based, and thus human rights under or protected by international law (not merely, if even, "natural" rights, but "unalienable" nonetheless). Even today, the phrase "international human rights" is somewhat awkward. Human rights is the preferable phrase. They are not rights merely at an "international" level, but, with the expectations of the Founders, rights of all and at all levels or in all contexts and against all governments. Second, one of the "international" bases for such rights was reflected in phrases such as the "law of nations." See infra notes 11, 13, 19, 21, 32, 107, 154, 166-167, 188, 291; see also infra text accompanying notes 204, 208, 215, 227, 231, 251, 291, 498-499. The phrase "international law" has been known to appear only since the early 19th century. See infra notes 233, 533; The Aurora, 2 F. Cas. 227, 228 (D.C.D.R.I. 1813) (No. 660) (first known federal case to use phrase "international law," also used "law of nations"). It was also not as common in the 19th century.

general specification of what, for past generations, had been natural, self-evident, and imprescriptible. As the subsection demonstrates, there is a rich history of the use of human right precepts in the United States. Concern for human rights has been prominent at critical stages in the growth of our nation and has been associated with most major politico-legal developments in our history. By 1789, that history was replete with references to human right precepts; and later trends in use of these precepts were fairly steady, at least through the early twentieth century.

The second subsection, on use by the judiciary, attempts to provide the fullest exposition to date of the actual trends in use of human right precepts by our courts. Although much has been written recently concerning the litigation of human rights, almost no attention has been paid in the literature to actual uses of "human right" and equivalent phrases by U.S. courts, trends in use, and categories of use. Computer-assisted research has made it possible to identify recent trends and to explore actual patterns of relevant judicial decisionmaking in much of the twentieth century. More tedious methods of research and more recent computer data banks have also made it possible to produce a similar documentation of judicial use of human right precepts in the eighteenth and nineteenth centuries. Interesting historic uses have emerged and are integrated in this section for as thorough a disclosure as is presently possible.

Although quite significant, the fact that justices from the United States Supreme Court have used the concept at least since the 1790s and that the phrase "human right(s)" appears in seventy-five Supreme Court decisions up to 1989 (with sixty-nine of these appearing in the last fifty years) has previously escaped the attention even of human rights litigants. Although litigants often focus on only a few lower federal court opinions, the use of human right precepts at such levels of federal decision-making can be identified in more than one thousand cases. Further, although most recent uses of human right precepts occur in decisions addressing constitutional normative content, a surprising number of constitutional law scholars, and not too few judges, seem to be needlessly unaware of the use of human rights by Supreme Court justices and by lower courts as constitutional standards. This second subsection provides the needed information, and it is organized further into two subsections: (1) general trends in use, and (2) trends toward more explicit content. The first part provides a general focus on actual patterns of use of human rights and equivalent phrases, including an identification of the Supreme Court justices who have utilized human rights in their opinions. The second part investi-
gates the details of actual use, including specific judicial language associated with human right norms and the constitutional rights or principles aligned with human rights in Supreme Court opinions.

As the trends demonstrate, an increasingly vital and vibrant relationship between human rights and constitutional rights and principles has existed and grown since the time of the Founders. Although a primary purpose of the article is to achieve greater understanding of that relationship and of the actual trends in use, it is also important to identify potential applications of human right precepts and some of the hurdles recently posed to a more thorough use of human rights in domestic litigation. Potential uses are mentioned in the section on past trends in judicial decision, but they are considered also in the third section of the article, a section exploring the right to an effective remedy for human right deprivations, recent attempts by lower court judges to deny or interfere with that right, and related concerns about the incorporation of human rights into domestic legal processes. Through better understanding of the prior use of human right precepts in our history and by opposing attempts to erase or obscure that history, we might further guarantee the rights of all who come within the jurisdiction of our courts.

II. THE ACTUAL USE OF HUMAN RIGHT PRECEPTS

A. General Use in U.S. History (1728-1948)

From the dawn of our Republic and throughout our constitutional history there have been numerous references to the “rights of man,” “rights of mankind,” and “human rights.” These and similar phrases were used interchangeably by the Founders and early justices to express a pervasive expectation among early Americans that human rights are indeed the right of each human being. Moreover, as evidenced also in other writings, the denial of human rights led to the condemnation of British rule, the American Revolution and the creation of the original amendments to the United States Constitution.

Among the initial uses of such phrases were those of one Daniel Dulaney, Attorney General of Maryland, and John Barnard, a minister from Massachusetts. Both had referred to the “Rights of Mankind,” Dulaney in a pamphlet published in 1728 and Barnard in a


5. D. DULANEY, THE RIGHT OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF
sermon in 1734 — the latter recognizing: "the natural Rights of Man-
kind, which it is the End of all Government to preserve. . . ."6 One
year later, Benjamin Franklin defended the right of his minister to
refuse to supply copies of allegedly heretical sermons to his accusers,
Franklin noting that for one to consider the minister’s refusal to be an
admission of guilt would be “contrary to the common rights of man-
kind, no man being obliged to furnish matter of accusation against
himself.”7 No doubt they, as many early Americans,8 had been influ-
enced by the English philosopher John Locke who had himself ex-
pressed an earlier concern for “the natural Rights of Man.”9 Also of
influence among the colonists was the argument of William Molyneux
at the end of the 1600s that the Irish should be “governed only
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doubted influence among the American colonists. Perhaps of influence, as well, were the English judicial opinions of this era and just before the American Revolution which referred expressly to the "rights of mankind." References to the rights of man became more frequent in the 1750s, marking the beginning of a pre-revolutionary era in which the belief in human rights gained a fervent acceptance. By 1756, the Connecticut Gazette had referred to the "natural Rights of Mankind," a phrase that appeared again in 1764 in the New-York Gazette and may well have appeared in other papers in that period and before. Also in 1764, Richard Bland wrote of "the Rights and Liberties of Mankind." In 1763, John Adams, then a young attorney, had recognized the value of English common law in promoting "the unalienable, indefeasible rights of mankind." In 1764, Richard Bland wrote of "the Rights and Liberties of Mankind." In 1763, John Adams, then a young attorney, had recognized the value of English common law in promoting "the unalienable, indefeasible rights of mankind." and soon thereafter even Blackstone, in the first volume of his Commentaries on the Laws of England would refer expressly to "the rights of mankind" and to "absolute rights of man." English traditions and the belief in natural rights also led

harm done"). At nearly the same time, Chief Justice Coke had recognized that pirates are "hostis humani generis." See King v. Marsh, 3 Bulstr. 27, 81 Eng. Rep. 23 (1615). The writer Gentili had also recognized that pirates violate "the law of nations." See A. Gentili, De Jure Belli Libri Tres (1612) (J. C. Rolfe trans. 1933).


15. New-York Gazette, Oct. 18, 1764, quoted in C. Rossiter, supra note 14, at 142, 493 n.130. One of the primary purposes of government, the Gazette declared, involves "the preservation of the natural Rights of Mankind." Id.

16. See also Maryland Gazette, July 15, 1727; id. at May 26, 1730, cited in C. Rossiter, supra note 14, at 493 n.130.


18. J. Adams, LIFE AND WORKS 440 (1851), quoted in Corwin, supra note 9, at 169.

19. 1 W. Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 125, 129 (1765). Although nearly 2,500 copies of his work had been sold in America before the Revolution, Blackstone was not to be followed in all respects. His writings were denounced in particular by Thomas Jefferson. See, e.g., Corwin, supra note 9, at 405; N. Schachner, supra note 8, at 36; Chafee, Freedom on Speech in Wartime, in 2 AALS, SELECTED ESSAYS ON CONSTITUTIONAL
James Otis, in his pamphlet *The Rights of the British Colonies Asserted and Proved*, to recognize in 1764 that "there are natural, inherent, and inseparable rights as men," rights that Otis based in part also on the law of nations. Both in 1764 and 1765, Samuel Adams wrote that rights such as the right to self-government, trial by jury, and self-taxation were "founded in the common Rights of Mankind." And what John Adams termed "our Rights as Men, and our Priviledges [sic] as Englishmen" formed the basis for his argument in 1765 that the British Stamp Act was "utterly void, and of no binding Force upon us." Later that same year, the assemblies of Pennsylvania and Massachusetts would confirm Adams' expectation and set the stage for defiance of British rule. John Dickinson prepared the first draft of a Pennsylvania resolution which declared in September of 1765 that "the Constitution of Government in this Province is founded on the natural Rights of Mankind, and the noble Principles of English Liberty." Samuel Adams helped to prepare the Massachusetts resolution of October, 1765, which noted: "there are certain essential rights which are founded in the law of God and nature, and are the common rights of mankind." The Massachusetts resolution also confirmed:

That the inhabitants of this province are unalienably entitled to those essential rights, in common with all men; and that no law of society can, consistent with the law of God and nature, divest them of those rights.

In 1766, Richard Bland's publication, *An Inquiry into the Rights of the British Colonies*, reconfirmed the expectation that the "Rights of Mankind . . . flow from" the law of nature, a law which, he and many
of his contemporaries thought, is certainly "not contrary to the common Understandings of Mankind." Similarly, in 1768, William Hicks wrote of "the natural rights of mankind" possessed by the colonists. As early as 1767, slavery was questioned as a violation of "the birthright of all mankind, Africans as well as Europeans." The drafting skills of Samuel Adams were prominent once again in the 1772 Declarations of Rights as Men prepared on behalf of the citizens of Boston, rights to which persons were entitled "by the eternal and

28. R. Bland, An Inquiry into the Rights of the British Colonies 11, 14 (1766), quoted in B. Wright, supra note 1, at 80. For early judicial acceptance of the criterion of common expectation, see, e.g., Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 707 (1819) (Story, J., concurring) ("common sense of mankind"); Terrett v. Taylor, 13 U.S. (3 Cranch) 43, 50 (1815) (Story, J.) (the "common sense of mankind"); Ervin's Appeal, 16 Pa. 256, 263 (1851) (Coulter, J.) ("the common sense of the people"); Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 315 (Mass. 1825) (principle "founded in common sense and common justice"); Bowman v. Middleton, 1 S.C.L. (1 Bay 252, 254) 101, 102 (S.C. 1792) ("against common right"); Ham v. McClaws, 1 S.C.L. (1 Bay 93, 98) 38, 40 (S.C. 1789) ("plain and obvious principles of common right and common reason" will void an inconsistent statute); see also Bank of Columbia v. Okey, 17 U.S. (4 Wheat.) 235, 244 (1819) ("the good sense of mankind"); Hursh v. North, 40 Pa. 241, 243 (1861) ("custom. . .is law by the usage and consent of the people"); J. Kent, 2 Commentaries on American Law 5 (absolute, natural rights "are clearly understood and settled by the common reason of mankind"); 10 ("the judgment and the practice of mankind") (1827). Early in English history it was held that a parliamentary act that was against "common right and reason" was void. See C. Mullett, supra note 5, at 37, quoting the trial of the Despensers, 1 State Trials 33 (Howell, ed.); see also C. Mullett, supra, note 5 at 39 n.20, 45 (Dr. Bonham's Case, 8 Repts. 107, 118 [1610]. C. J. Coke: "when an act of Parliament is against common right and reason . . . the common law will control it and adjudge such act to be void"). 49 n.48 (John Davys, Reports (1628), common law is "the Common custome of the realme . . . ius commune"). Coke's words were also used by the colonists. See Gay, supra note 8, at 846; C. Mullett, supra note 5 at 106; E. Corwin, The Constitution and What It Means Today 141 (1963); B. Knollenberg, Origin of the American Revolution: 1759-1766, at 163-64 (1960) (James Otis of Boston); see also id. at 164 ("in February, 1766, the County Court of Northampton County, Virginia, Justice Littleton Eyre presiding, unanimously advised the officers of the court to proceed without regard to the Stamp Act in as much as they conceive the said Act to be unconstitutional."); 1 Mays, Edmund Pendleton (1721-1803): A Biography 172 (1952) (same decision by the Louisa County Court in 1766). After the American Revolution, Coke's famous recognition fell into disfavor in England as it gained new acceptance in America. See, e.g., B. Knollenberg, supra, at 163, 350 nn. 25-26.

International law was also thought to have a similar base in human expectation. See, e.g., The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) (Strong, J.) ("common consent of mankind," "common consent of civilized communities"); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) ("The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world"); The Antelope, 23 U.S. (10 Wheat.) 66, 115, 119, 121 (1825); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) ("established by the general consent of mankind"). See also 4 W. Blackstone, Commentaries on the Law of England 66 (1765): "The law of nations is . . . established by universal consent among the civilized inhabitants of the world;" H. Grotius, supra note 11, at preface, § 40; ch. 1, § 14 (law of nations based on "some general consensus of opinion" and "derives its forceful authority from the will of all, or at least of many nations").


31. See L. Whipple, Our Ancient Liberties 34, 37 (1972) (Dec. of Nov. 20, 1772).
immutable laws of God and nature, as well as by the laws of Na-
tions." And the 1774 resolutions adopted by the freeholders of Al-
bermarle County, Virginia, no doubt mirrored the influence of
Thomas Jefferson.33

In a resolution of July 26, the Virginians from Albermarle County
declared that only their own duly constituted and appointed legisla-
ture could govern them and that they held rights such as this (i.e., to
self-government) "as the common rights of mankind."34 Only eight
days earlier, the freeholders of Fairfax County, Virginia, had similarly
affirmed the right to self-government, adding in a resolution of July 18,
1774, that its denial by the British "is totally incompatible with the
privileges of a free people and the natural rights of mankind."35 In
1774, Governor Wright of Massachusetts affirmed such rights as being
the "indelible rights of mankind."36 That same year Granville Clark
of Pennsylvania also wrote of the natural rights of man in his work
The Declaration of the People's Natural Right.37 Similarly, John Dick-
inson of Pennsylvania, in his Essay on the Constitutional Power of
Great Britain over the Colonies, wrote of the right of local legislation
"founded [in part] on the immutable and unalienable rights of human
nature."38

1774 was also the year that the loyalist Thomas Chandler, in his
Friendly Address to All Reasonable Americans, wrote of the need to
conform to the British will, arguing that an Apostle, "who had a due
regard for the rights and liberties of mankind," had ordered submis-
sion to the Emperor Nero.39 Such twists of meaning found favor with
other loyalists. It led, for example, to Peter Van Schaack's open de-
fnance of the state of New York in 1777 and of the movement for inde-
pendence, a defiance which he justified in part on "the sentiments of
Mr. Locke and those other advocates for the rights of mankind."40

It was another from New York, however, whose writing reflected a
more common understanding of the "essential," "natural," and "sa-

32. See C. MULLETT, supra note 5, at 99.
34. See id.
35. See id. at 159.
36. See C. MULLETT, supra note 5, at 110.
37. See C. ANTIEAU, supra note 33, at 158.
38. See C. MULLETT, supra note 5, at 143.
39. See B. BAILYN, supra note 8, at 313.
40. See id. at 29. In that same year, 1777, in England, Richard Price published the third
dition of his work ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIB-
ERTY (3d ed. 1777), which referred to the "rights of mankind." See id. at 11-14, 17.
Alexander Hamilton stated in 1775 that he was "convinced that the whole human race is entitled to" such rights, adding:

the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.

On the eve of the Revolution, in April of 1776, John Adams reflected similar sentiments when he wrote of the need to "study the law of nature," the histories of other people, and "the conduct of our own British ancestors, who have defended for us the inherent rights of mankind against foreign and domestic tyrants and usurpers."

By this time, the Declaration of the Causes and Necessity of Taking Up Arms had already been proclaimed by "Representatives of the United Colonies of North America" meeting in Philadelphia. Thomas Paine's classic revolutionary pamphlet, Common Sense, which referred expressly to "natural rights of all Mankind" and to "the Rights of Mankind," had been published and widely read.

And the more famous Declaration of Independence would soon be penned with a fervent reference to the rights of man that would be revered for ages to come: "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."

Here, of course, is our early history and that of a revolution based on human rights. What would follow was a Union based upon a federal constitution and what President John Quincy Adams would refer to as "the great result of this experiment upon the theory of human

41. See A. HAMILTON, supra note 1; see also B. BAILYN, supra note 8, at 188.
42. See A. HAMILTON supra note 1. On the jurisprudential orientation expressed by Hamilton, see also Paust, Human Rights, supra note 4, at 256-57, n.93, passim.
43. Adams, To the Inhabitants of the City and County of New York, Apr. 13, 1776 (pseudonym "Sentinel"), quoted in G. WOOD, supra note 8, at 6.
44. Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, reprinted in SOURCES OF OUR LIBERTIES 295-99 (R. Perry & J. Cooper eds. 1972). The Continental Congress had also proclaimed in the Declaration of Rights of 1774 that the British government was exercising "unconstitutional powers" and had violated "indubitable rights and liberties" of the Americans "which can not be legally taken from them, altered or abridged by any power whatever, without their own consent. . . ." Declaration of Rights, Oct. 14, 1774, reprinted in R. Perry & J. Cooper, supra, at 286, 288.
46. See R. Perry & J. Cooper, supra note 44, at 315 (Common Sense published on Jan. 8, 1776).
47. The Declaration of Independence (U.S. 1776).
rights." But in May of 1776, Congress had called merely for each of the colonies to form separate governments, and this occurred soon thereafter. By June of 1776, some three weeks before the Declaration of Independence, the new Constitution of Virginia proclaimed: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity."

In October of 1776, the new Constitution of Georgia was framed and its preamble related expressly to British acts of oppression as being "repugnant to the common rights of mankind." Later, the constitutions of thirty-one states would refer to such inalienable rights, and twenty-seven state constitutions would contain a provision like the ninth amendment to the U.S. Constitution, proclaiming that the enumeration of certain rights shall not be construed to impair or deny the existence of others retained by the people. Of these, and from the years 1790 to 1836, eight constitutions or declarations would also mention expressly "the invaluable rights of man." In order of first appearance, these were the constitutions or declarations of: Pennsylvania, Kentucky, Tennessee, Louisiana, Indiana, Illinois, Missouri, and Arkansas. In August of 1776, the Continental Con-
gress also cited "the rights of human nature" during a call to foreign officers to join those serving the Revolution.62

During the year 1778, Theophilus Parsons, later Chief Justice of Massachusetts, wrote of "the natural rights of mankind."63 By 1783, the preamble to a Massachusetts statute referred similarly to "the natural rights of all men" to their literary productions.64 It was also in Massachusetts, in 1783, that what might have been the first judicial use of the phrase "natural rights of mankind" appeared. In Commonwealth v. Jennison,65 the Supreme Court charged a jury considering a criminal prosecution for the enslavement of a black person that perpetual servitude could no longer be tolerated, the court noting that "[s]entiments more favorable to the natural rights of mankind ... have prevailed since the glorious struggle for our rights began."66 As the Massachusetts court further confirmed:

these sentiments led the framers of our Constitution ... to declare — that all men are born free and equal; and that every subject is entitled to liberty, and to have it guarded by the laws. ... In short, without resorting to implication in construing the Constitution, slavery is as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.67

Coincidentally, the "glorious struggle" against Britain ended that same year with the signing of the Treaty of Paris; and it was the British plenipotentiary who had signed that treaty, David Hartley, who wrote to Benjamin Franklin (in an effort to gain a new alliance with the United States) that "Great Britain & America are as yet the only true supports throughout the world of the principles of liberty & of the rights of mankind."68 As yet, the French Revolution and the French


63. See B. Wright, supra note 1, at 112.


66. Id.

67. Id. On the relation of human right precepts to the slavery question, see also supra text accompanying note 30, and infra notes 80, 103, 137-147, 149, 159-162.

68. See Oberg, One Man Who Saw Far Beyond a Revolution, N.Y. Times, Sept. 14, 1983, at 22, col. 5 (letter). Earlier, another Englishman, Gentleman Johnny Burgoyne, had written to Charles Lee (then an American Major General): "I am no stranger to the doctrines of Mr. Locke and other of the best advocates for the rights of mankind. ..." Letter of July 9, 1775, quoted in C. Rossiter, supra note 14, at 353. The letter was reprinted in several American newspapers in 1775. See id. at 525 n.119.
Declaration des droits de l'homme were some six years away.

In the next two years, Thomas Jefferson would draft the slightly less famous Virginia Statute of Religious Liberty, which expressly declared "that the rights hereby asserted are of the natural rights of mankind," and James Madison would write of "the right of every man to exercise" the "unalienable right" of religion. It was Jefferson, as well as Franklin, who would come to know several prominent advocates of the rights of man in France, including Lafayette, Rochefoucauld, Condorcet, and others; and it was Jefferson who would aid in the intellectual efforts culminating in the French Declaration of 1789. Later, in contrast to the sentiments expressed by the British plenipotentiary, Jefferson would note: "The appeal to the rights of man, which had been made in the United States, was taken


71. On Condorcet's views concerning the rights of man, see B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 722 (1945); Kent, supra note 69, at 168; C. BECKER, THE DECLARATION OF INDEPENDENCE 229-33 (1960). Condorcet once remarked: "The first Declaration of Rights that is entitled to be called such is that of Virginia" and its author, George Mason, "is entitled to the eternal gratitude of mankind." Quoted in Miller, Comments, THE GEORGE MASON LECTURES (1976).

72. See N. SCHACHNER, supra note 8, at 312, passim; see also C. BECKER, supra note 71, at 231-33; Howard, in THE GEORGE MASON LECTURES, supra note 71, at 18.

73. See id.; D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 222-23 (1951). The French Declaration stated: "The aim of all political association is the protection of the natural and imprescriptible rights of man's liberty, property, security, and resistance to oppression," quoted in Murphy, supra note 69, at 753 n.242. The French Declaration was adopted in 1789 by the French National Assembly and was prefixed to the French Constitution of 1791. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 88 (2d ed. 1968). Thomas Paine had also helped in the formation of the French Declaration. See S. Hook, supra note 45, at ix-x. On the influence of Franklin, see also Kent, supra note 69, at 164 n.44. On the influence of the American declarations, see Bainton, supra note 69, at 126 n.10, citing G. JELLINEK, DIE ERKLÄRUNG DER MENSCHEN UND BÜRGERRECHTE (1st ed. 1895, translated by M. FARRAND, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS [1901]); see also C. BECKER, supra note 71, at 229-33. Copies of the French Declaration were smuggled into Latin America soon thereafter, translated and secretly printed. By 1797, a conspiracy movement in Venezuela led by Gual and Espana had been influenced by such viewpoints in the U.S. and France, including those expressed in the French Declaration. See J. TREND, BOLIVAR AND THE INDEPENDENCE OF SPANISH AMERICA 17, 49 (1951). On Feb. 15, 1819, at Angostura (now Ciudad Bolivar), Simon Bolivar's Message to the new Congress of Venezuela noted that they had declared the Rights of Man and that these were: the liberty of acting, thinking, speaking and writing. See id. at 105, 108.
up by France, first of the European nations.”

Back in the United States, the references to human right precepts continued. In 1786, John Quincy Adams published his *Defense of the Constitutions of Government of the United States of America*, in which he referred expressly to “the rights of mankind.” In 1787, Thomas Cooper’s *Propositions Respecting the Foundations of Civil Government* spoke of “the natural rights of mankind”; and in 1788 Johnathan Jackson published *Thoughts upon the Political Situations of the United States*, in which he referred expressly to the “rights of man.” In a letter of September 7, 1787, Jonas Phillips warned members of the Constitutional Convention of dangers posed to Jews from certain drafts and reminded: “all men have a natural and unalienable Right To worship almighty God according to the dictates of their own Con-sciense. . . .” And Luther Martin, in a speech before the Maryland legislature of November 29, 1787 on the Constitutional Convention, pointed out that equality of suffrage is based in part on the “rights of men,” that the slave trade is “contrary to the rights of mankind . . . the common rights of men . . . [and] those rights to which God and nature had entitled us, not in particular, but in common with all the rest of mankind.” Martin also noted that slavery “lessens the sense of the equal rights of mankind, and habituates us to tyranny and oppression.”

At the time of the new Constitution of the United States and the Alien Tort Statute, both James Madison and Gouverneur Morris

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74. See D. Malone, supra note 73, at 355. As Malone notes, “American sentiment was overwhelmingly sympathetic with the Revolution in France when Paine’s pamphlet *The Rights of Man* appeared in an American edition . . . Like Paine, [Jefferson] . . . connected the two revolutions, and he believed that their fortunes were interrelated, if not inseparable. The firm establishment of the French government would be followed, in his opinion, by the spread of liberty all over Europe. . . .” Id. at 355-56; see also infra note 85. On the recognized “roots” of human rights “in the conception of natural rights . . . found throughout Europe” and the early influence of the French Declaration of 1789 in Europe (especially in: the Netherlands, Belgium, Switzerland, Germany, Italy, Austria), see Scheuner, *Comparison of the Jurisprudence of National Courts with That of the Origins of the Convention as Regards Other Rights*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 214 (A. Robertson ed. 1968).

75. See B. Wright, supra note 1, at 122.

76. See id. at 308, quoting Cooper at 3.

77. See id. at 123 n.2.


79. Id. at 186.

80. Id. at 211-12.


of New York referred to the "rights of mankind." Similarly, the anti-federalist John Williams of New York complained, like so many of his persuasion, that "the inestimable rights of mankind" were not adequately represented in the proposed Constitution. The same concern led Patrick Henry to speak during the 1788 Virginia Convention on the new draft Constitution of the barriers against deprivations of "human rights" still lacking in the draft. It was perhaps the first time that the phrase "human rights" was used in America, although clearly there had already been ample use of equivalent expressions.

The new President, George Washington, referred to the "rights of freemen" in his First Inaugural Address of April 30, 1789, and Benjamin Franklin used the phrase "rights of man" in letters written to Samuel Moore and David Hartley that same year. Ramsay's History of the American Revolution, published in Philadelphia in 1789, referred also to "civil . . . rights of human nature," a phrase that un-

83. See B. Wright, supra note 1, at 128, citing 2 The Records of the Federal Convention 222 (M. Farrand ed. 1911).
84. 2 Debates on the Federal Constitution 241 (J. Elliot ed. 1901).
85. See 3 Debates on the Federal Constitution 446 (J. Elliot ed. 1901) (Henry in Virginia, June 1788), quoted in Furman v. Georgia, 408 U.S. 238, 320 (1972) (Marshall, J., concurring). During the debates in New York and South Carolina, the phrase "rights of mankind" was also used. See 2 Debates on the Federal Constitution 362 (J. Elliot ed. 1901) (Hamilton in New York, 1788) and vol. IV, at 320 (Pinckney in South Carolina, May 14, 1788: fervent hope that "rights of mankind" will spread all over Europe).
86. This may not have been the first use of the phrase "human rights," since it was made without evident notice of it being any different than rights of "man" or "mankind." Moreover, it is questionable whether use of the word "human" signaled some new concern for the equal rights of women. It seems that greater attention to the equality of women arose toward the end of the 19th century, see infra note 172, and women did not enjoy a constitutionally recognized right to vote until the early 20th century, but it would be speculative and too simplistic to assume that various rights claimed in the name of "man" or "mankind" in the 18th century were not also claimed for women (whether or not women could participate directly in the political process or the enjoyment of other rights was delayed). Human rights precepts were used to claim rights for others who could not vote, see, e.g. supra notes 30, 66-67, 80, and infra notes 103, 113-114, 137-147, 149, 153, 165, 187, 242, 248, and it was clearly expected that the enjoyment of human rights should spread throughout the world, that these were rights claimed for all persons, see, e.g. supra notes 1, 6, 27, 30, 42, 68, 73-74, 79-80, 85 and infra notes 88, 101, 109, 111, 114-115, 125, 127, 171, 188, 194, 206, 249-250. Even today the words "man" and "mankind" are used in a most general sense, i.e. not to exclude women. See, e.g., infra notes 343-358, 362-363, 398, 452.
87. Quoted in 1 A Compilation of the Messages and Papers of the Presidents 51, 53 (J. Richardson ed. 1896). Washington had referred more broadly to "the rights of mankind" six years earlier when writing to the state governors on the occasion of the disbanding of the revolutionary army. See C. Rossiter, supra note 14, at 377, 529 n.74, citing 10 The Writings of George Washington 254, 256 (W.C. Ford ed. 1891) (letter of June 8, 1783).
88. Letter from B. Franklin to S. Moore (Nov. 5, 1789) in 10 The Writings of Benjamin Franklin 63 (A. Smyth ed. 1905-1907); letter from B. Franklin to D. Hartley (Dec. 4, 1789) in id. at 72, Franklin writing: "God grant, that not only the Love of Liberty, but a thorough Knowledge of the Rights of Man, may pervade all the Nations of the Earth, so that a philosopher may set his foot anywhere on its Surface and say, 'This is my country.'"
doubtedly expressed the expectation that there were certain natural human rights of a civil sort.

It was precisely the sort of concern expressed by John Williams and others that would lead to the famous compromise between Madison and others with regard to the Bill of Rights. Actually, Madison, like Hamilton and Justice Wilson, had himself feared that a specific enumeration of such rights might someday be interpreted so as to deny or disparage others. He had even stated, before the assembly of the first House of Representatives, that the argument that a specification of some of the rights of man might someday be misinterpreted to imply a denial of others was the best argument he had heard against the enumeration of any rights in the Constitution. He felt confident, however, that his new proposal — the predecessor to the ninth amendment — would sufficiently guard against such misconceptions in the future. Madison had also been persuaded by Jefferson and the general demands of persons in state government that a bill of rights should be added to the Constitution along with some form of *caveat* to cover the danger. In its final form, the ninth amendment affirms in as clear a manner as possible that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." With its adoption, the Founders definitely expected that the rights of man would be guaranteed under the ninth amendment, as well as under those amendments enumerating more specific guarantees. Thus, all of the first nine amendments

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90. See 1 ANNALS OF CONG. 435, 439 (1789) [1789-1791]; see also 3 Farrand, supra note 78, at 256 (speech of C. Pinckney of Jan. 18, 1788 in the South Carolina House of Representatives: no bill of rights because someone might deny those not enumerated, but "we certainly reserve to our-selves every power and right not mentioned. . ."). Similar points were made by James Wilson before the Pennsylvania Convention. See id. at 144 (speech of Nov. 28, 1787), 162 (speech of Dec. 4, 1787), adding: "Enumerate all the rights of men! I am sure, Sir, that no gentleman in the late convention would have attempted such a thing. . . ."

91. See Call, Federalism and the Ninth Amendment, 64 DICK. L. REV. 121, 125 (1960); Dunbar, James Madison and the Ninth Amendment, 42 VA. L. REV. 627, 629-31, 633-43 (1956); Rogge, Unenumerated Rights, 47 CAL. L. REV. 787, 789, 792 (1959); see also D. MALONE, supra note 73, at 168-79.


were designed to protect human rights.

Two years after the creation of the U.S. Constitution and the French Declaration of the Rights of Man, Thomas Paine's second influential work, *The Rights of Man*, was published in England and later in 1791 in America.94 In his new pamphlet, Paine used the expression "human right" as an equivalent to the phrase "rights of man."95 Paine's translation of the French Declaration also contained the phrase "human rights,"96 and throughout this important new work on authority and human rights Paine referred to the "natural rights of man,"97 "common rights of man,"98 "equal rights of man,"99 and "the indefeasible hereditary Rights of Man."100 Near the end of his publication he captured the expectations of the Founders of our Republic and of our French allies when he wrote: "The end of all political associations is the preservation of the natural and imprescriptible rights of man; and among these rights are liberty, property, security, and resistance of oppression."101

In the 1790s, express concern for the rights of man continued. Soon after, and with reference to Paine's new work, John Quincy Adams wrote again of the "rights of man".102 In 1795 his father, John Adams, wrote prophetically about a specific human right to freedom

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94 See D. MALONE, supra note 73, at 354-55.
95 See S. Hook, supra note 45, at 131, Paine stating: "Immortal power is not a human right, and therefore cannot be a right of Parliament. . . .; and as Government is for the living, and not for the dead, it is living only that has any right in it." On this point, see also id. at 128-130; supra text accompanying notes 27 and 50; Paust, *Human Rights*, supra note 4, at 240-44, 249-50, 252; Paust, *Human Right to Revolution*, supra note 4, at 550-53.
96 See S. Hook, supra note 45, at 186.
97 See id. at 151-52, 173, 213; see also id. at 231 ("rights of man").
98 See id. at 152.
99 See id. at 149, 198.
100 See id. at 227.
101 Id. at 213. On these points, see also United States v. Cruikshank, 92 U.S. 542, 553 (1876).
102 See 1 WRITINGS OF JOHN QUINCY ADAMS 69, 83 (W. Ford ed. 1913) (letters of "Publicola" of June 11 and June 22, 1791).
from slavery that would become of growing concern and divide a nation:

I was concerned in several Causes in which Negroes sued for their Freedom before the Revolution . . . . The Arguments in Favour of their Liberty were much the same as have been urged since in Pamphlets and Newspapers, in Debates in Parliament & c. arising from the Rights of Mankind . . . .

Also in 1795, one of the early law books, A System of the Laws of the State of Connecticut, referred expressly to "the rights of man," both natural and civil. Additionally, Supreme Court Justice Patterson made his first specific reference to the "rights of man" in Vanhorne's Lessee v. Dorrance, (although Justice Wilson had already referred to "the natural rights of man" in an historic 1793 charge to a grand jury, and Chief Justice Jay had referred to the "rights of men" in his opinion in Chisholm v. Georgia in 1793).

On May 1st, 1794, the Democratic and Republican Societies met together in Philadelphia and affirmed a common goal to "preserve and disseminate their principles . . . until the Rights of Man shall become the supreme law of every land, and their separate fraternities be absorbed in one great democratic society comprehending the human race." In 1798 that shared goal was partly abandoned, however, when Congress debated whether the new territory of Mississippi would have a government founded upon "the rights of man" and free from slavery. As noted previously, it was a goal shared in part by others across the Atlantic, even in the face of anti-democratic


104. VOL. 1 (Z. Swift ed. 1795).

105. Id. at 176.

106. 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) ("the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man").

107. Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6360) (Wilson, J., charge to grand jury) ("Emigration is, undoubtedly, one of the natural rights of man"). On the point mentioned by Justice Wilson, see also infra text accompanying notes 127, 164-165; infra note 157. Concerning the historic import of Henfield's Case with regard to criminal sanctions against individuals for violations of international law, see Paust, After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts, 50 TEX. L. REV. 6, 8-12 (1971), reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (R. Falk ed. 1976).

108. 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C. J.).


110. See 1 ORATIONS AND ADDRESSES OF GEORGE WILLIAM CURTIS 22 (C. Norton ed. 1894) (quoting Congressman Thatcher of Massachusetts).
adversity.\textsuperscript{111}

During the new century, references to human right precepts continued. In 1800, Jefferson wrote of threats to the "rights of man" posed by the close association of government and the clergy.\textsuperscript{112} Jefferson made new reference to the rights of man in his Second Inaugural Address of March 4, 1805, where he assured his audience that the American Indians are "[e]ndowed with the faculties and the rights of men,"\textsuperscript{113} an expectation affirmed some twenty-seven years later by Chief Justice Marshall and Justice Washington in \textit{Worcester v. Georgia}.\textsuperscript{114} In his Sixth Annual Message to Congress, on December 2, 1806, President Jefferson also voiced approval of the withdrawal of "citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa."\textsuperscript{115} In a letter to a federal judge in 1812, Jefferson reaffirmed the fact, well-known by this time, that the American colonists brought with them not merely "common law rights," but also "the rights of men."\textsuperscript{116}

The phrase "natural rights of man" appeared that same year in Reverend Samuel Smith's \textit{Lectures on Moral and Political Philosophy}.\textsuperscript{117} Two years later, John Taylor's tract, \textit{An Inquiry into the Prin-

\textsuperscript{111} See, e.g., supra notes 9-11, 13, 19, 40, 68, 71-74; see also infra notes 134, 165-67. Such expectations had been shared also by Ludwig van Beethoven. Beethoven had been working on a symphony since 1798 to commemorate Napoleon Bonaparte, his democratic ideals and the new, republican Europe that could follow the Revolution in France; but when he heard that Napoleon had crowned himself Emperor, Beethoven was enraged. "So he is just like all the rest . . .," Beethoven shouted. "He will stamp out human rights and become a greater tyrant than the others," Beethoven declared, and he ripped Napoleon's name from the new score, now renamed "Eroica."


\textsuperscript{113} \textit{Quoted in J. Richardson, supra note 87, at 378, 380.}

\textsuperscript{114} 31 U.S. 515, 559 (1832) (Marshall, C. J., opinion) ("The Indian nations had always been considered as distinct, independent political communities, retaining their natural rights. . . ."); \textit{id.} at 579 (Washington, J.) (every nation has right by law of nature, "abstract right of every section of the human race"). Later, this right was qualified as being "possessory" only and not a right to "title." See \textit{The Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 74 (1831), adding that such is a right of "occupancy" and self-government.

\textsuperscript{115} \textit{Quoted in J. Richardson, supra note 87, at 408; see also Bozeman, supra note 109, at 84.}

\textsuperscript{116} \textit{Quoted in J. LIEBERMAN, MILESTONES! — 200 YEARS OF AMERICAN LAW} 15 (1976) ("The truth is that we brought with us the rights of men"). On Jefferson's point, see \textit{also} Paust, \textit{Human Right to Revolution, supra note 4}, at 547, 561-62, and references cited therein.

\textsuperscript{117} VOL. II, at 188 (1812), \textit{quoted in B. Wright, supra note 1}, at 252.
principles and Policy of the Government of the United States, criticized Adams for supposedly rejecting natural law “philosophy in favour of human rights.”118 In New Hampshire, in 1817, the state supreme court affirmed that “legislative power” is limited by “the inalienable rights of mankind.”119 By this time also the U.S. Supreme Court had referred once again to “natural inherent right[s]”120 and to “rights of humanity” in time of war.121 Further, the second volume of Kent’s Commentaries on American Law referred expressly in 1827 to “the natural rights of mankind” and “natural, inherent, and unalienable rights” that the new nation had recognized and sought to assure.122 Additionally, in 1820, Jefferson wrote that George Wythe had been devoted to “the natural and equal rights of man,”123 and in 1822, Jefferson had written that “freedom of religion” is “the most inalienable and sacred of all human rights.”124

John Quincy Adams, as the new President in 1825, observed before the nation “that the great result of this experiment upon the theory of human rights has at the close of that generation been crowned with success...”125 It would lead countless others abroad to try to emulate that success and still others to try to join us on our shores.126 In 1832, Benjamin Oliver similarly wrote: “That a citizen of any community... has a right to leave... and to reside in some other country, ... seems to follow of course, from the preceding view of the natural rights of mankind, and the origin of governments.”127 One year later, President Andrew Jackson declared: “It is the right of mankind generally to secure by all means in their
power the blessings of liberty and happiness . . . .”128 And John Quincy Adams remarked, in 1835, that “[t]he theory of the rights of man has taken deep root in the soil of civil society . . . .”129

Although Jackson and Adams may not have foreseen the event, on March 2, 1836, the Texas Declaration of Independence claimed the “inherent and inalienable right of the people” to pursue their “inestimable and inalienable rights” through a new body politic.130 In an 1839 speech in New York, Adams referred again to “the rights of man” and “the rights of mankind,”131 while that same year a national convention of the Cherokee Indians referred to their “unalienable rights” to form a body politic.132 In the meantime, a book published in London in 1819 proclaimed that “human rights . . . have their origin . . . and obligatory force in the immutable Law of God” and that any law contrary to such is “void and of no effect.”133 Such precepts were evident also in later publications. For example in New York, in 1829, Thomas Skidmore’s book, The Rights of Man to Property, was published; and in 1834 Jonathan Dymond’s Essays in the Principles of Morality, and on the Private and Political Rights and Obligations of Mankind made its appearance in New York.

In 1853, a widely read reference set contained a book on American History which expanded upon the earlier observations of Presidents Adams and Jackson, and of Benjamin Oliver. As the book proclaimed:

Young America has taught lessons of great import to the Old World. Throughout Europe, the high claims of legitimacy have been weakened. The rights of man are more extensively recognized, the obligation of the governing power to secure the happiness of the people at large, is generally admitted.134

The same reference work declared later: “The thousands that flock to our shores, are so many living witnesses in behalf of our country, and afford an overwhelming refutation of the slanders poured out upon us by the enemies of liberty and human rights.”135 There was a great

128. Speech before the Senate and House, Jan. 16, 1833, reprinted in J. Richardson, supra note 48, at 610, 621.
129. Quoted in B. Wright, supra note 1, at 211.
130. Texas Declaration of Independence (1836); see also Kennett v. Chambers, 55 U.S. (14 How.) 38, 41 (1852) (argument of counsel) ("unalienable rights").
131. See B. Wright, supra note 1, at 74, 172.
135. Id. at 19.
deal of truth at least in the latter statement. It was a time when many more Europeans sought refuge in America after the wave of liberal revolts in 1830 and 1848 and the subsequent crackdown by those in power. Thus, although the reference book was generally correct, the “lessons of great import” would be applied more fully in Europe only later.

What were curiously ignored, however, were the cries of others on our shores for “liberty and human rights,” cries echoed more clearly in other writings at least since the 1830s. In his Essay on Slavery published in 1835, William Channing recognized that slavery is inimical to “the reality and sacredness of human rights . . .,” and that “slavery is an infraction of them . . .”, a point that William Lloyd Garrison had made in 1833 while referring to “the rights of man.” Channing also recognized that human rights are universal rights of every human being, rights that were affirmed in the Declaration of Independence. In defense of the evil institution of slavery, and missing the point, one J. Paulding wrote in 1836 that the Declaration of Independence “was not an elaborate metaphysical discussion of human rights, but a mere assertion of great general principles.” E.P. Hurlbut’s Essays on Human Rights and Their Political Guarantees, published in 1845, affirmed Channing’s view that human rights are “the rights of humanity,” “the rights of man,” and related to the historic Declaration.

The voices for the abolition of slavery continued to proclaim their cause in the name of human rights. For example, in the late 1840s an antislavery paper published in Wisconsin, the American Freeman, opposed a “white-manhood” suffrage provision in the new constitution

137. W. E. CHANNING, ESSAY ON SLAVERY (1835), quoted in B. WRIGHT, supra note 1, at 228 n.2.
140. See B. WRIGHT supra note 1, at 236, quoting J. K. PAULDING, SLAVERY IN THE UNITED STATES (1936).
141. See id. at 259. Hurlbut’s work is also cited in E. CORWIN, LIBERTY AGAINST GOVERNMENT 78 n.27 (1948). On the use of the phrase “rights of humanity,” see also supra text accompanying notes 121, and infra text accompanying notes 156, 213, 242; infra note 172.
of Wisconsin as being in "contempt for the rights of man."142 Before the U.S. House of Representatives in 1848, Horace Mann's speech against slavery echoed the then familiar call that the evil institution was an "invasion of the rights of man," a violation of the "universal rights of man."143 Earlier, in 1842, Joshua Giddings had drafted a Congressional resolution which stated that slavery is "an abridgment of the natural rights of man."144 Charles Elliott's The Sinfulness of American Slavery referred similarly to the "rights of man" and the "rights of mankind" in 1851;145 William Hosmer added in 1852 that "when the fundamental law of the land is proved to be a conspiracy against human rights . . . then and in so far, law ceases to be law, and becomes a wanton outrage on society."146 Two years earlier, in a speech on the Compromise Bill, Senator William Seward had made an eloquent appeal:

The abstractions of human rights are the only permanent foundations of society. It is by referring to them that men determine what is established because it is RIGHT, in order to uphold it forever . . . . The Constitution of the United States confers no power upon Congress to deprive men of their natural rights and inalienable liberty.147

During this era, Abraham Lincoln referred to the "personal rights of man;"148 and Frederick Robinson, a former president of the Massachusetts senate, argued before a convention of Democratic voters in Massachusetts in 1851 of "the necessity of recurring to those fundamental principles of human rights on which our free institutions are established" in order to end slavery and promote human dignity.149 Also during this period, Thoreau's work on Civil Disobedience related to "the rights of man" in 1849,150 a phrase that appeared in other writings in the 1850s.151 Judicial decisions in the state supreme courts

143. See B. WRIGHT, supra note 1, at 215.
144. Quoted in S. LYND, supra note 138, at 144.
145. See id. at 220.
146. See id. at 223, quoting W. H. HOSMER, THE HIGHER LAW 178 (1852).
147. Quoted in B. WRIGHT, supra note 1, at 221 n.3, citing B. SEWARD, 1 WORKS at 102-04.
On human rights as a foundation for society, see also Paust, Human Rights, supra note 4, at 231-32, 267.
148. B. WRIGHT, supra note 1, at 175 (Lincoln praising Jefferson).
149. See id. at 158.
150. See id. at 225; Thoreau, Civil Disobedience (1849), reprinted in WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU 655, 659 (B. Atkinson ed. 1965).
151. See, e.g., J. BOUVIER, INSTITUTES OF AMERICAN LAW 92-93 (Philadelphia 1858) ("free communication of . . . thoughts and opinions is one of the most precious rights of man;" "right to enjoy property is . . . absolute right of man."); C. Norton, supra note 110, at 22 (in 1856), 26 (in 1856), 66 (in 1859), 99 (in 1862: "the very root of the American doctrine of liberty, which is the equality of human rights based upon our common humanity"), 100-04 (in 1862: "human
of Alabama, Arkansas and Vermont also used human right precepts during this period.152

Senator Charles Sumner, another ardent supporter of the abolitionist struggle, reflected that "side by side with the growth of National Unity was a constant dedication to Human Rights".153 While addressing the law of nations in 1851, Sumner noted: "The influence we now wield is a sacred trust, to be exercised firmly and discreetly, in conformity with the Laws of Nations, and with an anxious eye to the peace of the world, but always so as most to promote Human Rights."154 In 1863, Sumner also argued that intervention in foreign countries is permissible if "obviously on the side of Human Rights."155 Interestingly, in 1853, when Austria seized a person in Turkey who was entitled to protection from the United States, the U.S. Secretary of State complained to Austria that its custody of that person had been obtained in violation of Turkish law and "the rights of humanity."156

After the Civil War, the use of human right precepts continued both in the United States Supreme Court157 and in Congress, which

152. See Lincoln v. Smith, 27 Vt. 328, 340 (1854); Borden v. State, 11 Ark. 519, 529 (1851); In re Dorsey, 8 Ala. (7 Port. 293, 378) 85, 110 (1838); see also Beebe v. The State, 6 Ind. 501, 506-10, 550 (1855) ("natural rights").

153. See B. WRIGHT, supra note 1, at 175 n.3, quoting 12 THE WORKS OF CHARLES SUMNER 238 (1877).


155. Speech on "Our Foreign Relations" (Sept. 10, 1863), in 7 THE WORKS OF CHARLES SUMNER 376, 410-12, 441, 470-71 (1875-1883).

156. Letter from Sec. of State Marcy to Mr. Hulsemann of Austria (Sept. 26, 1853) in 1 MESSAGE AND DOCUMENTS 1853-54, at 30, 47 (S. Doc. No. 1, 33d Cong., 1st Sess.; and Exec. Doc. 1, Message from the President of the United States to the Two Houses of Congress, at the Commencement of the First Session of the Thirty-third Congress); reprinted in 3 J. MOORE, A DIGEST OF INTERNATIONAL LAW 824, 833-34 (1906). During the episode, the U.S. minister resident at Constantinople, G. Marsh, wrote to Secretary Marcy of the Austrian "outrage upon the rights of humanity, their violation of the principles of international law. . . ." Letter from Marsh to Sec. Marcy, July 7, 1853, in S. Doc. No. 40, 33d Cong., 1st Sess., at 26 (Dec. 5, 1853); and in H.R. Doc. No. 91, id. at 32, 37 (U.S. Serial Set No. 724). Later, the U.S. consulate in Smyrna wrote to Mr. Marsh of "an infraction of the rights of men." Letter from E. Offley to G. Marsh (Oct. 1, 1853), in S. Doc. No. 40[K], id. at 53, and in S. Doc. No. 53[E], id. at 19 (U.S. Serial Set No. 698).

157. See Civil Rights Cases, 109 U.S. 3, 48-9 (1883); United States v. Cruikshank, 92 U.S. 542, 553 (1876); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67, 110, 116, 127 (1872); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119 (1866); see also Downes v. Bidwell, 182 U.S. 244, 282-83 (1900) ("certain natural rights"); Butcher's Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring) ("inalienable . . . right of men"); Elk v. Wilkins, 112 U.S. 94, 107 (1883) (Grey, J.) (1868 Act declared "right of expatriation to be a natural and inherent right of all people"); In re Look Tin Sing, 21 F. 905, 907-08 (C.C.D. Cal. 1884) ("right of man to change his home and allegiance is recognized as inherent and inalienable . . . a natural and inherent right of all people"); cases cited infra at note 165.
paid particular attention to human rights while approving the 13th, 14th and 15th Amendments and recognized, in fact, that the amendments were designed to serve human rights. Senator E.C. Ingersoll of Illinois noted, for example, that the Thirteenth Amendment would assure "that the rights of mankind, without regard to color or race, are respected and protected." During the 1866 session of Congress, W. Lawrence of Ohio also noted that "[l]egislative powers exist in our system to protect, not to destroy, the inalienable rights of man." Speaking in support of the Fifteenth Amendment in 1869, Senator Sumner pointed out that state rights had been exalted to promote slavery, but that with the Union victory state rights must "yield to human rights, and the nation be exalted as the bulwark of all." He added:

Beyond all question the true rule under the national Constitution, especially since its additional amendments, is that anything for human rights is constitutional. Yes, sir; against the old rule, anything for slavery, I put the new rule, anything for human rights.

As the Supreme Court would later recognize, the 1871 Civil Rights Act also had a human rights purpose. Similarly, Congress declared in 1868 that "the right of expatriation is a natural and inherent right of all people." That same year a treaty between China and the United States affirmed "the inherent and inalienable right of man to change his home and allegiance," a right that later became ineffective for those of particular races or nationalities when Congress denied entry to unfavored groups or set racially-oriented quotas to deny free entry.


160. Buchanan, supra note 159, at 19; ten Broek, supra note 159, at 195-96.

161. *Quoted in D. Dewey, supra note 125, at 173.

162. Id. at 173.


164. 15 Stat. 223, ch. 249, quoted in *Fong Yue Ting v. United States*, 149 U.S. 698, 715 (1893); *In re Look Tin Sing*, 21 F. 905, 907-08 (C.C.D. Cal. 1884).

At this time, Johann Bluntschli, a Swiss scholar of international law and professor at Heidelberg, published two works which expressly referred to "human rights." Modern Law of Nations of Civilized States, published in 1867, recognized that "treaties the contents of which violate the generally recognized human right... are invalid." Bluntschli's other work, a code of international law, affirmed that: "Human rights remain in force during war."

By 1874, the third edition of Francis Lieber's book On Civil Liberty and Self-Government noted that liberty of conscience "is one of the primordial rights of man," and that "the individual rights of man become more distinctly developed with advancing civilization" — a development that Professor Lieber associated also with "self-determination." Similarly, others wrote of the "absolute rights of man"; and at the end of this era a new call for human rights and self-determination was heard as persons such as Theodore Parker declared: "woman... is here to develop her human nature, enjoy her human rights, perform her human duty...."

166. Quoted in M. McDougal, H. Lasswell & L. Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER 341 (1980). Bluntschli's work was also quoted in subsequent Nuremberg proceedings. See T. Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 226 (1949) ("states are allowed to interfere in the name of international law if 'human rights' are violated to the detriment of any single race," quoting J. Bluntschli, Das moderne Völkerrecht der civilisierten Staaten 270 (3d ed. 1878).

167. BLUNTSCHLI ON THE LAW OF WAR AND NEUTRALITY — A TRANSLATION FROM HIS CODE OF INTERNATIONAL LAW 15, para. 24 (F. Lieber trans. 1866) (copy in the Lieber collection, U.S. Army T.J.A.G. School, Charlottesville, Va.). The title of Bluntschli's work was Das moderne Kriegsrecht der civilisierten Staaten als Rechtsbuch dargestellt (1866).


169. Id. at 39.


172. Sermon of T. Parker, in 1 History of Woman Suffrage 277 (E. Stanton, S. B. Anthony & M. Gage eds. 1881), quoted in B. Wright, supra note 1, at 178; see also id. at 177 (address of suffragists to the women of Ohio: "Rights are coeval with the human race, of univer-
teenth century, like the century that preceded it, was replete with human rights concerns and developments, both legislative and judicial, that were designed further to guarantee the human rights of Americans and of others within our jurisdiction.

Early into the twentieth century these concerns continued. Elliot's *Biographical Story of the Constitution*, published in 1910, noted that the "inherent and inalienable rights of man . . . [were] incorporated in the Declaration of Independence and the Bills of Rights;" but others argued that such rights were not being adequately implemented. As one writer lamented in 1912 concerning the Court's shifting use of the Fourteenth Amendment:

> It was to be a charter of liberty for human rights against property rights. The transformation has been rapid and complete. It operates to-day to protect the rights of property to the detriment of the rights of man.174

Another writer offered a more promising observation in 1914. Noting the views of French and German scholars concerning the "rights of man" that were set forth in a new 1912 edition of the French text *Manual de Droit International Public*, he affirmed that increasing attention was being paid to "the fundamental rights of the individual — the rights of man," by international legal scholars.175

Also in 1914, in order to stimulate greater attention to human rights by all U.S.-Americans, President Woodrow Wilson used the occasion of this country's celebration of its Declaration of Independence to say: "America will come into the full light of the day when all shall know that she puts human rights above all other rights and that her flag is the flag not only of America but of humanity."177

Reflecting eighteenth and nineteenth century expectations, Carl Becker observed in 1922 that the transnationally renowned Declaration of Independence had reflected "a philosophy of human rights
which is valid, if at all, not for Americans only, but for all men."178 In fact later, in 1925, the American Institute of International Law prepared a draft code of public international law which recognized several "international" or "universally recognized rights" of individuals;179 and in 1929 the Institut de Droit International, meeting in New York, adopted a Declaration of the International Rights of Man.180 Commenting on expectations evident at the 1931 meeting of the Institut de Droit International, the American scholar James Brown Scott declared: "the rights set forth [in the 1929 Declaration] . . . are inherent in the nature and dignity of the human being, not derived from the State, they should not be submitted to the control or final decision of any State."181 Views such as these would compel Americans to participate in the drafting of a new declaration for all of humankind in 1948, the Universal Declaration of Human Rights.182 Finally, with the Universal Declaration, what had been self-evident and inalienable for past generations was now documented more clearly as a set of common legal expectations of and for all humankind.

B. Use by the Judiciary as Constitutional Rights and Standards

When one realizes that there is a human rights dimension to every

178. C. BECKER, THE DECLARATION OF INDEPENDENCE 225 (1922); see also H. LAUTERPACHT; supra note 73; Murphy, supra note 69, at 703, 749-50, also quoting Abraham Lincoln on similar points. On the transnational influence of the Declaration of Independence and the American Revolution, see Paust, Human Right to Revolution, supra note 4, at 547, 560-62, and references cited therein; see also American Institute of International Law 1916 Declaration of the Rights and Duties of Nations, reprinted in 10 AM. J. INT'L L. 124, 125 (1916) (Declaration of Independence "and the universal practice of the American Republics" — also declaring, importantly for our inquiry here: "International law is at one and the same time both national and international").

179. American Institute of International Law, Project No. 4, art. 2 ("the international rights of individuals, namely, the rights which natural or juridical persons can invoke in each nation . . .") and Project No. 13, preamble and art. 1, reprinted in 20 AM. J. INT'L L., SPEC. SUPP. 300, 304, 326 (1926). For related views in the early part of this century, see infra notes 296-317, 601-602.


form of human interaction, one recognizes the ubiquitous nature of human rights and can begin to recognize, as several judges throughout our history undoubtedly have, the broad potential of human right norms for the identification, clarification and supplementation of constitutional rights and standards.

In this section, the judiciary's use of human right precepts is analyzed, with primary attention to the federal judiciary. The section addresses historic usage in two parts: (1) general trends, and (2) trends toward more explicit content. The first part is primarily an overview and provides an introductory investigation. It explores the initial juridic uses of human right precepts in the eighteenth and nineteenth centuries as well as more recent patterns concerning the where, when, who and what of United States Supreme Court use of human right precepts. More specifically, the first part provides needed documentation of the general history of the use of these precepts, Supreme Court justices who have adopted and refined them, types of equivalent phrases extant in judicial decisions, and other types of trends that are helpful for scientific exploration of the nature and growth of human right precepts as tools for constitutional decisionmaking.

The second part investigates specific judicial language and rights or principles that have been aligned with human right precepts in Supreme Court and other federal cases. It is organized loosely around general rights or interests that judges have either expressly or implicitly associated with human right precepts. Such an inquiry should demonstrate partly the how and why of judicial use, and it does, but the reader will note that human rights applications are potentially unending, especially in cases addressing constitutional rights and standards. As documented in the previous section on general use in U.S. history, the Founders had thought of human rights as being "constitutional rights" even before the early state constitutions and the U.S. Constitution, and both the early amendments and a number of subsequent amendments to the United States Constitution were added in part to guarantee human rights.

185. See supra note 93.
186. See, e.g., supra text accompanying notes 90-93, 156-160; supra notes 93, 139.
1. General Trends in Juridic Use

a. 1783-1893

As noted previously, what may have been the first judicial application of human right precepts in America occurred in 1783. In that year, the Supreme Court of Massachusetts related "natural rights of mankind" to the prohibition of slavery in the case of Commonwealth v. Jennison.\textsuperscript{187} Justices of the United States Supreme Court also made their first use of human rights precepts in the eighteenth century. In 1793, while addressing the interrelationship between natural law, the law of nations and individual responsibility, Justice Wilson referred to "the natural rights of man" in Henfield's Case.\textsuperscript{188} During that same year Chief Justice Jay used the similar expression "rights of men" in Chisholm v. Georgia,\textsuperscript{189} a case decided after the first known use of the phrase "human rights" during argument by counsel.\textsuperscript{190} Justice Patterson declared in the 1795 decision in Vanhorn's Lessee v. Dorrance\textsuperscript{191} that "the right of acquiring property, and having it protected, is one of the natural, inherent, and unalienable rights of man."\textsuperscript{192} This right to property, Chief Justice Marshall affirmed later in 1827, is a "right which every man retains."\textsuperscript{193} In 1795, Justice Iredell also used the phrase "natural unalienable right," but without full acceptance of the concept.\textsuperscript{194} In the reports of lower federal courts, one also finds reference in the 1790s to unalienable "natural rights"\textsuperscript{195} and to "the rights

\textsuperscript{187} See supra text accompanying notes 65-67. Similar use of the phrase "rights of man" was made during argument before the Supreme Court of New Jersey in 1845. See P. FINKELMAN, SLAVERY IN THE COURTCOM 141 (1985) (argument of A. Stewart in The State v. Post, 20 N.J. Law (1 Spencer) 368 (1845)). But see Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 210-11, 215, 217 (1836) (slavery was "contrary to natural right" — contra naturam — but "not contrary to the law of nations").

\textsuperscript{188} 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, Iredell, & Peters, JJ., charge to grand jury) ("Emigration is, undoubtedly, one of the natural rights of man"). In Henfield's Case, the district attorney Rawle also mentioned "the rights of man," noting that "[t]he rights of man are the rights of all men in relation to each other . . . [and that p]erfect equality is one of those rights." See id. at 1118.

\textsuperscript{189} 2 U.S. (2 DalI.) 419, 478 (1793) (Jay, C. J.).

\textsuperscript{190} See id. at 421 (argument of counsel).

\textsuperscript{191} 2 U.S. (2 DalI.) 304 (1795) (Patterson, J.).

\textsuperscript{192} Id. at 310.

\textsuperscript{193} Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 346 (1827) (Marshall, C. J.). See also id. at 345 ("natural rights"). For use of similar phrases by Marshall, see infra notes 216 and 229. In Ogden, Justices Thompson and Trimble also used the phrase "natural right." See id. at 309, 319.

\textsuperscript{194} See Talbot v. Jansen, 3 U.S. (3 DalI.) 133, 162 (1795) (Iredell, J.). There, counsel had also used the phrases "natural rights," "inherent rights of man," and "natural rights of man" which every government or nation must pay homage to. See id. at 141 (argument of counsel).

\textsuperscript{195} See United States v. Robins, 27 F. Cas. 825, 828-29 (D. S.C. 1799) (No. 16,175) (argument of counsel).
of mankind.”

In the early nineteenth century, state courts also made express use of human right precepts. In 1815, the Supreme Court of Massachusetts declared that “every man has a natural right to exercise . . . employments [as an auctioneer, attorney, or tavern keeper, etc.] free of tribute.” The Supreme Court of New Hampshire recognized in 1817 that the legislative power is limited by “the inalienable rights of mankind.” And with striking confirmation of the supremacy of human rights, the Supreme Court of Alabama declared in 1838: “any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.” At the same time, the Alabama court used the expression “dearest rights of man.”

Use of the phrase “human right” occurred in a decision by the Supreme Court of Arkansas in 1851, a decision addressing the concept of “natural rights” as well. The dissenting opinion there also addressed “natural inherent rights” and “natural, inherent right[s]...
of universal obligation."  

In 1854, the Supreme Court of Vermont recognized that "all men have certain natural, inherent, and inalienable rights . . . natural rights of men . . . natural rights of persons." The phrases "natural rights" and "reserved natural rights" were also used by the Supreme Court of Indiana in 1855. Additionally in 1869, the Supreme Court of California recognized that the newly adopted thirteenth amendment to the U.S. Constitution protects "personal liberty, one of the absolute rights of man." Earlier, the Supreme Court of California had recognized that vested property rights of private persons were guaranteed "[b]y the law of nations, independent of treaty stipulations," that cession of territory did not impair such rights, and that "[b]y the law of nations those rights . . . were 'sacred and inviolable'. . . ." And in 1872, the Supreme Court of Maine referred to the "inherent rights of the people" while addressing the limits of legislative power, the guarantee of due process of law, and the phrase "law of the land."  

In the meantime, the U.S. Supreme Court had also continued its attention to natural, inherent rights, although specific judicial reference to the phrase "human rights" appeared only in 1810 and would not occur again until after the Civil War. In the 1810 case, in *Fletcher v. Peck*, Chief Justice Marshall became the first Supreme Court Justice to use the phrase "human rights" while recognizing, quite importantly, that our judicial tribunals "are established . . . to decide on human rights." In an 1813 case, the Court used the phrase "natural inherent right," and in an 1814 decision it recog-

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204. *Id.* at 568.
206. *Beebe v. The State*, 6 Ind. 501, 508-10 (1855) (Perkins, J.); *id.* at 550 (Gookins, J.). For cases in other states see, e.g., *White v. White*, 5 Barb. 474, 484 (N.Y. App. Div. 1849) ("natural rights"); *Parham v. The Justices*, 9 Ga. 341, 352 (1851); *Billings v. Hill*, 7 Cal. 1, 12, 16 (immutable laws of natural justice bind States, nations and individuals vis a vis each other), 17 ("inherent and inalienable rights of human nature that no government can justly take away"); see also, *Riggs v. Martin*, 5 Ark. 506, 508 (1844) ("maxim of universal justice pervading the whole system of the common and civil law"). Other uses may be identified as computer banks cover the earliest state court opinions.
210. Again, statements here represent the author's best guess as to actual patterns of use in the late 1700s and early 1800s. Computer banks of Lexis for the Supreme Court now go back to 1790. Not considered in the following analysis is *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1856) (Campbell, J., dissenting) (individuals "come into society with rights which cannot be invaded without injustice"), since no mention of natural law or rights or related phrases appears.
211. 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C. J., opinion).
nized possible application of "the rights of humanity" in time of war.213 The Court noted in Green v. Biddle,214 that rights in real estate were more than "ordinary rights of individuals" and, as demonstrated by "the ordinary practice of nations in their treaties," were "rights which no civilian would suppose could be affected by a change in sovereignty."215 In 1829 Chief Justice Marshall declared that the "right to contract . . . is a natural original right."216 And in 1830, in a dissent, Justice Johnson argued that the right to emigrate and change allegiance had too many qualifications as to time and circumstance to be "inherent and unalienable."217

Argument of counsel before the Court also made use of human right precepts during this time. In 1805 counsel made reference to the "natural right to migrate" and the "natural right" of emigration.218 Argument of counsel in 1819, 1821 and 1824 also used the phrase "natural right;"219 and argument concerning "the natural rights of men" to certain species of property (i.e., copyright interests) can also be found in reports for 1833.220 Similarly, in 1834, counsel had argued that by the common law of England an author had "the sole and exclusive property in his copy,"221 and that such a right was founded upon the "natural right" to property.222

213. The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) (Story, J.). For other uses of this phrase, see supra text accompanying notes 141, 156, and infra 242. For use of the phrase "duties of humanity," see Henfield's Case, 11 F. Cas. at 1107 ("On states as well as individuals the duties of humanity are strictly incumbent"); 3 H. Grotius, supra note 11, ch. XVII, § 3 (F. Kelsey trans. 1964). For use of the phrase "principles of humanity," see DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS, July 6, 1775; see also supra note 172.

214. 21 U.S. (8 Wheat.) 1 (1823).

215. Id. at 100 (Johnson, J.). The syllabus and counsel also referred to "unalienable" rights of sovereignty. Id. at 2, 63; And so did Justice Washington. Id. at 85.


222. Id. at 596, 598.
In his dissenting opinion in *Wheaton v. Peters*, Justice Thompson agreed with counsel that state statutes in the United States had also recognized and protected "the natural right which an author has to the productions and labour of his own mind... a pre-existing right, founded on the eternal rules and principles of natural right and justice, and recognized by the common law." While noting several relevant statutes, Justice Thompson also quoted a Massachusetts statute of 1783 which had recognized in its preamble that "security of the fruits of their study and industry... is one of the natural rights of all men" and that one of the purposes of protecting such a property interest would be "to encourage books for the benefit of mankind." Unquestionably related to the natural right to property was the recognized right to exchange property, a right that counsel argued in 1837: "Every man has a natural right to buy, and sell [sugar, coffee, or cotton]." Counsel before the Court also argued that British judges had pronounced void "as being in violation of natural justice and inherent right" similarly related prohibitions of legislative impairment of contracts as they affect land titles and other property rights.

While also addressing customary international law but finding no general consensus or opinio juris on the prohibition of slavery, Chief Justice Marshall recognized as "generally admitted" in 1825, "[T]hat every man has a natural right to the fruits of his own labor." Justice Baldwin used the phrase "inherent right" in two cases in 1831, but emphasized in both that it was not applicable. In an 1832 opinion, Chief Justice Marshall recognized that Indian nations retained "their original natural rights, as... possessors of the soil," with some exceptions, and Justice Washington referred to the "right of every section of the human race to a reasonable portion of the soil," a right which is given "to every nation" by the "law of nature." And in 1839, counsel referred to the "natural right" of a corporation to sue in the courts of other nations, a right that had been based on the "com-

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223. *Id.* at 682-84 (Thompson, J., dissenting).

224. *Id.* at 682. Justice Thompson also used the phrase "general rights of mankind." *See id.* at 672, 675, citing Millar v. Taylor, 4 Burr. 2303, 2359 (K.B. 1769).

225. *The Charles River Bridge v. The Warren Bridge*, 36 U.S. (11 Pet.) 420, 451 (1837) (argument of counsel). *See also id.* at 468 ("inherent and inalienable... rights"), 475 ("rights... sacred and inviolable").


230. *Id.* at 579 (Washington, J.). *See also supra* text accompanying notes 113-114.
ity” or “usage” of nations “and has become a positive obligation on all nations.” Counsel added: “in general terms, . . . there are, between nations at peace with one another, rights, both natural and individual . . . [including] the right [of individuals] to sue in their courts. . . .” Thus, by the 1830s, the natural rights of man were recognizably inter-related with international norms concerning both wartime and peace-time circumstances. This is not surprising, of course, given the general history of the use of human right precepts up to the 1830s and the early expectations that human rights were rights of all humankind and, thus, of significance regardless of national boundaries.

In an 1841 case, The Schooner Amistad, counsel made the argument that persons held as slaves on board a vessel that was later captured by them and taken to our shores must be set free or the U.S. executive and the courts would become complicitors in the deprivation of fundamental human rights. Importantly, counsel asked the question whether “the people of the United States whose government is based on the great principles of the Revolution, proclaimed in the Declaration of Independence, confer upon the federal executive, or judicial tribunals, the power of making our nation accessories to such atrocious violations of human right?” In response, the Supreme Court ordered the Executive to release the former captives. While doing so, the Court noted that a conflict of rights concerning claims to “property” and the status of the persons held as slaves (who might not have been slaves “but kidnapped and free”) was “inevitable, and must be decided upon the eternal principles of justice and international law.” The Court added:

[W]here human life and human liberty are in issue, and constitute the very essence of the controversy, [a treaty concerning documents pertaining to ships and their cargo] never could have intended to take away the equal rights of all foreigners who should contest their claims before any of our courts to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt that these negroes ought to be deemed free; and that the Span-

231. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 553, 556-57 (1839) (argument of counsel). In the Court's opinion in the case, Chief Justice Taney made no mention of natural rights as such, but declared: “We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts. . . .” Id. at 592 (Taney, C. J., opinion).


233. Id. at 595 (Story, J., opinion).
ish Treaty [re: ships and property] interposes no obstacle to the just assertion of their rights.

In 1840 and 1844, Justice Baldwin repeated use of the concept of “inviolable” rights, in these instances, rights inviolable under the Constitution.\(^\text{234}\) In 1846, U.S. government counsel argued successfully that there was no “natural right” to transfer allegiance and citizenship;\(^\text{235}\) and in 1849, counsel disagreed before the Court as to whether the right to vote was a “natural right,” “inalienable right,” or merely a “political” right.\(^\text{236}\) In 1850, counsel had also referred to the “unalienable and indefeasible right” to alter, reform, or abolish government,\(^\text{237}\) an argument that would be repeated only two years later.\(^\text{238}\) During 1850, the Court addressed another claim involving “the rights of property” and the cargo of a ship, but without offsetting claims to human life and liberty. While avoiding excess duties on imported goods, victorious counsel argued that such taxes are illegal “because they tend to produce fines and penalties, to derogate from the common law, and from the rights of property, and to appropriate private property to public use, which, being contrary to natural right and justice, is only tolerated in cases of necessity, and upon full compensation.”\(^\text{239}\) In 1852, counsel made arguments about other “unalienable” property rights,\(^\text{240}\) and in both 1853 and 1854, three Supreme Court Justices implicitly confirmed the “natural right” of acquiring and enjoying private property.\(^\text{241}\) Counsel argued in another 1854 case that no white people “have ever denied that the Indians were human beings entitled to the rights of humanity, to the natural rights of holding, and acquiring, and alienating property, real and personal, including the rights of marriage and descent,” an argument that generally prevailed.\(^\text{242}\) In 1857, counsel referred in one case to “those


\(^{236}\) See Luther v. Borden, 48 U.S. (7 How.) 1, 19-20, 28 (1849) (arguments of counsel).


\(^{238}\) See Kennett v. Chambers, 55 U.S. (14 How.) 38, 41 (1852) (argument of counsel).


\(^{241}\) See The City of Boston v. Lecraw, 58 U.S. (17 How.) 426, 434 (1854) (Grier, J., opinion) (“natural right” re: property); State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 397 (1853) (Catron, J., dissenting) (legislative power to regulate state bank and power of eminent domain "both, to a limited extent, interfere with the natural right guaranteed by the constitution, of acquiring and enjoying it"); Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 283 (1853) (Curtis, J., opinion) (legislation on interpretation of wills did not violate “any principle of natural right”).

\(^{242}\) See United States v. Ritchie, 58 U.S. (17 How.) 525, 530 (1854) (argument of counsel). A Mexican land grant of 1837 addressed in the case had also confirmed that land belonged to a person "by natural right and actual possession". Id. at 535 (Nelson, J., opinion).
immutable principles of right and justice which are the foundation of . . . law” and argued in another “that a mother is not deprived, by her second marriage, of the natural right of controlling the person of her child, and determining its future home.” That same year, opinions of the attorneys general used the phrases “right of a man to expatriate himself” and “any man’s fundamental right.”

During this time, however, the Missouri Compromise, which had granted freedom to slaves in certain western territories, was struck down at the expense of human liberty and the “natural rights” of slaves. While dissenting in *Dred Scott v. Sandford*, Justices McLean and Curtis referred to “the natural rights of man” and to “natural rights” of persons. But the rights of states and to property found more favor with the majority of the Court as is evidenced by Chief Justice Taney’s comment that “general terms used in the Constitution of the United States, as to the rights of man,” did not include black slaves. Nonetheless, two years later in Georgia a federal judge declared before the grand jury that earlier Congressional legislation having proscribed international slave trading, and “having declared it to be piracy, the natural rights of the inhabitants of Africa are secured against the violation of them. . . .” The use of the phrase “human rights” by the U.S. Supreme Court appeared again in the 1866 case, *Ex parte Milligan*. Addressing the right of those accused of having committed a crime “to be tried and punished according to law,” Justice Davis declared: “By the protection of the law human rights are secured; withdraw that protection, 

248. Id. at 557 (McLean, J., dissenting), quoting E. VATTEL, supra note 19 (“The laws of nations are but the natural rights of man applied to nations.”).
249. Id. at 574 (“The natural rights of people of color”), 575 (not true to allege “that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts”), 620 (slavery is inconsistent “with the Declaration of Independence and with natural right”), 624 (“Slavery, being contrary to natural right, is created only by municipal law . . . without foundation in the law of nature or the unwritten common law.”) See also id. at 574 (“inalienable rights”). Justice Curtis resigned after the *Dred Scott* decision, a decision that “was greeted with unmitigated wrath from every segment of the United States except the slave holding states;” see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 271, 615 (2d ed. 1983).
250. See id. at 409 (Taney, C.J., opinion); see also id. at 410 (“inalienable rights” today would “embrace the whole human family”).
251. Charge to Grand Jury, 30 F. Cas. 1026, 1030 (1859) (No. 18,269a) (Wayne, J.).
252. 71 U.S. (4 Wall.) 2, 119 (1866) (Davis, J., opinion); see also id. at 126 (rights “inviolable”).
and they are at the mercy of wicked rulers, or the clamor of an excited people."253 Also that year counsel used the phrases "natural right" and "natural and inherent right" in argument before the Court254 and, in deciding the case in 1867, Justice Field recognized that "all men have certain inalienable rights,"255 a recognition that was undoubtedly shared by Justice Miller who wrote in a related case of the "inalienable" right to defend one's own cause during a suit in court.256

In 1868, Justice Swayne also used the phrase "natural right" while addressing a statute granting immunity to a ship's pilot, adding that such a statute "abridges the natural right of the injured party to compensation, and is therefore to be construed strictly."257 In 1871 Justice Bradley, joined by Justice Swayne, recognized the "inestimable . . . natural right of . . . bringing the offender to justice" when such person attacks our persons and the right "of invoking the penalties of the law upon" them.258 And in 1872 Justice Clifford repeated the recognition of Chief Justice Marshall forty years earlier that Indians retain their "natural rights" as possessors of the soil.259

Express use of the phrase "human rights" occurred again in 1873 in the Slaughter-House Cases,260 with Justice Miller rightly noting that the 13th, 14th and 15th amendments provide "additional guarantees


254. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 ("natural right"), 298 ("natural rights"), 313 ("natural and inherent right") (1867) (argument of counsel); see also United States v. Armijo, 72 U.S. (5 Wall.) 444, 446 (1866) (argument of counsel) (land grant and "natural right"); Stanley v. Colt, 72 U.S. (5 Wall.) 119, 132 (1866) (argument of counsel) (altering express provisions in a will "is contrary to the principles of natural right and justice which no legislature can contravene").

255. Cummings, supra note 254, at 321 (Field, J., opinion). Since Justice Field related this and similar phrases to rights of men (see infra notes 262, 270, 282) and counsel in this case had used the phrase "natural right" in argument (see supra note 254), and since these phrases were generally interrelated in U.S. history, Justice Field's use of the phrase "inalienable right" is counted here as if he had said "inalienable right of man." Justice Field was quoted by counsel in 1873, but to no avail. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 134 (1873) (argument of counsel). On Justice Field's views, see also C. SWISHER, STEPHEN J. FIELD - CRAFTSMAN OF THE LAW 148, 418-27 (1930).

256. Ex parte Garland, 71 U.S. (4 Wall.) 333, 384 (1867) (Miller, J., dissenting). In Ex parte Garland, counsel had made related arguments. See id. at 352 ("natural right"), 356 (not a "natural right"), 357-58 (no "natural inalienable right"), 369-70 (not a "natural right") (arguments of counsel).

257. See The China, 74 U.S. (7 Wall.) 53, 63 (1868) (Swayne, J., opinion); see also id. at 66 (similar exemption in U.K. was recognizably "fruitful of injustice," and . . . contrary to the fundamental principles of natural right.").

258. See Blyew v. United States, 80 U.S. (13 Wall.) 581, 595, 598 (1871) (Bradley, J., dissenting).


260. 83 U.S. (16 Wall.) 36 (1873).
of human rights" to those persons covered. In their dissenting opinions, Justices Field, Bradley, and Swayne argued the proper application human right precepts while using the phrase "rights of man." Thus, one finds in a single case an interchangeable use of "human rights" and "rights of man" phrases by no less than four justices, a practice in accord with similar patterns of use more generally in early American history.

In the late 1870s, 1880s and 1890s, the more popular expression was "rights of man," although the related concept of "natural rights" continued to receive attention. As the Court affirmed in United States v. Cruikshank in 1876:

The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men . . ." The very highest duty of the States, when they entered the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator."

The same expression was repeated less splendidly in the Civil Rights Cases in 1883, while in 1878 Chief Justice Waite had used the phrase "unalienable right" and in 1884 Justice Field used an

261. Id. at 67 (Miller, J., opinion).
262. Id. at 110 (Field, J., dissenting).
263. Id. at 116 (Bradley, J., dissenting).
264. Id. at 127 (Swayne, J., dissenting) ("Life is a gift of God, and the right to preserve it is the most sacred of the rights of man.").
265. Such an interchangeable use in the same case would occur again in four more recent cases: Reynolds v. Sims, 377 U.S. 533, 561, 630 (1964); Adamson v. California, 332 U.S. 46, 51, 62 (1947); In re Yamashita, 327 U.S. 1, 26-27 (1946); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942); see also infra notes 314, 322.
266. See Ralston v. Turpin, 129 U.S. 663, 675 (1889) (Harlan, J., opinion) ("natural right of an owner to make such disposition of his property . . ."); Barrell v. Tilton, 119 U.S. 637, 642 (1887) (Field, J., opinion); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (Matthews, J., opinion) (right to vote is "not regarded strictly as a natural right"); Campbell v. Holt, 115 U.S. 620, 629 (1885) (Miller, J., opinion) (defense of lapse of time to obligation to pay money is "no natural right"); Rector v. Gibbon, 111 U.S. 276, 284 (1884) (Field, J., opinion); Hurtado v. California, 110 U.S. 516, 549 (1884) (Harlan, J., dissenting) (Madison recognized that trial by jury is not a "natural right"); see also id. at 539: "rights . . . immutable;" Bowditch v. Boston, 101 U.S. 16, 19 (1879) (Swayne, J., opinion); Reynolds v. United States, 98 U.S. 145, 164 (1878) (Waite, C.J., opinion) ("he has no natural right in opposition to his social duties"); Leavenworth, Lawrence & Galveston R.R. v. United States, 92 U.S. 733, 746 (1875) (Davis, J., opinion); Randall v. Kreiger, 90 U.S. 137, 148 (1874) (Swayne, J., opinion) (dower is not a "natural right"); see also infra text accompanying note 279.
267. 92 U.S. 542, 553 (1876) (Waite, C.J., opinion). The same point was made in 1869 by the California Supreme Court. See supra note 208.
269. Reynolds v. United States, 98 U.S. at 165 (Waite, C.J., opinion); see also id. at 164 ("natural right"); The Cherokee Trust Funds; Eastern Band of Cherokee Indians v. United States and Cherokee Nation, 117 U.S. 288, 304 (1886) (Field, J., opinion) (Cherokee national convention of 1839 use of "unalienable rights").
equivalent phrase, the "inalienable . . . right of men."270 During this period, reference to "natural, inherent, and unalienable" rights,271 "inalienable" rights272 and "the right of man"273 also continued in state courts; and the phrase "human rights" appeared in a reporter's note to a decision in a lower federal case in 1882 concerning the rights of Chinese emigrants.274

In 1884, 1889, and 1893, the U.S. Supreme Court quoted an article in an 1868 treaty between China and the United States which had recognized "the inherent and inalienable right of man to change his home and allegiance" only to uphold a series of subsequent Congressional acts which denied such a right to persons of Chinese descent.275 The
Court did at least note, however, that "[b]y the law of nations" resident aliens can invoke domestic laws and even the government's protection against foreign nations. The same treaty language was quoted in a lower federal court in 1884 to produce results more favorable to such persons, the court holding that the Congressional acts restricting the immigration of Chinese to the United States are not applicable to a citizen of the United States born within the U.S. of Chinese parents when such a citizen travels abroad and seeks reentry. An earlier Congressional act recognizing that "the right of expatriation is a natural and inherent right of all people" was quoted in the same opinion, as it had been the year before by the Supreme Court and would be later in the 1893 decision noted above.

During this general period, Chief Justice Waite also referred in 1887 to "the most sacred questions of human rights" which are at stake in a criminal trial; and in 1888 Justice Field used the phrases "inalienable rights of man," "inalienable rights" and "right of man" while identifying the right to pursue one's happiness and the right to be free in the enjoyment of one's faculties and to pursue a lawful vocation. In 1890, Justice Field also recognized that the right to property had been declared early to be "one of the inalienable rights of man;" and in 1892 Justice Gray affirmed that the rights to life and liberty were "natural and inalienable rights of man" beyond the power of Congress. Also in 1890, Justice Fuller recognized what he termed "the inherent right of resort to the courts," while in 1892 and 1893 Justice Brewer used the phrase "unalienable rights" and Professor Louis Henkin. See Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853 (1987).

276. See Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893) (Gray, J., opinion).
277. See In re Look Tin Sing, 21 F. 905, 907 (C.C.D. Cal. 1884) (Field, J., opinion).
278. Id. at 908; see also supra note 164.
280. See Fong Yue Ting, supra note 276, at 715 (Gray, J., opinion).
283. Crowley v. Christensen, 137 U.S. 86, 90 (1890) (Field, J., opinion); see also id. at 91 (no "inherent right").
284. See Logan v. United States, 144 U.S. 263, 287 (1892) (Gray, J., opinion).
286. All with reference to the Declaration of Independence. See, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893) (Brewer, J., opinion); Budd v. New York, 143 U.S. 517, 550 (1892) (Brewer, J., dissenting); Church of the Holy Trinity v. United States, 143 U.S. 457, 467 (1892) (Brewer, J., opinion); see also Budd v. New York, 143 U.S. at 524 (argument of counsel) ("inalienable" right).
in 1890 and 1892 Justices Brewer and Harlan referred to "inviolable" rights under the Constitution. Similar phrases also appeared in other lower federal court opinions in the 1880s and early 1890s.

From the survey of trends thus far, it is evident that human rights or equivalent phrases and precepts were used in some fifty cases decided by U.S. Supreme Court Justices from 1793 to 1893. These precepts appeared moreover in sixty-one opinions written by twenty-eight U.S. justices in that hundred year period. There were sixteen cases in the first half of the period and thirty-four cases in the second half, thus demonstrating a doubling of the use of human rights or equivalent precepts. Even more of the opinions appear after 1850: forty-two out of sixty-one. Further Justice Field, the justice who wrote more of the relevant opinions than any other, wrote during the same latter part of the time period (although Chief Justice Marshall had been a close second). What is evident thus far, is an early and fairly consistent use of human rights or equivalent precepts by the Court, with slightly greater use by the justices from 1853 to 1893. It is a pattern different than that evident in the section on general historic use, with the difference due perhaps to the greater attention paid outside the Court to the slavery question prior to the Civil War.

b. 1894-1989

In 1895, the U.S. Supreme Court noted an early British opinion in which it was recognized that a foreign marriage "'valid from being established by the sentence of a court in France having proper jurisdiction . . . is conclusive, whether in a foreign court or not, from the law of nations in such cases,'" adding: "'otherwise the rights of mankind would be very precarious and uncertain.'" In 1896 and 1898 Jus-

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290. See id. The Justices in first order of use were: Wilson, Jay, Patterson, Marshall, Duvall, Story, Johnson, Thompson, Trimble, Baldwin, Washington, Curtiss, Catron, Grier, McLean, Ta-ney, Davis, Field, Miller, Clifford, Bradley, Swayne, Waite, Harlan, Gray, Matthews, Fuller, Brewer.

Brown, McKenna and White had also used the phrase "natural right;" and in 1898, Chief Justice Fuller recognized the "inherent right of man" to change his home and allegiance while denying a right freely to immigrate and become a naturalized U.S. citizen.

At the turn of the century, the Court recognized once again that the right to citizenship in the United States is not among the inherent, natural rights of all persons. In important dictum, however, the Court identified "certain natural rights, enforced in the Constitution by prohibitions against interference with them," including, importantly for this study, the rights "to free access to courts of justice, to due process of law and to an equal protection of the laws." Four months earlier, Justice Harlan had quoted President McKinley while recognizing that the Cuban people are "entitled to enjoy . . . that 'measure of self-control which is the inalienable right of man . . . ." In 1900 Justice White used the phrases "natural right" and "inalienable rights" and Justices Gray and Shiras used the phrase "natural right." Also in 1900, counsel referred to a "natural right to labor" and, in 1901 in another case, to rights "sacred and inalienable." In 1904 counsel argued that the right to "preserve life is the most sacred right of man," and counsel argued in 1905 that the right to pursue ordinary vocations is "among the inherent and inalienable rights of man."
able rights of man,” while in 1895 counsel had referred to a liberty “inherent in the rights of man.” And in 1907, a New York court declared that “certain rights pertaining to mankind . . . termed ‘natural rights’” include the right to inviolability of the person or to personal immunity from unreasonable interference.

A few opinions had also used the phrases “inalienable rights,” “unalienable rights,” and “inherent rights” in the period 1894-1900. In the period just after 1900 until 1925, there were only a few opinions using the phrases “natural right(s),” “inalienable rights,” or “unalienable rights;” and use of the phrases “right of

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309. See, e.g., Wilson v. Eureka City, 173 U.S. 32, 36 (1899) (McKenna, J., opinion); Miller v. Cornwall R.R., 168 U.S. 131, 134 (1897) (Fuller, J., opinion); Hovey v. Elliott, 167 U.S. 409, 443 (1897) (White, J., opinion); Allgeyer v. Louisiana, 165 U.S. at 585; Ashley v. Ryan, 153 U.S. 436, 441 (1894) (White, J., opinion) (not a “right inherent” to be corp.).
man," "right of mankind," and "human rights" was relatively less frequent. "[R]ights of mankind" was used in 1908 by Justice Moody, and the phrase "human rights" was used both in 1915 by Justice Pitney, and in 1920 by Justice McKenna while considering German violations of "human rights and all international law." In 1920, Justice Clarke also used the phrase "fundamental rights of men" while considering abuse of governmental discretion in connection with Chinese immigrants and persons of Chinese descent. Lower federal courts also made use of such phrases, but with the pattern in lower courts also made use of such phrases, but with the pattern in lower
court decisions one finds a general inattention to human right precepts for the first third of the twentieth century.

Computer-assisted research also allows thorough investigation of the actual patterns of use of human right precepts in the U.S. Supreme Court since 1925. What this research reveals is the fact that use of such precepts has increased markedly in the latter parts of the twentieth century. From 1925 to 1989, the Supreme Court has used the phrase "human right(s)" in sixty-nine cases, with nearly half of these appearing in the last twenty-years.318 The equivalent phrase "rights of man" also appears in twenty-six Supreme Court decisions from 1925 to 1987,319 with nearly half of these appearing in the last twenty years.


318. These cases are listed infra in notes 323-342. Lexis found the phrase “human right” or “human rights” in over 195 Supreme Court cases decided between 1925 and 1989, but upon close inspection only 69 seem relevant. Use by a justice included quotations adopted by a justice. Not included in this survey are the arguments of counsel. See, e.g., Sibbach v. Wilson, 312 U.S. 1, 2 (1940) (“human rights”); United States v. Wood, 299 U.S. 123, 129 (1936) (“human rights”); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 597 (1935) (“unalienable rights with which man was endowed”). Also not included is First National Bank of Boston v. Belloti, 435 U.S. 768, 782 n.18 (1978) (Powell, J., opinion) (“human right causes”). Since six Supreme Court cases prior to 1925 contain the phrase “human rights” (see supra notes 211, 253, 261, 281, 314 and 315), seventy-five Supreme Court cases are known to involve use of the phrase “human right(s).” Most uncharacteristically, only four of those cases appear in 1986-1989.

For the general period investigated, two cases were found which used the phrase "rights of mankind," while eight cases contain the words "unalienable" or "inalienable right." Only four of the cases contained a use of two types of phrases. Thus, use of the phrase "human right(s)" or equivalent phrases has occurred in ninety-three Supreme Court cases from 1925-1989, with nearly half of these appearing in the last twenty years.

These trends are more remarkable when one compares them with those noted previously from 1793 to 1893. For the early period, human right precepts were used by the Court in forty-six cases. Such a frequency of use over a one hundred year period has been matched by the Court in the last twenty years (i.e., from 1969 to 1989). Viewed differently, the use of human right precepts by the Supreme Court has been five times more frequent since the late 1930s than during the previous history of the Court. Thus, if the history of the Supreme Court is divided into four periods, one finds that use of human right precepts has been five times greater in the last quarter than during the previous three quarters of Supreme Court decisionmaking.

When recent trends are analyzed for ten year periods from 1939-1989, one discovers a fairly even but growing use of human right precepts over the last fifty years, with use in nineteen cases from 1979-
1989, twenty-four cases from 1969-1978, twenty-six cases from 1959-1968, nine cases from 1949-1958, eighteen cases from 1939-1948, and only four cases from 1903-1938. A similar pattern is demonstrable when one measures frequency of use of the phrase “human right(s)” (with use in 14, 16, 19, 9, 10, and 3 cases respectively). For the period covering 1925 through 1988, a frequency of use analysis also demonstrates that human right precepts appear more frequently in main or concurring opinions (in sixty-one) than in dissenting opinions (in forty-one), although use in main opinions is nearly the same as that in dissenting opinions. A similar pattern is evident with regard to use of the phrase “human right(s)” (in twenty-eight main, fourteen concurring, and thirty-one dissenting opinions from 1925 through 1988).

When one also identifies the types of Supreme Court justices who used “human right” or equivalent phrases in their opinions during the last sixty-five years, one discovers a rather large group with disparate jurisprudential approaches to decision. Further, nearly all of the present members of the Court have used human right precepts, and none have expressly repudiated use of these precepts in constitutional adjudication. In the vast majority of uses, the justices have used human right precepts without explanation or citation to other cases. Often the use of such precepts is made with express or implicit expectation that human rights are fundamental constitutional rights or legal principles. Thus, perhaps like the Founders, members of the Court have often assumed that human right precepts reflect primary constitutional expectations that need little explanation or supplementation with case or other precedent.

The justices who have used the phrase “human right(s),” in order of first use from 1925, are: (1) Black, (2) Jackson, (3) Murphy, (4) Douglas, (5) Roberts, (6) Reed, (7) Frankfurter.


325. Oyama v. California, 332 U.S. 633, 673 (1948) (Murphy, J., concurring); Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy, J., concurring); In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting); Screws v. United States, 325 U.S. 91, 136 (1945) (Murphy, J., dissenting); Glasser v. United States, 315 U.S. 60, 69 (1942) (Murphy, J., opinion). Total of 5 cases.

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concurring). One case total.


opinion). Total of two cases; see also Burke v. Barnes, 479 U.S. 361, 365 (1987) (Stevens, J., dissenting).


346. Harris v. United States, 331 U.S. 145, 193 (1947) (Murphy, J., dissenting); In re Yamashita, 327 U.S. 1, 28 (1946) (Murphy, J., dissenting). Total of 2 cases.


350. Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring); see also id. at 293 n.10 ("natural rights of free men"). One case total.


of mankind" in one of their opinions.358 Those justices who used human right precepts most often were: Douglas (eighteen opinions), Brennan (twelve opinions), Marshall (ten opinions), and Frankfurter (seven opinions).

Thus, it is evident from overall trends that throughout our constitutional history human right precepts have been used in at least one hundred and sixty-six cases decided by the justices. In most instances, there is implicit acceptance of human rights as constitutional standards; and although there is rarely any mention of specific theories of incorporation,359 it is clear that the Supreme Court most often utilizes

358. See supra note 320.

human right standards as juridic aids for interpretation of constitutional or statutory norms. With such an extensive frequency of use, there is simply no question whether human right standards can be or are being applied by the Court — they are used freely and frequently by justices with varied jurisprudential backgrounds.

These trends are also discernible in lower federal court opinions. For example, use of the phrase "human right(s)" has appeared in over ninety circuit court opinions since 1930 and, according to computer-assisted research, in over one thousand lower federal court opinions overall. Approximately half of the circuit court opinions using national Human Rights Arguments in United States Courts: Customary International Law Incorporated into American Domestic Law, 8 BROOKLYN J. INT'L L. 207 (1982); On International Human Rights Law in State Courts, 18 INT'L L. 59 (1984); see also R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964); Salzberg & Young, The Parliamentary Role in Implementing International Human Rights: A U.S. Example, 12 TEX. INT'L L. J. 251 (1977); Weissbrodt, Human Rights Legislation and U.S. Foreign Policy, 7 GA. J. INT'L & COMP. L. 231 (1977).

Direct incorporation of human rights occurs directly by the judiciary and/or through a particular constitutional provision authorizing the incorporation of international law. See, e.g., U.S. CONST., art. III, § 2, cl. 1 (recognizing judicial power over such matters); art. VI, cl. 2 (recognizing that treaties are part of supreme federal law). In this sense, both the incorporation of international law (and any rights or duties thereunder) and judicial competence to identify, clarify and apply international law are constitutionally based, although it does not necessarily follow that rights so incorporated must thereby achieve a constitutional status in the face of conflicting federal legislation. With respect to indirect incorporation to aid in interpreting a constitutional norm and mirrored or equivalent incorporation (e.g., through the ninth amendment), human rights thus incorporated achieve a constitutional status and thereby prevail over an inconsistent statute, whether or not they are treaty-based or customary at the international level; see also Paust, Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom, 28 VA. J. INT'L L. 393 (1988) [hereinafter Paust, Rediscovering the Relationship]; Paust, Self-Executing Treaties, 82 AM. J. INT'L L. 760 (1988).

360. Lexis has identified the use of the phrase "human right(s)" in more than 750 circuit court cases from 1940; but only about a fourth of the cases are relevant, since some merely refer to a human rights agency or commission, the title of an article, and so forth. Most of the ninety cases are incorporated here in the study of trends toward a more explicit content. Two early cases are identifiable on Westlaw: Evans v. Rives, 126 F.2d 633, 635 (D.C. Cir. 1942) ("human rights"); Shores v. United States, 80 F.2d 942, 952 (9th Cir. 1936) (Denman, J., dissenting) ("human rights"). For earlier lower federal court cases, see supra notes 188, 195, 196, 274, 288, 317, infra 361.

the phrase "human right(s)" have been written in the last ten years; and use of such a phrase has occurred in every circuit, although use has been more frequent in the Second, Fifth and D.C. Circuits. A similar though less extensive use of the phrase "rights of man" exists in lower federal court opinions; but only five recent lower court opinions are known to contain the phrase "rights of mankind," and only one recent lower court opinion is known to contain the phrase "inalienable right of a human being."

Throughout our constitutional history a lower federal judge has refused to entertain a human rights claim only rarely. Thus, a judge who refuses stands nearly alone in opposition to the expectations of the Founders and to hundreds of federal judicial decisions utilizing human right precepts. As in the Supreme Court, most lower courts seem to use human rights law as an aid for interpreting relevant constitutional or statutory provisions and, thus, clarifying and supplementing the content of such provisions. Federal courts have used human rights directly as the basis for a decision or as an alternative basis for a decision less frequently, although direct incorporation of human rights law is constitutionally permissible. Additionally, there have been increasing references to the Universal Declaration of Human Rights in federal decisionmaking either as a guide for identification and clarification of the human rights guaranteed by the United


366. For examples of such uses by indirect incorporation, see Paust, Effective Litigation, supra note 182, at 240-42.

367. For examples, see id.

368. See, e.g., id. at 231-33, 236, 240; Paust, International Law, supra note 359, at 665-68; Paust, Human Rights, supra note 4. See also Paust, Self-Executing Treaties, supra note 359. On the judicial powers at stake, see also id. at 761-66, 771-73, 775-77.
Nations Charter\textsuperscript{369} or as a legally relevant set of standards for the determination and application of constitutional rights.\textsuperscript{370}

2. Trends Toward More Explicit Content

In view of the trends in use of human right standards, it is fairly clear that most of the Supreme Court justices throughout our constitutional history have recognized that human rights can provide useful content for the identification, clarification and supplementation of constitutional or statutory norms. At the same time, human rights norms may provide only a limited, general content, even a content articulated merely at a high level of abstraction. It was this latter aspect of certain human rights norms that Justice Frankfurter once addressed, not to deny their utility but, on the contrary, to affirm their import as general standards:

In dealing . . . with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . . On the other hand, the gloss

\textsuperscript{369} See U.N. CHARTER, arts. 1(3), 55(c), 56. As primary treaty law, the U.N. Charter's guarantees and obligations are also a part of supreme federal law within the meaning of art. III, § 2, cl. 1 and art. VI, cl.2 of the U.S. Constitution. Thus, these articles form the general constitutional basis for both direct and indirect incorporation of human rights law that is also recognized and guaranteed under the U.N. Charter. See also Paust, Effective Litigation, supra note 182, at 228, 230, 234-37, 244. Other constitutional bases for incorporation can, of course, involve use of specific amendments or other sections of the Constitution. See supra note 366; U.S. CONST., art. I, § 8, cl. 3 and 10; Paust, Self-Executing Treaties, supra note 359.


This is not at all surprising, however, since the Universal Declaration is the primary document at the international level providing a more detailed specification of human rights content. See supra note 182. As the Executive branch aptly noted in its landmark brief in Filartiga, "the Universal Declaration of Human Rights . . . goes beyond the U.N. Charter in specifying and defining the fundamental rights to which all individuals are entitled." Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) at 9, reprinted in 19 I.L.M. 585, 592 (May 1980). The Second Circuit noted as well that a relevant "prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights," adding that "the Charter precepts embodied in this Declaration 'constitute basic principles of international law,'" and that such a declaration is "significant because [it] . . . specifies with great precision the obligations of member nations under the Charter." Filartiga v. Pena-Irala, 630 F.2d at 882-83.
of some of the verbal symbols of the constitution does not give them a
fixed technical content. It exacts a continuing process of application.371

Earlier, Justice Frankfurter had noted that “basic rights do not
become petrified as of any one time” and that “due process is not con-
fined within a permanent catalogue.”372 Yet, he continued:

[t]he knock at the door . . . as a prelude to a search, without authority of
law but solely on the authority of the police, did not need the commen-
tary of recent history to be condemned as inconsistent with the concep-
tion of human rights enshrined in the history and basic constitutional
documents of English-speaking peoples.373

Later, while making a similar jurisprudential point, Justice Brennan
affirmed in 

*Furman v. Georgia* that “the Framers did not envision . . .
a narrow . . . role for this basic guaranty of human rights,” the eighth
amendment.374 In the same case Justice Marshall noted Patrick
Henry’s concern that an enumerated bill of rights not be read nar-
rowly to deprive persons of their “human rights,”375 a view shared
also by other federal judges.376

Strangely, Justice Frankfurter also remarked that it “‘is very
queer to try to protect human rights in the middle of the Twentieth
Century by a left-over from the days of General Grant,’”377 and he
declared:

We cannot expect to create an effective means of protection for human
liberties by torturing an 1871 statute to meet the problems of 1960.378

Yet, Frankfurter’s point was not that the 1871 Civil Rights Act could
not properly absorb “the expanding reach of its purpose to the extent
that the words with which that purpose is conveyed fairly bear such

371. Rochin v. California, 342 U.S. at 169 (Frankfurter, J., opinion).

372. Wolf v. Colorado, 338 U.S. at 27 (Frankfurter, J., concurring). For similar points, see
    Schmidt, 489 F.2d 1335, 1338 (7th Cir. 1973) (“Our enlightened concern for individual human
    rights as it has penetrated the prison compounds has taken us a long way from the judicial
    attitudes of the past”), quoting Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970);
    nomenclature,” e.g., whether action is civil or criminal).

373. Wolf v. Colorado, 338 U.S. at 28. These words were quoted in Spinelli v. United States,
    393 U.S. at 436, n. 1 (Fortas, J., concurring).

374. 408 U.S. at 268.

375. See id., at 320.

376. See Valle v. Stengel, 176 F.2d 697, 703 (3d Cir. 1949) (“field of human rights covered by
    the privileges and immunities clause is indeed a broad one”); Thomas v. Hunter, 153 F.2d 834,
    839 (10th Cir. 1946) (“too narrow a definition when the question under consideration is the
    violation of human rights and liberty guaranteed by the Constitution”), quoted in United States
    v. Smith, 411 F.2d 733, 736 (6th Cir. 1969).

377. See Monroe v. Pape, 365 U.S. at 244 (Frankfurter, J., dissenting), quoting Chaffee, Safeguarding

378. Id. at 244.
expansion," but that "admissible expansion of meaning through the judicial process does not entirely unbind the courts."379

More recently, a number of other justices have recognized that the 1871 Civil Rights Act "is remedial and in aid of the preservation of human liberty and human rights" and that "all statutes and constitutional provisions authorizing such statutes are [to be] liberally and beneficially construed.'"380 The 1964 Civil Rights Act seems to have had a similar human rights purpose,381 although the Court has thus far only expressly recognized the purpose of the 1964 Act to serve related precepts of human dignity.382 Other federal legislation has been enacted to serve human rights,383 including, as recognized by several members of the Court, the 1978 Domestic Volunteer Service Act which seeks to assure "the protection of the . . . human rights of persons with developmental disabilities."384

379. See id.

380. See Briscoe v. Lahue, 460 U.S. at 348 (Marshall); Allen v. McCurry, 449 U.S. at 109-10 n.8 (Blackmun); Gomez v Toledo, 446 U.S. at 639 (Marshall); Owen v. City of Independence, 445 U.S. at 636 (Brennan); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. at 400 (Stevens); Quern v. Jordan, 440 U.S. at 357 (Brennan); Monell v. Dept’ of Social Serv., 436 U.S. at 684 (Brennan); Novotny v. Great Am. Fed. Savings, 584 F.2d 1235, 1248, 1254, 1261 (3d Cir. 1978); Thompson v. New York, 487 F. Supp. 212, 213 (N.D.N.Y. 1980) — all cases quoting Representative Shellabarger’s speech during passage of the 1871 Act which was the precursor to 42 U.S.C. § 1983. Shellabarger adding: "the largest latitude consistent with the words employed is uniformly given in such statutes. . . ."


382. See Heart of Atlanta Motel v. United States, 379 U.S. at 291.


384. See Pennhurst State School and Hospital v. Halderman, 451 U.S. at 12, 20, 26 (Rehn-
In terms of incorporation theory it is important that legislation has a human rights purpose, since such forms of enactment can recognizably provide the needed implementing legislation for so-called non-self-executing treaties. In any event, it is certainly appropriate for a court to seek to serve a stated legislative purpose; and when that purpose includes the preservation, protection and/or promotion of human rights, it is both rational and proper to look to human rights law in aid of interpretation and application of the legislation. Thus, whether or not international law is directly incorporable in a particular case, it can provide useful criteria and content for judicial discovery and use in aid of interpretation of relevant constitutional, statutory or other legal provisions, including the common law. This is especially so when documented human rights are sufficiently particularized to aid in the setting of boundaries to shared meaning or to give a richer, more detailed content.

As recognized in previous sections, the original amendments to the U.S. Constitution and the 13th, 14th and 15th amendments all had a human rights purpose. Indeed, as noted, the desire of each faction to assure an adequate and effective guarantee of human rights was the basis for the adoption of the Bill of Rights which included the ninth amendment. It is not unusual, then, to find members of the Court aptly affirming that "our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights." Nor is it unusual to find judges stating that "judicial self-restraint which defers too much to . . . powers of the states . . . will not serve to enhance Madison's priceless gift of 'the great rights of mankind secured under this Constitution,' for these secure the only climate in which the law of freedom can exist." As the Court noted in 1876:

The rights of life and personal liberty are natural rights of man. "To

385. On non-self-executing treaties see Paust, Effective Litigation, supra note 182, at 238-40, 244, and references cited therein; supra note 359. A statute's human rights purpose might also provide the basis for a claim that a private right of action can be implied from the statute. See generally Cort v. Ash, 422 U.S. 66 (1975); see also Randall, supra note 359; see also Note, Limiting the Scope of Federal Jurisdiction Under the Alien Tort Statute, 24 VA. J. INT'L L. 941, 948 (1984) (not exploring the point made here); Chumney v. Nixon, 615 F.2d 389, 391, 394-395 (6th Cir. 1980) (civil cause of action implied from domestic criminal statute because of "overall congressional purpose").

386. See United States v. Weil, 46 F. Supp. at 326 ("The old inflexible rules of the common law should not and cannot be adhered to where human rights and liberties are endangered.").


secure these rights,” says the Declaration of Independence, “govern-
ments are instituted among men . . .” The very highest duty of the
States, when they entered the Union under the Constitution, was to pro-
tect all persons within their boundaries in the enjoyment of these
“unalienable rights with which they were endowed by their Creator.”

Other justices have made specific recognitions concerning the pur-
pose of various amendments to guarantee human rights, and federal
judges have even declared that it is “the whole philosophy of human
rights which makes the Constitution the great living document that it
is.” In affirming these sorts of recognitions, however, one justice
has also noted that “the Congress that enacted the Fourteenth
Amendment was particularly conscious that the ‘civil’ rights of man
should be distinguished from his ‘social’ rights,” and that, regrettably,
one has a right to be a racist bigot and “close his home or club to any
person. . . .” Federal judges have also noted that judicial entertain-
ment of “exotic concepts” of deprivation might lead to a “trivializa-
tion” of the Constitution, adding: “If this should occur, some of the
monumental accomplishments in defining fundamental human rights

389. United States v. Cruikshank, 92 U.S. at 553; see also Screws v. United States, 325 U.S.
at 144 (“natural to give the shelter of the Constitution to those basic human rights for the vind-
cication of which” Civil War was fought and “extension of federal authority so as to guard against
 evasion by any State . . . was an obvious corollary”); Board of Comm’rs v. Aetna Life Ins. Co., 90
F. at 226 (state legislative power is restrained by the inalienable rights of man).

at 268, 320-31 (8th amend.); United States v. Barnett, 376 U.S. at 755 (5th, 6th amends.); Gideon
v. Wainwright, 372 U.S. at 343 (6th amend.); Abel v. United States, 362 U.S. at 243 n.2 (4th amend.);
at 28 (4th amend.); Wheeling Steel Corp. v. Glander, 337 U.S. at 577 (14th amend.); Adamson v.
California, 332 U.S. at 121-22 (original and 14th amends.); United Pub. Workers of Am. v. M.
Mitchell, 330 U.S. at 95 (1st, 5th, 9th, 10th amends.); In re Yamashita, 327 U.S. at 26 (5th
amend.); Screws v. United States, 325 U.S. at 136, 144 (13th, 14th, 15th amends.); Glasser v.
United States, 315 U.S. at 69 (6th amend.); Johnson v. Zerbst, 304 U.S. at 462 (6th amend.);
Coppage v. Kansas, 236 U.S. at 17 (14th amend.); Slaughter-House Cases, 83 U.S. at 67 (13th,
14th, 15th amends.); S.E.C. v. Lowe, 725 F.2d 892, 908 (D.C. Cir. 1984) (Brieant, J., dissenting)
(1st amend.); Minor v. United States, 375 F.2d 170, 175 n.1 (8th Cir. 1967) (6th amend.); United
States v. Johnston, 318 F.2d 228, 291 (6th Cir. 1963) (“first eight amendments and the Four-
rights covered by the privileges and immunities clause is indeed a broad one”; on this point,
see also Hamilton, supra note 158, at 174 (privileges and immunities in 14th amend. are “the natural
rights of man”); Maxwell v. Dow, 176 U.S. 381, 591 (1900) (Peckham, J., opinion) (privileges
and immunities include “all rights secured to our citizens by treaties”); McPherson v. Blacker,
146 U.S. 1, 38 (1892) (Fuller, C.J.) (“The privileges and immunities of citizens of the United
States are those which arise out of . . . treaties . . . .”); In re Parrott, 1 F. at 504-21 (privileges and
immunities given to aliens under treaty, supremacy clause, and 14th amend.); Baker v. City of
Portland, 2 F. Cas. at 473-75 (same); In re Dobric, 189 F. Supp. 638, 640 (D. Minn. 1960) (our
great American Charter, declaratory of the rights of man); Hanley v. Moody, 39 F.2d at 200 (5th
& 14th amends.); see also United States v. Salerno, 481 U.S. at 755 (“incompatible with the
fundamental human rights protected by our Constitution”)(Marshall, J., dissenting); Fisher v.
HEW, 522 F.2d 493, 496 (7th Cir. 1975) (argument re: 5th, 13th, 14th amends.).

391. In re Yamashita, 327 U.S. at 26 (Murphy); Eisentrager v. Forrestal, 174 F.2d 961, 963
n.9 (D.C. Cir. 1949).

392. See Bell v. Maryland, 378 U.S. at 313 (Goldberg).
and liberties may be compromised."\(^{393}\)

At the same time, however, those fundamental rights must ever be protected by the judiciary. As Justice Marshall noted in *Bakke*, "[t]he denial of human rights was etched into the American Colonies' first attempts at establishing self-government."\(^{394}\) And in *Milligan* an earlier Court affirmed that "the President . . . is controlled by law,"\(^{395}\) adding, "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers. . . ."\(^{396}\) Recognizing a similar danger, the Court noted in 1946: "From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights."\(^{397}\)

From these statements and the historic trends noted above, it is evident that concerns for human rights, democratic government, and the relatively free participation of individuals in political processes have been interrelated. Thus, one can find the Court seeking to protect human rights and democratic values while recognizing that "each and every citizen has an unalienable right to full and effective participation in the political processes."\(^{398}\) It is equally common to find the Court affirming that "the right of suffrage is a fundamental matter in a free and democratic society" and that such a matter " 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man.' "\(^{399}\) Not surprisingly, one finds such language


394. 438 U.S. at 388; see also Neely v. Henkel, 180 U.S. at 124 (Cuban people are "entitled to enjoy . . . that 'measure of self-control which is the inalienable right of man. . . .' ").


396. *Ex parte Milligan*, 71 U.S. at 119; see also In re Sugano, 40 F.2d at 962 ("It is only by strict observance of lawful authority by governmental officers that human rights can be safeguarded against arbitrary and oppressive authority"); *Ex parte Kozlowski*, 277 F. at 88; Hopkins v. Oxley Stave Co., 83 F. at 928 ("not enough that the rights of man be printed . . . they must be constantly and carefully guarded from invasion and encroachment from any quarter").

397. Duncan v. Kahanamoku, 327 U.S. at 330; see also Laird v. Tatum, 408 U.S. at 20 ("no call for a garrison state"); United States v. Ballard, 12 F. Supp. at 325 ("The fountain head of dictatorship is at the convergence of legislative and executive power. . . . Whenever the legislative and executive coalesce, the rights of man dwindle in exact ratio to their adhesiveness."). On the points mentioned, see also Paust, *International Law*, supra note 359.


reproduced in circuit court opinions with the recognition that "[i]n the Supreme Court has made it clear in a series of cases that the right of effective participation in the political process 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'" 400

Similarly, federal courts have recognized that "democratic government . . . [is] government premised upon individual human rights," 401 that under human rights law the "will of the people is the basis of authority" of governments, 402 and that law and liberty are "intimately linked" such that without "enforcement of the law . . . there could be no human rights." 403 Thus, the web of interconnection grows with expanding conceptual strands of liberty, law, individual rights of equal participation, authority, and concepts of democratic government—the very notions, among others, that the Founders associated with democratic values and human rights.

Obviously first amendment interests concerning freedom of speech and association can be interrelated with the right to participate in political processes. Justice Douglas noted in Scales that the censorial power is properly in the people over the government and not in the government over the people, and that Jefferson had aptly noted the danger to the "rights of man" posed by a creeping governmental incursion into areas previously left free from governmental regulation because of free speech and liberty interests at stake. 404 The notion that "free communication of thoughts and opinions is one of the invaluable rights of man" has also found attention in the federal courts, 405 and in the Supreme Court it has been noted that a state cannot stop a "person from making a speech about the rights of man." 406 More recently, in the Second Circuit, it was also noted that the first amendment had a human rights purpose: "Licensing of the press was abandoned in Eng-

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402. See United States v. Vargas, 307 F. Supp. 908, 919 (D. P.R.), quoting art. 21(3) of the Universal Declaration of Human Rights. On this point, see references cited supra notes 170, 399; see also supra note 394.

403. See Lesley v. Oklahoma, 407 F.2d 543, 549 (10th Cir. 1969) (Jones, J., concurring); see also supra note 395.


land in 1694, but the memories of this imposition upon the natural rights of man lingered sufficiently to lead to the enactment of the First Amendment almost a century later." 407

Federal courts have also recognized that an arrested person has a "human right to talk" to his mother 408 and that human rights to freedom of association are also at stake in the work environment in connection with labor union activities 409 or, more generally, out on the streets. 410 The human right to freedom of religion 411 and the related need for a separation of church and state in order to assure the religious "rights of man" or "mankind" 412 have also received the attention of federal courts; and yet the Supreme Court has also recognized that the Founders believed that the rights of man are rooted in God and that we have been a religious people. 413

Another set of interests associated with human rights has involved freedom of movement, 414 the right to travel, 415 emigration, 416 and immigration. 417 There has often been a reference in such cases also to


408. See Fuller v. United States, 407 F.2d 1199, 1212 (D.C. Cir. 1968).

409. See American Fed'n of Labor v. American Sash & Door Co., 335 U.S. at 549; Sheldon v. O'Callaghan, 497 F.2d 1276, 1281 (2d Cir. 1974); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 738 (7th Cir. 1976); N.L.R.B. v. Sterling Elec. Motors, 112 F.2d at 65; Hopkins v. Oxley Stave Co., 83 F. at 929; see also Atchison T. & S.F. Ry. v. Gee, 139 F. at 584 ("rights of man" in such context "not to be measured by braggarts or bullies, or vulgarity, or profanity").

410. See Wilson v. Eureka City, 173 U.S. at 36 ("right of persons to assemble and parade was a well-established and inherent right, which could be regulated but not prohibited").


416. See In re Look Tin Sing, 21 F. at 907; Henfield's Case, 11 F. Cas. at 1120 ("Emigration is, undoubtedly, one of the natural rights of man"); see also supra cases cited in notes 218, 275, 279, 295.

417. See Ng Kam Fook v. Esperdy, 375 U.S. at 956; Kennedy v. Mendoza-Martinez, 372 U.S. at 161 n.16; see also United States v. Ruby Co., 588 F.2d 697, 700 (9th Cir. 1978) (careless actions of immigration officials in another case "implicated a human right"); Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201 (9th Cir. 1975) (removal of child from Vietnam counterposed
the relationship between such human rights and liberty. More generally, the courts have recognized that the rights to life and personal liberty are basic human rights. Interestingly, the courts have also declared that the right to counsel granted in the sixth amendment "is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty," while courts have also recognized that the right to counsel is itself a basic human right. Similarly, federal with child's human rights to liberty and due process); In re Sugano, 40 F.2d at 962; United States ex rel. Murphy v. McCandless, 40 F.2d at 645; Go Lun v. Nagle, 22 F.2d at 248; Charleyee v. United States, 19 F.2d at 341; Johnson v. Damon ex rel. Leung Fook Yung, 16 F.2d at 66; Colyer v. Skeffington, 265 F. at 69.


420. See Hewitt v. Helms, 459 U.S. at 483; Henry v. United States, 361 U.S. at 101; Draper v. United States, 358 U.S. at 321; Glasser v. United States, 315 U.S. at 69; Johnson v. Zerbst, 304 U.S. at 462; Adams Express Co. v. Kentucky, 238 U.S. at 201; Coppage v. Kansas, 236 U.S. at 17; Rassmussen v. United States, 197 U.S. at 531; Cotting v. Kansas City Stock Yards Co., 183 U.S. at 107; Hawker v. New York, 170 U.S. at 203; Miller v. Cornwall R.R., 168 U.S. at 134; Allgeyer v. Louisiana, 165 U.S. at 584-85, 589-90; Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. at 160; Logan v. United States, 144 U.S. at 287; Budd v. New York, 143 U.S. at 550; Church of the Holy Trinity v. United States, 143 U.S. at 467; Civil Rights Cases, 109 U.S. at 48-49; United States v. Cruiikshank, 92 U.S. at 553; Helms v. Hewitt, 655 F.2d 487, 494 (3d Cir. 1981); Mattis v. Schnarr, 547 F.2d 1017; United States v. Majourau, 474 F.2d 766, 770 (9th Cir. 1973); United States v. Ramey, 464 F.2d 1240, 1242 (5th Cir. 1972); Reed v. United States, 401 F.2d 756, 760 (8th Cir. 1968); Minor v. United States, 375 F.2d 170 at 175 n.1; Ortiz v. United States, 317 F.2d 277, 279 (5th Cir. 1963); Tinkle v. United States, 254 F.2d at 28; Kraft v. United States, 238 F.2d at 799; United States v. Eberhart, 127 F. at 256; United States v. Patrick, 54 F. at 351; United States v. Sanges, 48 F. at 86; see also United States v. Barnett, 376 U.S. at 755 ("freedom" is a "basic human right"); United States v. Smith, 411 F.2d 733, 736 (6th Cir. 1969); Lesley v. Oklahoma, 407 F.2d 543, 549 (10th Cir. 1969); Thomas v. Hunter, 153 F.2d 834, 839 (10th Cir. 1946); see also Prudential Ins. Co. v. Cheek, 259 U.S. at 540 (liberty of contract as natural right); Coppage v. Kansas, 236 U.S. at 28 (liberty of contract as inalienable right); Patterson v. Bark Eudora, 190 U.S. at 174 (same); Friebie v. United States, 157 U.S. at 165 (same); Jones v. Great S. Fireproof Hotel Co., 86 F. at 375 (liberty of contract as inalienable right of man).


422. See Bute v. Illinois, 333 U.S. at 678; Lane v. Attorney Gen. of the United States, 477 F.2d 847, 850 (5th Cir. 1973).
courts have declared in connection with the fourth amendment that "arrest on mere suspicion collides violently with the basic human right of liberty," but have also recognized the relation between human rights, privacy and freedom from unreasonable searches and seizures independent of liberty per se.  

Liberty interests have also been prominent in federal cases recognizing human rights with respect to the family relationship or rights to a family. More specifically, human rights have been related to "the liberty interest in family privacy," "the importance of the family," "freedom to marry," "rights to conceive and raise one's children," "the right to procreate," freedom from compulsory sterilization and "the right to have offspring." Additional mention has been made of the interrelated right of unmarried persons to have contraceptives, and the relationship between human right precepts and "maternity leave," "the responsibility of parenthood," "the elemental human right of physical contact with one's family and


424. See Spinelli v. United States, 393 U.S. at 436 n.1; Abel v. United States, 362 U.S. at 243 n.2; Wolf v. Colorado, 338 U.S. at 27-28; Harris v. United States, 331 U.S. at 193; United States v. de Hernandez, 731 F.2d 1369, 1372 (9th Cir. 1984); id. at 1375 (Jameson, Dist. Judge, dissenting); see also Kawannee Oil Co. v. Bicron Corp., 416 U.S. at 483 (fundamental human right to privacy threatened when industrial espionage is condoned).


428. Weinberger v. Salfi, 422 U.S. at 771; Stanley v. Illinois, 405 U.S. at 651; Griswold v. Connecticut, 381 U.S. at 502; Logan v. Hollier, 711 F.2d 690, 691 (5th Cir. 1983); Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d at 164 n.11; Coleman v. Darden, 595 F.2d 533, 537 (10th Cir. 1979); Duchesne v. Sugarman, 546 F.2d at 825.


friends,"434 “the children’s right to remain with and be raised by their natural parents,”435 “rights of fatherhood,”436 “the liberty . . . to direct the upbringing and education of children,”437 and liberty rights concerning the natural or adoptive family which do not pertain to “the foster relationship.”438

Human rights were also mentioned by Justice Marshall when considering equal protection interests of poor families and the question “whether there is a ‘right’ to welfare assistance.”439 Privacy interests near or outside the family context have also been addressed by the members of the Court in terms of human rights;440 and so have the rights to property,441 to a “portion of the soil,”442 and “to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others.”443 To the list of concerns associated with

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438. Drummond v. Fulton County Dep’t. of Family and Children’s Servs., 563 F.2d 1200, 1207 (5th Cir. 1977).
439. See Dandridge v. Williams, 397 U.S. at 521 n.14, citing the Universal Declaration of Human Rights, art. 25 (right of all persons “to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing,” and so forth); see also United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. at 391 (argument of counsel) (unalienable “right to buy food, fuel, or other harmless necessities of life”); T. SMITH, supra note 171, at 56 (inherent right to life is “the gift of God” and “includes a right to the means necessary to support it. Thus every individual is entitled to a sufficient portion of the fruits of the earth to preserve life, and no class of persons are entitled to acquire or possess all to the entire exclusion of others.” Upon this principle the indigent are supposed to be entitled to a support from the more opulent portion of the community. So also, every individual is entitled to be protected in the preservation of his health, and from such practices as may prejudice it.”). On the present problems concerning adequate enjoyment of this right by all persons in the U.S., see, e.g., Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content, 27 How. L.J. 145, 187-89 (1983), and references cited therein [hereinafter Paust, Human Dignity].
440. See Bell v. Maryland, 378 U.S. at 313 (privacy and private association); Kawanee Oil Co. v. Bicron Corp., 416 U.S. at 487 (fundamental human right to privacy threatened when industrial espionage is condoned).
441. See Adams Express Co. v. Kentucky, 238 U.S. at 201; Cappage v. Kansas, 236 U.S. at 17; Rasmussen v. United States, 197 U.S. at 531; Northern Sec. v. United States, 193 U.S. at 361; Miller v. Cornwall R.R. Co., 168 U.S. at 134; Allgeyer v. Louisiana, 165 U.S. at 584-85; Robertson v. Baldwin, 165 U.S. at 294; Monongahela Navigation Co. v. United States, 148 U.S. at 324; Crowley v. Christensen, 137 U.S. at 90; Ralston v. Turpin, 129 U.S. at 675; Ogden v. Saunders, 25 U.S. at 346; Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) at 310 (“the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man”); Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1057-58 (8th Cir. 1978) (“human right to own property is a most fundamental right”); Hanley v. Moody, 39 F.2d at 200; see also supra text accompanying notes 220-224.
442. Worcester v. Georgia, 31 U.S. at 559, 579 (natural “right of every section of the human race to a reasonable portion of the soil”). Marshall’s statement in Worcester (id. at 559) was quoted in Talton v. Mayes, 163 U.S. at 383. Regarding this right, see also supra note 439.
human right precepts one can add judicial attention to the human rights of prisoners, the involuntarily committed, juvenile detainees denied bail, those persons who have been subjected to cruel and unusual punishment, and those punished without benefit of a judicial trial in the United States. One federal judge even declared that "admiralty recognizes the human rights that are involved" in appraising claims of seamen.

Perhaps more recognizable have been judicial concerns for human rights in connection with general race discrimination, school desegregation issues, equal protection of indigents, and the rights of (such right tied to "inalienable . . . right of men to pursue their happiness"); Cummings v. Missouri, 71 U.S. at 321; Humes v. City of Little Rock, 138 F. at 932; In re Grice, 79 F. 627, 640 (N.D. Tex. 1897), misquoting Bertholf v. O'Reilly, 74 N.Y. 509, 515 (1878); Portland Bank v. Apthorp, 12 Mass. 252, 256 (1815); see also Williams v. Fears, 179 U.S. at 274 (argument of counsel: "natural right to labor"); In re Parrott, 1 F. at 498 (Hoffman, J.) ("inviolable right to labor for a living"); id. at 506 ("The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man . . . inalienable right"); 507 (an "absolute, fundamental and natural right . . . guaranteed under the treaty").


See Rennie v. Klein, 653 F.2d 836, 870 (3d Cir. 1981); Walters v. McKinnis, 221 F. at 750.


See Loving v. Virginia, 388 U.S. at 12; Heart of Atlanta Motel v. United States, 279 U.S. at 279; Wheeling Steel Corp. v. Glander, 337 U.S. at 577; Valle v. Stengel, 176 F.2d 697, 703 (3d Cir. 1949) (race discrimination re: private pool where police used to exclude persons from use violates privileges and immunities clause).


See Lane v. Attorney Gen. of the United States, 477 F.2d 847, 850 (5th Cir. 1973) (equal protection denied by "government-sanctioned inequality between indigents and non-indi-
women.\textsuperscript{453} There has also been attention to the human right to be free from discrimination on the basis of national origin, but not always successfully.\textsuperscript{454} “[F]reedom from a maimed body” has also been recognized as an “inalienable right of a human being,”\textsuperscript{455} and the right to a reputation has been mentioned as an “inherent and indefeasible” right.\textsuperscript{456} Predictably, one of the categories of right receiving the most attention has been the due process requirement found in the fifth and fourteenth amendments.\textsuperscript{457}

Of further interest are cases addressing unlawful activities which involve recognized violations of human rights of the victims of such activities.\textsuperscript{458} Another interesting set of cases implicitly recognizes private rights to money damages for human right deprivations but affirms
that "notwithstanding a deepseated feeling that price-tagging of fundamental human rights is dangerous business," a plaintiff litigating under a statutorily created jurisdictional basis setting an amount in controversy must meet the burden of establishing that amount in controversy.459 Finally, and quite importantly with respect to the human right to an effective remedy noted in the next section of this article, numerous opinions at all levels of the federal judiciary have quoted with approval Judge Murrah's statement in 1945 that federal courts retain their historic receptivity to human rights claims:

[We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.460]

Indeed, as the trends noted above demonstrate, numerous other federal opinions can be marshaled to support the general points made in Judge Murrah's oft-quoted statement. More generally, the Supreme Court also affirmed in its famous decision in Paquete Habana that "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their


460. Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945) (Murrah, J.), appeal dismissed per stipulation, Mitchell v. McElroy, 326 U.S. 690 (1945), quoted in Fair Assessment in Real Estate Assoc., 454 U.S. at 124; Juidice v. Vail, 430 U.S. at 343; Preiser v. Rodriguez, 411 U.S. at 517; Zwickler v. Koota, 389 U.S. at 248; McNeese v. Board of Educ., 373 U.S. at 674 n.6; Pugh v. Rainwater, 557 F.2d 1189, 1201 (5th Cir. 1977); McRedmond v. Wilson, 533 F.2d 757, 760 (2d Cir. 1976); Gay v. Board of Registration Comm'nrs, 466 F.2d 879, 884 (6th Cir. 1972); Becker v. Thompson, 459 F.2d 919, 926 (5th Cir. 1972); Garvin v. Rosenau, 455 F.2d 233, 237 (6th Cir. 1972); Moreno v. Henckel, 431 F.2d 1299, 1309 (5th Cir. 1970); Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967); United States v. La Vallee, 373 F.2d 49, 54 (2d Cir. 1967). Similar statements appear in Eisen v. Carlisle & Jacquelin, 417 U.S. at 156; Ng Kam Fook v. Esperdy, 375 U.S. at 956; Evans v. Tubbe, 657 F.2d 661, 665 (5th Cir. 1981); Gray v. Morgan, 371 F.2d 172, 175 (7th Cir. 1966); see also supra text accompanying note 211 (Fletcher v. Peck, 10 U.S. at 133); Morgan's La. & Tex. R.R. & S.S. v. Texas Cent. Ry., 137 U.S. at 192 ("inherent right of resort to the courts"); Miller v. Cornwall R.R., 168 U.S. at 134 ("inherent and indefeasible" right of access to courts and to a remedy); infra notes 471-476. Of course, human rights are guaranteed "under" the Constitution in several ways, e.g., through art. III, § 2, cl.1 and art. VI, cl.2 (see supra note 369), through the original amendments (see supra notes 92-93, 390), through the 13th, 14th, and 15th amendments (see supra notes 261-264, 390), and through the privileges and immunities clause of art. IV, § 2 (see supra note 390); see also supra notes 387-389, 459; Filartiga v. Pena-Irala, 630 F.2d at 885-87.

[Image 0x0 to 438x653]
determination."\(^{461}\)

As trends in actual decision over the last two hundred years clearly demonstrate, human rights are such matters of right and they have been incorporated directly, indirectly and through the ninth amendment\(^{462}\) in an ever expanding number of judicial opinions. Perhaps in view of some of these trends (for they have never been documented so fully before) Circuit Judge Gibbons criticized the majority opinion in *Jaffee v. United States*,\(^{463}\) noting that one of the "fragile protections" set up "against human rights violations . . . is the admonitory law of intentional torts, designed to require public accountability for individual conduct, official or private, going beyond the bounds of social acceptability."\(^{464}\) In criticizing the decision of the majority that the complaint of a U.S. serviceperson subjected to involuntary human experimentation involving nuclear tests by the military had failed to state a claim upon which relief could be granted, Judge Gibbons, after citing several human rights instruments, aptly noted:

> The international consensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt. That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government. That this court, which once had a deserved reputation for sensitivity to human rights issues, should undertake to do so is a saddening demonstration of the extent to which it has lost the spirit which once animated our deliberations.

> The opinion of the court is couched in terms of unwillingness to create a "new" cause of action. This cloak of deference to the legislative branch is disingenuous, for what the majority has done, by radical judicial legislation with totalitarian effects, is to wipe out causes of action designed to require official accountability. These causes of action have been a part of the common law for centuries and were recently reap-

\(^{461}\) 175 U.S. 677, 700 (1900) (Gray, J., opinion). Similar language appears in *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (Gray, J., opinion); see also infra notes 505-515, and accompanying text; Paust, *The President Is Bound By International Law*, supra note 395.


\(^{463}\) 663 F.2d 1226 (3d Cir. 1981).

\(^{464}\) Id. at 1249 (Gibbons, J., dissenting). On this point, see also Paust, *Is the President Bound*, supra note 395, at 740-43, 751-58, 766-72, and references cited therein.
proved by the Supreme Court.465

As Judge Gibbons seemed to affirm, servicepersons are also human beings with human rights. The next section also expands upon his general points about causes of action and remedies, those made by the Supreme Court in Paquete Habana, and those contained in the widely quoted statement of Judge Murrah.

III. THE RIGHT TO A REMEDY AND RELATED CONCERNS

A. The Precepts and Predominant Trends

Article 8 of the authoritative Universal Declaration of Human Rights expressly affirms that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."466 As prior trends in U.S. decision demonstrate, the Constitution and domestic U.S. laws guarantee or "grant" such fundamental rights. Similarly, international law, which is a part of supreme federal law,467 grants such fundamental rights. Thus, the human "right to an effective remedy" expressly set forth in the Universal Declaration is applicable by its terms in the context of domestic U.S. litigation. As part of human rights law, the right to an effective remedy is also itself a part of supreme federal law for purposes of direct incorporation, indirect incorporation, or mirrored/equivalent incorporation under the ninth amendment.468 For these reasons, Article 8 of the Universal Declaration is of significant utility in demonstrating to a federal court why litigants have a right to a private remedy for human right deprivations.

Of course the numerous cases using human right precepts documented above are further evidence of the long-term judicial practice in this country of recognizing both the utility of human rights norms and the right to a private remedy for their deprivation. As recognized previously, this is especially true with respect to those cases in which Judge Murrah's affirmation of the historic receptivity of federal courts


466. Supra note 3; on the Authoritativeness of the Universal Declaration, see also supra notes 182, 369-370. The fundamental right to an effective remedy, and thus to a "cause of action" to obtain such a remedy, is now a customary standard with respect to nonimmunity recognized under international law; see also infra note 545. Such a customary norm, tied also to the U.N. Charter, should preempt any inconsistent law; see also U.N. CHARTER, art. 103.

467. See, e.g., supra text accompanying note 461; Paust, Effective Litigation, supra note 182, at 230-33, 236-42, 244; Paust, Human Dignity, supra note 439, at 212-22, and references cited therein; supra note 359.

to human rights claims is quoted approvingly. Early in our history, at a time when human right precepts had already received the attention of our courts, Chief Justice Marshall, in his landmark opinion in *Marbury v. Madison*, affirmed more generally:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . [Blackstone] says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

Moreover, in striking confirmation of judicial power and responsibility to hear human right claims, the Chief Justice recognized seven years later that our judicial tribunals “are established . . . to decide on

469. See *supra* note 460.

470. 5 U.S. (1 Cranch) 137 (1803); *see also* United States v. Cruikshank, 92 U.S. at 553 (reproduced in text accompanying note 267 supra.).

471. *Id.* at 163; *see also id.* at 146 (argument of counsel) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109.”); United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 380 (1922) (argument of counsel) (“the rule that where there is a right there is a remedy”); *In re Metro. Ry. Receivership*, 208 U.S. 90, 100 (1908) (argument of counsel) (“There are two fundamentals of the common law, which are essentials of that due process of law which is guaranteed by the Constitution. Where there is a right there is a remedy. Ashby v. White, 1 Salkeld, 19, 21 (1703) (Holt, C.J., dissenting). No person can be denied a hearing before he is prevented from asserting a claim of right.”). In one British report of *Ashby* it was stated: “it is a vain thing to imagine that there should be a right without a remedy; want of right and want of remedy are *termini convertibiles*.” Michaelmas Term, 2 Queen Anne. in B.R., 87 Eng. Rep. 810, 815, 6 Mod. Cases 45, 53. Chief Justice Holt was also reported to have declared: “if the plaintiff has a right, he must in consequence have a remedy to vindicate that right; for want of right and want of remedy is the same thing. If a statute gives a right, the common law will give a remedy to maintain that right, a fortiori where the common law gives a right, it gives a remedy to assert it.” 1 Salkeld at 21. On British remedies for violations of international law, *see also infra* note 502.

Later, Chief Justice Marshall would declare: “The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy.” Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J.). The Chief Justice made the same point about “the duty on the government to furnish adequate remedies” in *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. at 517; *see also Mahon v. Justice*, 127 U.S. 700, 717 (1888) (Bradley, J., dissenting) (“There must be some remedy for such a wrong. It cannot be that the states, in surrendering their right of obtaining redress by military force and reprisals, have no remedy whatever.”); *infra* notes 473-475. On the implied right to a remedy at common law and the maxim *ubi jus ibi remedium, see, e.g., Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39-40 (1916), also citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 123 (1765); Riggs v. Martin, 5 Ark. 506, 508 (1844) (“It is a maxim of universal justice pervading the whole system of the common and civil law that wherever a party has a legal right he is entitled to a legal remedy to enforce it”).

Of further interest is the recognition of the Court in 1848: “It is in close conformity to, and congenial with, the seventh amendment of the Constitution, and with the saving in the Judiciary Act of the right to a remedy at common law, [that] wherever the common law should be competent to give it [such right is reserved and secured].” *See New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 409 (1848) (Daniel, J., concurring); *see also Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 533 (1872) (Clifford, J., opinion) (adding: “the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act”); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 188 (1870) (Clifford, J., opinion) (same).
human rights."

Similarly, other justices have declared that the right "to free access to courts of justice" is one of the "natural rights" guaranteed by the Constitution, that there is an "inherent right of resort to the courts," and that the right "to institute and maintain actions of any kind in the courts" is one of the "fundamental privileges and immunities which belong essentially to the citizens of every free government." Such a consequence, if it


473. Downes v. Bidwell, 182 U.S. at 282-83 (1901) (Brown, J., opinion); see also City of Dallas v. Mitchell, 245 S.W. 944, 946 (Tex. Civ. App. 1922) ("when legislative encroachment by the nation, state, or municipality invade these original and permanent [natural] rights, it is the duty of the courts to so declare, and to afford the necessary relief"); and supra text accompanying notes 257-258.

474. Morgan's La. & Tex. R.R. & S.S. v. Texas Cent. Ry., 137 U.S. at 192 (Fuller, C.J., opinion); see also Miller v. Cornwall R.R., 168 U.S. at 134 ("inherent and indefeasible rights," including right to have courts open so "'every man, for an injury done . . ., shall have remedy'" by due course of law), quoting Constitutions of Pennsylvania: 1709, art. IX, secs. 1, 11; 1838, art. IX, secs. 1, 11; 1873, art. I, secs. 1, 11.

475. See Butcher's Union Co. v. Crescent City Co., 111 U.S. at 764 (1884) (Bradley, J., concurring) (referring also to Justice Washington for this view; see Corfield v. Coryell, 6 F. Cas. 546 (C.C.R. Wash. 1825) (No. 3230) (Washington, J.)); see also supra text accompanying note 257; Bounds v. Smith, 430 U.S. 817, 821-25, 827-28 (1977) ("fundamental constitutional right of access to the courts"); Wolf v. McDonnell, 418 U.S. 539, 577-80 (1974) ("right of access to the courts . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights" such as those recognized in the Civil Rights Act of 1871); Johnson v. Avery, 393 U.S. 483, 485 (1969); Bank of Augusta v. Earle, 38 U.S. at 592 (Taney, C. J., opinion) ("We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts"); cf. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 579-81 (2d ed. 1983) (right of access limited more recently to cases involving fundamental rights — which would cover human rights claims — or freedom from arbitrary denial and denials otherwise violative of equal protection or due process). Each of these last citations, however, makes no mention of the cases cited in notes 471-473 supra or Butcher's Union Co., supra. An interesting state court decision is Smith v. Moody, 26 Ind. 299, 302 (1866). On the interrelationship between privileges and immunities guaranteed by the Constitution and human rights or "treaties," see supra note 390.

476. Virginia Coupon Cases, 114 U.S. 270, 303 (1884) (Matthews, J., opinion). For the same point stated more elegantly, see Hammond-Knowlton v. United States, 121 F.2d 192, 205 n.37 (2d Cir. 1941) (Frank, J.) ("It is idle chatter to speak of a legal wrong for which there is no legal redress; a so-called legal right without a legal remedy is . . . but a shabby mythical entity like the 'grin without a cat' which Lewis Carroll's Alice justifiably could not understand."). Earlier and more simply, Madison had expressed the view shared by the Founders that "a right implies a remedy." See THE FEDERALIST No. 43 (J. Madison); see also Nixon v. Fitzgerald, 457 U.S. 731, 783 (1982) (White, J., dissenting), quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395 (1971) (Brennan, J., opinion) ("To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him 'the protection of the laws.' ")'); Hovey v. Elliott, 167 U.S. 409, 414 (1897) (White, J., opinion)
resulted from the choice of a federal judge to ignore the human right to an effective remedy for human right deprivations, could also have grave implications for the United States. Indeed, it would place the United States in the unenviable position of a violator of international law, since a federal denial of a judicial remedy in the United States for relevant human rights violations would necessarily clash with the affirmative obligation to guarantee an "effective remedy" in competent national tribunals that is expressly set forth in Article 8 of the Universal Declaration, which, as noted above, is itself a significant indicia of the human right obligations of the United States under the United Nations Charter.

Importantly also, when interpreting a provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms that is similar to Article 8 of the Universal Declaration, \(^\text{477}\) it is also important to note that criminal responsibility can attach in the case of judicial tolerance of certain violations of international law. See United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals 3 (1950). Further, the judiciary's commitment to law would be compromised in such a case and its decision to tolerate illegality would function the same as though the court had been an accomplice of the actual perpetrators.

\(^{477}\) See infra text accompanying note 484. As Circuit Judge Edwards noted recently, "[t]here is evidence . . . that the intent of [the drafters of the Judiciary Act of 1789] . . . was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis. . . . If . . . [there is] a denial of justice . . ., under the law of nations the United States would become responsible for the failure of its courts and . . . [such] might thereby escalate into an international confrontation." See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 782-83, and references cited therein; see also Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 428 (6th Cir. 1984) ("great national interest" at stake and "failure of this court to recognize a properly executed treaty would indeed be an egregious error because of the position that treaties occupy in our body of laws"); Henfield's Case, 11 F. Cas. at 1108 (failure to punish violator of international law or force such person to make reparation renders U.S. "in some measure an accomplice in the guilt, and . . . responsible for the injury"); 1 Op. Att'y Gen. 106, 107 (1802) (government "ought to take every reasonable measure to cause reparation to be made by the offender. But if the offender is subject to the ordinary processes of law," the government may not be required to make reparation); 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 158-59 (J. Elliot ed. 1901) (Davie in North Carolina in 1788: denial of justice if foreigners not given redress re: rights under treaties presents need for federal judicial competence); 4 W. Blackstone, Commentaries 68 (4th ed. 1899) (failure to punish violator of law of nations makes state an "accomplice or abettor"); P. Jessup, The Uses of International Law 101 (1959) (a state may be held responsible for the decision of one of its courts which violates a treaty or international law"); Q. Wright, supra note 359, at 72 (nation-state cannot comply with U.N. Charter obligations if its courts refuse protection); infra note 479; infra text accompanying note 484. The pertinent part of Article 6 declares: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 13 of the European Convention adds: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority. . . ."
the European Court of Human Rights declared in a clear and trenchant manner:

One can scarcely conceive of the rule of law without there being a possibility of having access to the courts. . . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.479


In the Van Bokkelen case, Haiti had maintained that an alien would have "natural rights or of mankind" (2 J. Moore, at 1823, 1844), and the arbitrator agreed that "under the public law or law of nations aliens enjoy purely natural rights in whatever state they may be." Id. at 1845. But the arbitrator also found that a treaty-based right of access included a right to a remedy, adding: "whether free access to the tribunals of a country for the purpose of prosecuting or defending a suit be described as a remedy or as a right, is unimportant. It is in this relation a matter of description rather than of substance. It is the proceeding with which we are concerned, and not the name of it. The right or privilege to make a judicial assignment . . . involves the application of a remedy . . . 'Remedies,' says Mr. Justice Story, 'are part of the consequences of contracts.'" Id. at 1827. The arbitrator also declared: "'Free access to the tribunals of justice' that was limited to admission to the courts, without the privilege to plaintiff or defendant of employing the usual, ordinary processes of the court, would be a delusion and a snare . . . he must necessarily be entitled to invoke in his behalf all the customary and civil processes of the courts which are open to citizens." Id. at 1846, also quoting 1877 draft rules of the Institute of International Law at Geneva. Money damages of $60,000 were awarded and finally paid to Van Bokkelen. See id. at 1852 ff. By the twentieth century, it had been recognized more generally that state responsibility can attach to the deprivation of an opportunity to recover damages from a wrongdoer or to the failure to provide a remedy. See, e.g., In re Janes (United States v. United Mexican States), 4 R.Int'l Arb. Awards 82, 87, 94-96, 98 (1925); Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 13(2), in 55 Am. J. Int'l L. 545 (1961); International Law Commission Draft Convention on State Responsibility, U.N. Doc. A/CN.4/134 & Add.1 (1961), reprinted in [1961] 2 Y.B. Int'l Comm'n 46, art. 7(3), at 47, U.N. Doc. A/CN.4/SER.A/1961/Add.1; Restatement of the Foreign Relations Law of the United States 495 ($ 711(a) and Comment a to § 711), 500 (Comment e thereto), 506 (Reporters' Note 2 thereto) (denial of access to domestic courts, judicial denial of human rights, and denial of remedies for injury inflicted by the state or a private person) (Tentative Draft No. 6 1985) [hereinafter Draft Restatement].

Moreover, Hamilton articulated a concern for "the denial or perversion of justice" to aliens by our courts in the eighteenth century. See THE FEDERALIST No. 80 (A. Hamilton), quoted in Tel-Oren v. Libyan Arab Republic, 726 F.2d at 783; see also supra note 477; Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 216 (1828) (Story, J.) ("right of justice" re: violation of international law); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) ("failure of justice"); 1 Op. Att'y Gen. 30, 32 (1793) (Randolph, Att'y Gen.) (quoting British: "The laws of nations . . . do not allow reprisals, except in case of . . . justice absolutely denied, in re minime dubia, by all the
The right of access to the courts and the concomitant right to an effective remedy are thus recognized as fundamental human rights having a basis in customary international law. Moreover, the fact that the tribunals, and afterwards by the prince”). On the general point recognized in Golder, see also Nixon v. Fitzgerald, 457 U.S. 731, 768 (1982) (White, J., dissenting), 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) (“Accountability of each individual for individual conduct lies at the core of all law — indeed, of all organized societies.”) On the right of an individual to reparation for a denial of justice, see also infra note 602.

More generally, the phrase denial of justice has also been associated with the precept of due process. See, e.g., Texaco v. Short, 454 U.S. 516, 527 n.21 (1982) (statute of limitation acceptable “‘unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.’”); Grunenthal v. Long Island R.R., 393 U.S. 156, 159 (1968) (can set aside a verdict if the amount is “so high that it would be a denial of justice”); Wilson v. Iseminger, 185 U.S. 55, 63 (1902), citing T. Cooley, CONSTITUTIONAL LIMITATIONS 451 (5th ed. 1883); Smith v. Swornstedt, 57 U.S. 288, 303 (1850); Ex parte Crane, 30 U.S. (5 Pet.) 190, 192 (1831) (Marshall, C.J., opinion) (quoting 3 W. BLACKSTONE, supra note 471, at 111); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 288 (1827) (Johnson, J., dissenting) (“In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war”); Wiscart v. Dauchy, 3

289 U.S. (2 Wheat.) 213, 288 (1827) (Johnson, J., dissenting) (“In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war”); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 329 (1796) (Wilson, J., dissenting); Haddens v. Chambers, 2 U.S. (2 Dall.) 236, 236 (1795) (Smith, J., opinion) (“it would be a denial of justice to refuse him the only remedy, which he can have on this occasion”); Hoare v. Allen, 2 U.S. (2 Dall.) 102, 104 (1789); Gorgerat v. McCarty, 1 U.S. (1 Dall.) 366, 367 (1788) (argument of counsel); Bridges v. Wixon, 144 F.2d 927, 943 (9th Cir. 1944) (Healy, J., dissenting); In re Chicago & E.I. Ry., 121 F.2d 785, 789 (7th Cir. 1941) (“burdensome costs and long delays . . . in some instances might be said to be a denial of justice”); Bufalino v. Irvine, 103 F.2d 830, 832 (10th Cir. 1939) (re: deportation proceeding: “In order to render such a hearing objectionably unfair, there must be some practice which contributes to a denial of justice, or an essential element of due process must be absent”); Kielema v. Crossman, 103 F.2d 292, 293 (5th Cir. 1939) (same); United States v. French, 95 F.2d 922, 932 (8th Cir. 1938); Woodruff v. North Bloomfield Gravel Mining Co., 16 F. 25, 33 (D. Cal. 1883) (“to require the complainant to pursue each defendant separately would . . . amount to an absolute denial of justice”); Cronin v. Patrick County, 89 F. 79, 84 (W.D. Va. 1882) (“To refuse permission to file these pleas would be a denial of justice”); Stewart v. Potomac Ferry Co., 12 F. 296, 303 (E.D. Va. 1883) (“To have postponed the claims . . . would have been a denial of justice”); The Adolph, 7 F. 501, 506 (S.D.N.Y. 1881) (“In this case it would be a denial of justice to remit the seamen to their remedy in personam against the owner in Sweden”).

480. See M. MCDougal, H. LASSWELL & L. CHEN, supra note 166, at 739-40, and references cited therein; George, supra note 468; supra notes 471, 473-475, 477, 479 and infra 494-495. Circuit Judge Edwards has recently confirmed this point, at least in part: “Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory.” Tel-Oren v. Libyan Arab Republic, 726 F.2d at 783, citing 1 L. OPPENHEIM, INTERNATIONAL LAW § 165a, at 366 (H. Lauterpacht 8th ed. 1955). On the fundamental nature of such a right, see also supra 475, 479.

Similarly it had been recognized early that “by the law of nations” a private person has the right to “pursue and recover” property taken in violation of international law. See Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (1781); infra note 491. Counsel had also argued before the Court in 1839 that “‘under the law of nations’ an individual deprived of a right under the law of nations ‘is entitled to redress.’” See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 536 (1839) (argument of counsel). And in several early cases it was recognized that when ships and/or cargo were taken in violation of the “law of nations,” one can obtain restitution, damages and/or costs. See, e.g., The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 348-49 (1822); The Josefa Segunda, 18 U.S. (5 Wheat.) 338, 344, 347-48 (1820) (argument of counsel); The Anna Maria, 15 U.S. (2 Wheat.) 327, 335 & appendix, note 1, at 70 (1817); The Venus, 12 U.S. (8 Cranch) 253, 289 (1814); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 76, 105, 107-08, 112, 115 (1804) (argument of counsel); id. at 117, 124-26; Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 11, 16, 25 (1801) (argument of counsel); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 157-58 (1795) (Patterson, J.); id. at 160 (Iredell, J.); id. at 169 (Rutledge, C.J.); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 9, 15 (1794) (argument of counsel); id. at 16 (order of the Court); Talbot v. The Commanders
right to an effective remedy expressed in Article 8 of the Universal Declaration finds support in every relevant human rights instrument is supportive of both the fundamental and customary nature of such a right.

Significantly, the U.S. Executive Branch has also affirmed many of these points more generally in its relatively famous brief in *Filartiga*:

It has long been established that in certain situations, individuals may sue to enforce their rights under international law. . . . The . . . international law of human rights . . . endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. The highly respected Constitutional Court of Germany has recognized this right of individuals. The court declared that, although "contemporary generally recognized principles of international

and Owners of Three Brisgs, 1 U.S. (1 Dall.) 95, 98, 108 (1784); cf. La Amistad, 18 U.S. (5 Wheat.) 385, 389-91 (1820) (restitution only, because of strong public policy to remain neutral vis-a-vis belligerents).

481. For pertinent articles of the European Convention, see supra note 478. Others include: American Convention on Human Rights, O.A.S. T.S. No. 36, 1969, art. 25 (1) at 1 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention. . . ."), reprinted in 65 Am. J. Int'l L. 697 (1971), as supplemented by the 1948 American Declaration of the Rights and Duties of Man, art. 18 ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights"), O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965); 1981 African Charter on Human and Peoples' Rights, art. 7(1)(a) ("Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs. . . ."); reprinted in 77 Am. J. Int'l L. 904 n.13 (1983), and 21 I.L.M. 59 (1982); International Covenant on Civil and Political Rights 1966, art. 2(3)(a) and (b) "Each State party . . . undertakes: (a) To ensure that any person . . . shall have an effective remedy. . . .; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities. . . ."), see also id., art. 9(4); International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 U.N.T.S. 195, adopted by G.A. Res. 1904 (XVIII), 18 U.N. GAOR, Supp. 15, at 35-37, U.N. Doc. A/5515, art. 6 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals . . ., as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered. . . ."); Convention Relating to the Status of Refugees, 1951, art. 16, 189 U.N.T.S. 137, 19 U.S.T. 6223 [1967 Protocol Relating to the Status of Refugees] ("A refugee shall have free access to the courts of law on the territory of all Contracting States. . . [and] in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts. . . ."); Convention Relating to the Status of Stateless Persons, 1954, art. 16, 360 U.N.T.S. 117 (basically the same as 1951 Refugee Convention, supra). Also of interest is the shared expectation expressed in a 1985 International Conference on Criminal Justice: Education, Reform, and Human Rights Protection in the Arab World recommendation "guaranteeing the citizen's right to access to the ordinary courts" as well as other means of protection. I.S.I.S.C. Conference pamphlet at 4-5, preamble and recommendation 1(13) (M.C. Bassioni trans. from Arabic 1986).

482. For evidence of this sort of reasoning, see, e.g., Memorandum for the United States in *Filartiga*, supra note 370, at 9-13, adding: "uniform treaty consideration. . . provides a strong indication that the proscription . . . has entered customary international law," citing A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103, 124-28 (1971); *Filartiga* v. Pena-Irala, 630 F.2d 878, 882-84; Memorial of the United States before the International Court of Justice at 71-2, in Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J. 1.
law include only a few legal rules that directly create rights and duties of private individuals by virtue of international law itself," an area in which they do create such rights and duties is "the sphere of the minimum standard for the protection of human rights."

As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. . . .483

The Executive added that when the existence and content of a relevant human right are supported by general consensus: "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights . . . [When content is thus demonstrable by patterns of generally shared expectation] private enforcement is entirely appropriate."

484 Significantly also, the Executive affirmed that the Universal Declaration "goes beyond the UN Charter in specifying and defining the fundamental rights to which all individuals are entitled."485 The right to an effective remedy in national tribunals expressed in Article 8 of the Declaration is thus implicitly recognized also by the U.S. Executive as a fundamental human right.

Earlier in our history, several state court decisions had similarly recognized the propriety of private lawsuits against individuals for violations of general international law. After ruling that the burning of a courthouse by Confederate soldiers was an unlawful act of war in violation of "the laws of nations," the Supreme Court of Kentucky declared:

There must be a remedy, and of that remedy the State judiciary has jurisdiction. There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction; and for every wrong the common law . . . provides an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory aid. . . .

Wherefore, on international and common law principles, we adjudge that the petition in this case sets forth a good cause of action. . . .486

483. Memorandum for the United States in Filartiga, supra note 370, at 20-21, citing Paquete Habana at the end of the quoted language. For an example of judicial acceptance of this point, see, e.g., Fernandez v. Wilkinson, 505 F. Supp. at 798. For evidence of other relevant efforts by the Executive branch to clarify its understanding of an appropriate role for the judiciary, see infra note 590.

484. Filartiga Memorandum, supra note 370, at 22; see also Paust, letter, 18 VA. J. INT'L L. 601, 603-06, 608 (1978).

485. Filartiga Memorandum, supra note 370, at 9 (emphasis added).

486. Christian County Court v. Rankin & Tharp, 63 Ky. (2 Duvall) 502, 505-06 (1866). This case was cited for such a point later in W. WINTHROP, MILITARY LAW AND PRECEDENTS 780 n.31 (2d ed. 1920). Such a case reaffirms the availability of civil sanctions for acts that are also criminally sanctionable under international law (in this case the law of war, war crimes); see also infra notes 487-90, 501, 503.
The Kentucky court also recognized such a cause of action and right to a remedy in several other cases. In one such case the court spoke of “a right to maintain this action for adequate damages,” the propriety of “civil remedies for private wrongs,” and the “tortious” nature of acts of soldiers in “violation of the law of international war,” adding that the soldier’s “act was illegal, and he is personally responsible in this action for all the consequences of his own unjustifiable and tortious act.”

Analogous cases were decided by the Supreme Court of South Carolina in the 1780s with respect to unlawful acts occurring at the time of the American Revolution. Thus judicial recognition of the private right to a remedy for violations of international law predates the U.S. Constitution and relevant federal statutes. In an early case in Pennsylvania, it was decided that no cause of action existed where there was no violation of the law of nations by the Continental Congress, the Pennsylvania Board of War, or General Schuyler, although plaintiff’s counsel had rightly argued: “that every right must have a remedy is a principle of general law.” Several years later, in 1824, and in response to what was found to be a violation of the law of nations by the U.S. seizure of a French vessel abroad, the U.S. Supreme Court entertained suit by a private party for damages while noting that if such law is violated “justice demands that the injured party should receive a suitable redress.” In 1828, Justice Story sim-

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487. Dills v. Hatcher, 69 Ky. (6 Bush) 606 (1869); Ferguson v. Loar, 68 Ky. (5 Bush) 689, 692-95 (1869) (soldier is liable to private person for value of mule taken in violation of the laws of war, laws of nations); Lewis v. McGuire, 66 Ky. (3 Bush) 202, 203 (1867) (individual liable for violation of the laws of war, laws of nations); Terrill v. Rankin, 65 Ky. (2 Bush) 453, 457-62 (1867) (same); see also Hogue v. Penn, 66 Ky. (3 Bush) 663, 666 (1868) (not mentioning violation of international law as such).


489. Id. at 462.

490. Id. at 457.

491. See, e.g., Turnbull v. Ross, 1 S.C.L. (1 Bay 20, 23) 9, 10 (1785) (right to return of property, wherever found, taken in violation of laws of nations); Whitaker v. English, 1 S.C.L. (1 Bay 15) 6 (1784). The right to recover property recognized in Turnbull had been recognized in Miller v. The Ship Resolution as a right under “the law of nations.” See supra note 480. For other cases prior to 1789 that had recognized remedies for a violation of the law of nations, see, e.g., supra notes 480 and infra 492; see also infra note 501 (Res. of Cont. Cong.).

492. See Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 363 (1788).

493. Id. at 359. In Marbury v. Madison, the Supreme Court would affirm this point fifteen years later. See supra text accompanying note 471.

494. The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) (Story, J., opinion). For recognition of a private right “by the law of nations” to “pursue and recover” property taken in violation of international law, or to obtain restitution, damages and costs, see supra notes 480 and 491. In 1795, the Supreme Court also recognized the propriety of a “remedy by a writ of prohibition” concerning the detention of a vessel in a manner violative of the “law of nations.” See United States v. Peters, 3 U.S. (3 Dall.) 121, 132 (1795). An 1821 House committee report had also contained an extract of an 1818 report of the African Institution which recognized that an earlier
ilarly remarked: "with reference to principles of international law, he has a right, both to the justice of his own and the foreign sovereign."  

After the Civil War, the U.S. Supreme Court also ruled that a plaintiff could not sue a private defendant when the relevant acts were lawful belligerent acts in accord with the law of nations. In such a case, the Court noted, a person is "relieved from civil responsibility." Clearly however, when international law is violated, "civil responsibility" was thought to exist. Also of interest are early cases in New York applying standards under the law of nations to private contracts, and in California recognizing that “[b]y the law of nations,” private rights to property “were ‘sacred and inviolable’ . . .”

Indeed, since the dawn of the United States, it has been recognized that an individual can both sue and be sued in federal courts for conduct in violation of international law. An extraordinary number of decisions have recognized the propriety of private claims or causes of action involving rights under or violations of international law, and

British decision in the case of the French slave ship Le Louis had affirmed that if a governmental vessel engaged in a search of another vessel in violation of international law “the discovery . . . unlawfully produced” could not be taken advantage of by the government or its agents. See The Antelope, 23 U.S. (10 Wheat.) 66 (1825), appendix at 25. In a general sense, the British case of Le Louis points to a result similar to that mentioned in later U.S. cases. See, e.g., Cook v. United States, 288 U.S. 102 (1933) (violation of international law by U.S. obviates jurisdictional competence); United States v. Toscanino, 500 F.2d 267 (2d Cir.), reh’g denied, 504 F.2d 1380 (2d Cir. 1974) (violation of international law by U.S. agents would obviate jurisdiction).

495. See Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 216 (1828) (Story, J., opinion), quoted later in Williams v. Heard, 140 U.S. 529, 543 (1891) (Lamar, J., opinion). As Story noted, such is a "right of justice." Id. The right in that case was also protected by treaty.


497. See id. at 605.

498. See Goodrich and De Forest v. Gordon, 15 Johns. 6 (Sup. Ct. of Judicature N.Y. 1818) (private contract for ransom of vessel captured by British is "sanctioned by the law of nations"); Seton v. Low, 1 Johns. 1 (Sup. Ct. of Judicature N.Y. 1799) (interpretation of insurance policy); see also infra note 517.

499. See Teschemacher v. Thompson, 18 Cal. 11, 22-3 (1861) (private property rights guaranteed by the law of nations, independent of treaty stipulations, when territorial cession occurred), quoting Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436 (1838).


numerous criminal prosecutions of individuals for violations of inter-

concerning title to land derived from treaty); The Paquete Habana, 175 U.S. 677 (1900); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 458, 461 (1899) (even though claims before U.S.-Mexico commission were those of governments, private company had claim of right under a "treaty and the award of the commission," and such right is undoubtedly "susceptible of judicial determination"); Jones v. Meehan, 175 U.S. 1 (1899); The Three Friends, 166 U.S. 1, 53 (1897); Hilton v. Guyot, 159 U.S. 113, 163 (1895); Geoffroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Pacific R.R., 120 U.S. 227, 233 (1886); United States v. Rauscher, 119 U.S. 407, 419 (1886) ("The treaty...being...the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty."); Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) (private rights); Chew Heong v. United States, 112 U.S. 536, 563 (1884) (Field, J., dissenting) ("treaties must continue to...be obeyed by the people, applied by the judiciary and executed by the President"); Haustein v. Lynham, 100 U.S. 483 (1879) (private rights under treaty); Coleman v. Tennessee, 97 U.S. 509, 517 (1878); The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) (ship collision at sea); Haver v. Yaker, 76 U.S. (9 Wall.) 32, 34-5 (1870); Fellows v. Denniston, 72 U.S. (5 Wall.) 761, 768-72 (1867); Beard v. Federy, 70 U.S. (3 Wall.) 478, 491-92 (1866) ("rights...entitled by the law of nations to protection"); Fremont v. United States, 58 U.S. (17 How.) 542, 557 (1854) (private property rights protected by customary law); Kennett v. Chambers, 55 U.S. (14 How.) 38, 50 (1852) (Taney, C.J., opinion) (individuals are "personally bound" by treaties and "can do no act, nor enter into any agreement" in violation thereof); United States v. Brooks, 51 U.S. (10 How.) 442, 460 (1850) (private rights under treaty); The Passenger Cases, 48 U.S. (7 How.) 283, 413 (1849); United States v. The Cargo of the Brig Malek Adhel, 43 U.S. (2 How.) 210, 235 (1844) (compensation in damages is also a possible remedy re: piracy); United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 595-96 (1841) (Story, J., opinion) (private rights and protection under treaties and the general law of nations); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) at 536 (argument of counsel re: individual rights and duties under the law of nations); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436, 439 (1838) (private property rights governed by law of nations); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562 (1832) (Marshall, C.J., opinion); Shanks v. Du Pont, 28 U.S. (3 Pet.) 242, 247-48 (1830) (Story, J., opinion) (treaty); Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825) (private property rights protected by treaty); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824) (same); The Apollon, 22 U.S. (9 Wheat.) 362, 367, 369-80 (1824) (violation of law of nations abroad by the U.S., private party is "receive a suitable redress"); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 348, 350-55 (1822); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819) (private property rights protected by treaty); The Anne, 16 U.S. (3 Wheat.) 435, 447-48 (1818); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817) (private property rights protected by treaty); Harden v. Fisher, 14 U.S. (1 Wheat.) 300 (1816) (same); The Nereide, 13 U.S. (9 Cranch) 388, 420 (private "privilege" under the law of nations), 423 (1815); id. at 454 (Story, J., concurring: private "privilege" under the law of nations); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815); Brown v. United States, 12 U.S. (8 Cranch) 110, 128-29 (1814); id. at 153 (Story, J., dissenting); Fairfax's Devisce v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (private property rights protected by treaty); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) ("The reason for [art. III, § 2, cl. 1]... was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals... Whenever a right grows out of, or is protected by, a treaty...whoever may have this right, it is to be protected."); Rose v. Himley, 8 U.S. (4 Cranch) 241, 276-77 (1808) (Marshall, C.J., opinion); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454, 458 (1806); United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J., opinion); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272, 279, passim (1796); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 159-61 (1795); Glass v. The Sloop Betsy, 3 U.S. (3 Dall.) 6, 14 (1794) (district court is "competent to enquire, and to decide, whether... restitution can be made consistently with the law of nations and the treaties..."); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J., opinion) (alien's individual right "revived at the peace, both by the law of nations and the treaty of peace"); Miller v. The Ship Resolution, 2 U.S. (2 Dall.) at 4 ("by the law of nations" a private person "may pursue and recover" property taken in violation of international law "in whatever country it is found"); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) (private cause of action implied from Warsaw Convention); People of Saipan v. United States, 502 F.2d 90, 96-

Also relevant here are the many cases recognizing that a treaty can confer title to land in the U.S. to private individuals even without an act of Congress and that such a right is judicially protectable. See, e.g., Jones v. Meehan, 175 U.S. 1, 10 (1899); Best v. Polk, 85 U.S. (18 Wall.) 112, 116 (1873); Holden v. Joy, 84 U.S. (17 Wall.) at 247 (1872); Crews v. Buchman, 66 U.S. (1 Black) 352, 356 (1861); Doc v. Wilson, 64 U.S. (23 How.) 457, 463 (1859); Mitchell v. United States, 34 U.S. (9 Pet.) 711, 748 (1835); Godfrey v. Beardsley, 10 F. Cas. 520, 522 (C.C.D. Ind. 1841) (No. 5497). Similarly relevant are the cases recognizing that the construction of treaties is the peculiar province of the judiciary and that Congress has no power to settle or interfere with property rights conferred by treaties, "except in cases purely political." See, e.g., Jones v. Meehan, 175 U.S. at 32; Holden v. Joy, 84 U.S. (17 Wall.) at 247 (Clifford, J., opinion) ("no constitutional power to settle or interfere with rights under treaties, except in cases purely political"); Reichart v. Felps, 73 U.S. (6 Wall.) 83, 89 (1867) (Grier, J., opinion) (same, adding: "The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals"); Mitchell v. United States, 34 U.S. (9 Pet.) at 749; see also Santiago Ainsa v. New Mexico & Ariz. R.R., 175 U.S. 76, 81-84 (1899); Smith v. Stevens, 77 U.S. (10 Wall.) 321, 327 (1870). Interestingly, these latter cases thus demonstrate an exception to the so-called "last in time" rule whereby, in the case of an unavoidable clash between a treaty and an act of Congress, the last in time prevails. One might call this the "rights under treaties" exception, "except in cases purely political." Further, since human rights law is hardly "purely political," this recognized exception could prove valuable for the continued protection of fundamental human rights. See Paust, Rediscovering the Relationship, supra note 359.

For further evidence of the early expectation that individuals "could resort to the federal courts to enforce their treaty-based claims," see Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1919 (1983), citing Memorandum from Thomas Jefferson to George Hammond (the British Minister Plenipotentiary) (May 29, 1792), reprinted in 1 AMERICAN STATE PAPERS: 1 FOREIGN RELATIONS 201, 210-11, 215 (1832). For early recognition of private rights and obligations under the law of nations, see supra note 11; see also 3 H. Grotius, supra note 11, ch. 18, § 1 ("what is permissible for private individuals ... by the law of nations"). An early draft of Article III of the U.S. Constitution also declared that "the Judiciary [shall] have authority to hear and determine ... by Way of Appeal ... all cases in which foreigners may be interested in the Construction of any Treaty ... or on the Law of Nations ...." Document VII of the Committee of Detail, reproduced in 2 Farrand, supra note 83, at 157. The draft was dropped, possibly because the federal judiciary was given far more than mere appellate jurisdiction and Document VII was conditioned on an appellate competence. See also 3 Farrand supra note 78, at 608 (appeal of "all Causes wherein Questions shall arise on the Construction of Treaties made by U.S. — or on the Law of Nations") (the Pinckney Plan), 117 ("as well as the trial of questions arising on the law of nations, the construction of treaties. ...") (1787 Pinckney Plan); 2 Farrand supra note 83, at 136 (the Pinckney Plan), 143 (legislative power to punish "offences against the law of nations"), 168 (same in Committee of detail Doc. IX), 182 (Madison's report), 316, 570, 595, 614-15; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292, 244, 238 (M. Farrand ed. 1937) ("foreigners where treaties are in their favor"), 22. As the cases noted above demonstrate, subsequently there was no real distinction made between suits resting on treaties as such or the more general law of nations; see also Paust, Self-Executing Treaties, supra note 359. Before the North Carolina Convention, W.
national law have occurred throughout our history.\textsuperscript{502} Civil or crimi-

Davie had also recognized that "treaties . . . by the law of nations . . . are the supreme law of the land to their respective citizens or subjects. All civilized nations have concurred in considering them as paramount to an ordinary act of legislation." W. Davie, speech of July 28, 1788, reproduced in 3 Farrand, supra note 78 at 347; see also The Federalist No. 80 (A. Hamilton) ("cases arising upon treaties and the laws of nations" are appropriate); The Federalist No. 22 (A. Hamilton) ("treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."); 4 J. Elliot, supra note 477, at 158 (Davie in North Carolina in 1788: "It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners" and should be protected by the federal judiciary); id. at 267 (Rutledge in South Carolina in 1788: "every treaty was law paramount, and must operate . . . this treaty is binding in our courts and in England" re: private duties); id. at 277-79 (Pinckney: treaties are "paramount to the laws of the land," create individual rights and duties, and have the force of law); Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 Law & Hist. Rev. 223, 232 (1986) ("law of nations" was "within the federal judicial power . . . within the language of Article III . . ."). From the many cases and authorities noted above (and infra note 502), it is evident that in terms of the views of the Founders and patterns of practice before, during, and for years after the Constitutional Convention customary international law was directly incorporable for both civil and criminal sanctions despite a lack of express reference to custom in the Constitution outside of article I, § 8, clause 10 (the concurrent power of Congress to define and punish offenses against the "law of nations"). Thus, constitutionally, in terms of views of the Founders and relevant practice, "[t]he judicial power"(art. III, § 1) includes the power to apply customary international law (see also supra note 570) and the Executive is bound to faithfully execute such "Laws" (art. II, § 3; see also Paust, The President Is Bound by International Law, supra note 395).

There is also early evidence of the expectation that private causes of action and remedies for violations of international law were also appropriate in state courts. In 1781, a resolution of the Continental Congress recommended that states further "authorize suits to be instituted for damages by the party injured" by a violation of international law, "and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." See 21 Journals of the Continental Congress 1137 (G. Hunt ed. 1912). See also supra text accompanying notes 486-493, 498-499.

nal sanctions for private violations of international law were often interchangeable depending on who was seeking enforcement, an individual, the government or both. And there have been several in-

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For relevant British cases, see The Fortuna, 165 Eng. Rep. 1240, 1241, 1 Dodson's Rep. 81, 85 (1811) ("any trade contrary to the general law of nations... may subject the vessel employed in that trade to confiscation"); Madrazo v. Willes, 106 Eng. Rep. 692, 694, 5 Sergt. & Lowb. 313, 3 BE ALD 353, 358 (1820) (Best, J.) ("If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation"), quoted in Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 213 (1836); 3 Elliot, supra note 85, at 507 (Nicholas in Virginia, 1788, recounting British punishment of "offence against the law of nations"). In Madrazo, Judge Bailey also recognized the broad right of aliens to a remedy: "A British Court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a British subject to them." Id. (emphasis added). These cases also appeared in the appendix to The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

President Washington's Proclamation of Neutrality of 1793 had warned U.S. citizens that they were liable to punishment under the law of nations and would be prosecuted in U.S. courts. See, e.g., Proclamation of Neutrality No. 3, April 22, 1793, reprinted in 11 Stat. 753 (App. 1859), cited and discussed in 1 Op. Att'y Gen. at 58. For early recognition of a "crime against the law of nations," see supra note 11 and infra note 597.

In 1781, the Continental Congress had recommended to the states that they enact laws to punish offenses against the law of nations. See 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (G. Hunt ed. 1912). The 1781 resolution listed certain violations and ended with general clauses incorporating all "infractions of treaties and conventions to which the United States are a party" and all "offences against the law of nations, not contained in the foregoing enumeration." Id. at 1137; see also Note, Enforcing the Customary International Law of Human Rights in Federal Courts, 74 CAL. L. REV. 127, 129-30 n.15 (1986).

503. See cases and opinions cited supra in notes 486-488, 501-502; United States v. The Cargo of the Brig. Malek Adhel, 43 U.S. (2 How.) at 235 (both confiscation and compensation in damages are possible remedies); Talbot v. Jansen, 3 U.S. (3 Dall.) at 160 (alien can proceed "criminaliter or civiliter, to have restitution of his vessel"); United States v. La Jeune Eugenie, 26 F. Cas. 832, 845-48 (C.C.D. Mass. 1822) (No. 15,551); Davison v. Seal-skins, 7 F. Cas. 192, 194 (C.C.D. Conn. 1835) (No. 3661) (civil suit to recover property taken by pirates is also possible); 3 Op. Att'y Gen. 484, 490 (1839) (same); 1 Op. Att'y Gen. 141, 147 (1804) (foreign minister may civilly "prosecute" an offence against the law of nations "either in the district or the Supreme Court of the United States, or by an indictment in the district court" — civil prosecution in the district court probably would have occurred under the Alien Tort Act); Paust, Litigating Human Rights, supra note 468, at 84-85, 90-91; Randall, supra note 500, at 41, 48-50, 498-99; Note, supra note 502, at 129, 130 n.15 (Continental Congress had early recommended to the states that they punish offenses against the law of nations and also "authorize suits for damages by the party injured "); 137 & n.63 (quoting Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 864 (D. Md. 1961)), 147 n.119 ("both civil and criminal liability in any jurisdiction where the perpetrator might be found"); see also Dickinson, The Law of Nations As Part of the National Law of the United States, 101 PA. L. REV. 26, 29-30 (1952); supra note 372.
stances of litigation by private persons against our governments (both federal and local) and foreign governments concerning actions that involved violations of international law.\textsuperscript{504} For example, in one of the more recent human rights cases, District Judge Rogers recognized that “[i]nternational law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case.”\textsuperscript{505} “[A]rbitrary detention,” he noted, “is prohibited by customary international law”\textsuperscript{506} and “[t]herefore is judicially remedial as a violation of international law.”\textsuperscript{507} He added “[t]his Court is bound to declare such an abuse and to order its cessation. . . . [T]he courts cannot deny . . . protection. . . .”\textsuperscript{508}

The propriety of judicial attention to rights and duties of individuals under customary international law has also been affirmed more expressly by the U.S. Supreme Court in 1942:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of . . . individuals.\textsuperscript{509}

And, as noted previously, the Court had recognized earlier in a landmark opinion that international law “must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented.”\textsuperscript{510} With respect to treaty-based rights, the Supreme Court has also noted that certain rights are:

capable of enforcement as between private parties in the courts of the country . . . A treaty, then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the pri-


\textsuperscript{505} Fernandez v. Wilkinson, 505 F. Supp. at 798.

\textsuperscript{506} Id.; see also supra notes 423, 448.

\textsuperscript{507} Fernandez v. Wilkinson, 505 F.Supp. at 798.

\textsuperscript{508} Id. at 799-800.

\textsuperscript{509} Ex parte Quirin, 317 U.S. at 27-28; see also Bank of Augusta v. Earle, 38 U.S. (13 Pet.) at 536 (argument of counsel: “the law of nations is . . . as binding and obligatory upon courts of justice, and upon individuals, as any other part of the common law”); Strother v. Lucas, 37 U.S. at 436-37 (a private right acquired by custom “is as inviolable as if it was founded on a written law.”), 439 (duty to apply international law); The Nereide, 13 U.S. (9 Cranch) at 421; Miller v. The Ship Resolution, 2 U.S. (2 Dall.) at 33 (court duty to administer “the law of nations dispassionately and righteously”).

\textsuperscript{510} The Paquete Habana, 175 U.S. at 700 (emphasis added); see also supra notes 467, 509 and infra notes 511, 513, 515, 570, 596.
vate citizen or subject may be determined.\footnote{511}

Applying this language more recently, Circuit Judge Trask, in a concurrence, affirmed that if a "treaty contains language which confers rights or obligations on the citizenry . . . then, upon ratification, it becomes a part of the law of the land under Article VI."\footnote{512} The Supreme Court, with a more mandatory tone, has also noted in this regard:

A treaty . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and \textit{must} be enforced by them in the litigation of private rights.\footnote{513}

Similarly, the Court has declared, with respect to private rights guaranteed by a treaty, that a treaty:

stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.\footnote{514}

Early in our history, while addressing the purpose of article III, section 1 of the U.S. Constitution and the general right to judicial protection of treaty-based rights, Chief Justice Marshall affirmed:

The reason for inserting that clause in the constitution was, that all per-

\footnotetext[511]{511}{Edye v. Robertson, 112 U.S. at 598-99, adding: "the court resorts to the treaty for a rule of decision for the case before it, as it would to a statute." The same point can be found in United States v. Rauscher, 119 U.S. at 419, Strother v. Lucas, 37 U.S. at 438, and \textit{In re Metzer}, 17 F. Cas. at 234 ("It has been repeatedly decided by the supreme court that under . . . the constitution, a treaty becomes equivalent to a law of congress, and where its stipulations apply, they must be observed and enforced by the court, in adjudging . . . upon individual rights . . . ."); \textit{see also} Chew Heong v. United States, 112 U.S. at 563 (Field, J., dissenting) ("treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed"); Baker v. City of Portland, 2 F. Cas. at 473 (treaty "is the supreme law of the land, and the courts are bound to enforce it fully and fairly"); Blandford v. State, 10 Tex. App. 627, 640-41 (1881) (treaties are "to be regarded and enforced by the State judiciary as equivalent to acts of the Legislature, without the aid of legislative enactments . . . duty of the courts of the State to take cognizance of, construe, and give effect to the treaties"); Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878) (treaty is "a living law, operating upon and binding the judicial tribunals, state and federal, and these tribunals are under the same obligations to notice and give it effect as they are to notice and enforce the constitution . . . .").}

\footnotetext[512]{512}{People of Saipan v. United States, 502 F.2d at 101 (Trask, J., concurring); \textit{see also} id. at 96-97 (private cause of action); cf. Paust, \textit{Effective Litigation}, \textit{supra} note 182, at 238-42, and references cited therein.}

\footnotetext[513]{513}{Maiorano v. Baltimore & O.R.R., 213 U.S. at 272-73 (emphasis added); \textit{see also} Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1857); Strother v. Lucas, 37 U.S. (12 Pet.) at 439; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) at 360, 370-71; Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) at 348-49; Ware v. Hylton, 3 U.S. (3 Dall.) at 237 ("National or federal judges are bound by duty and oath to the same conduct" as state judges); \textit{In re Parrott}, 1 F. at 502; cases cited \textit{supra} notes 509, 511, and \textit{infra} note 515.}

\footnotetext[514]{514}{Asakura v. City of Seattle, 265 U.S. at 341; \textit{see also} LaAbra Silver Mining Co. v. United States, 175 U.S. at 458, 461 (private claim of right under a treaty is undoubtedly "susceptible of judicial determination"); Blandford v. State, 10 Tex. App. at 640-41.}
sons who have real claims under a treaty should have their causes decided by the national tribunals. . . . Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.515

Private acts in violation of treaties conferring private rights also received the early attention of the Court in connection with attempts to enforce private contracts. As Chief Justice Taney declared in 1852, individual citizens are "personally bound" by treaties.516 An individual, the Chief Justice noted, "can do no act, nor enter into any agreement" in violation of a treaty, adding: "And if he does so he cannot claim the aid of a court of justice to enforce it."517 Later, while quoting the Chief Justice, a lower federal court affirmed that a private contract in contravention of a treaty recognizing equal treatment for Chinese and U.S. citizens "is absolutely void, and should not be enforced in any court."518

More recently, in Filartiga v. Pena-Irala,519 the District Court for the Eastern District of New York awarded punitive damages of ten million dollars to private litigants, primarily because of the serious nature of the violation of international law engaged in by the private defendant.520 The district court noted that Congress, by enacting the Alien Tort Statute, had also given the federal courts "power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law."521 The court noted further that it "must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation" of torture made generally by the international community;522 and, since it viewed the particular infraction as being quite serious, the court decided that pu-

517. Kennett v. Chambers, 55 U.S. (14 How.) 38, 50 (1852); see also Hurd v. Hodge, 334 U.S. 24, 35 (1948) (private agreements subject to public policy of the United States manifest in treaties); and supra note 498. It was recognized earlier in England that "a claim founded on piracy, or any other act which, in the general estimation of mankind, is held to be illegal and immoral, might . . . be rejected in any Court upon that ground alone." The Diana, 165 Eng. Rep. 1245, 1247, 1 Dodson's Rep. 95, 100 (1813); see also Madrazo v. Willes, 106 Eng. Rep. 692, 693, 5 Sergt. & Lowb. 313 (1820) (Bayley, J.), stating: "It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action."
520. Id. at 863-67.
521. Id. at 863; see also Randall, supra note 500, at 499 (Act recognizes "the duty of the tortfeasor to compensate the injured alien.").
522. Id. at 863.
nitive damages were appropriate. The court also noted that although punitive damages have rarely been awarded by international or domestic tribunals in cases involving violations of international law such cases exist as precedent and that, moreover, "[t]he Supreme Court . . . has recognized that punishment is an appropriate objective under the law of nations, saying . . . that [a particular infraction] ' . . . may be punished by all the penalties which the law of nations can properly administer.' "

Actually, the law of nations hardly ever prescribes appropriate penalties or civil sanctions. This fact, however, has not inhibited application of civil or criminal sanctions for more than two hundred years (and whether or not a statutory aid exists). Moreover, as recognized at least since 1792, the power to develop remedies to effectuate international law recognizably exists: "the law of nations . . . is enforced by . . . the municipal law of the country; which . . . may . . . facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered."  

B. Deviant Opinions in Tel-Oren

Despite such clear guidance and ample precedent, however, a few federal judges still stray from the proper application of international law and seem needlessly to be unaware of the rich history of judicial attention to individual rights and duties under international law. One such instance is evident in the controversial and unexpected opinions of Judges Edwards and Bork in Tel-Oren v. Libyan Arab Republic, a
relatively recent decision in the Circuit Court for the District of Columbia. Of the two opinions, that of Judge Edwards is closer to the precedents, but at least one point at issue seemed to throw his analysis off — that of individual duties or liability under international law. As Judge Edwards stated, without evident familiarity with the cases and opinions noted above, "I do not believe the law of nations imposes the same responsibility or liability on non-state actors . . . as it does on states and persons acting under color of state law." 527 Later he added, wrongly:

I do not believe that the law of nations . . . holds individuals responsible for most private acts; it follows logically that the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal courts. 528

After calling twice for "direction from the Supreme Court" 529 and rightly noting that "[t]hrough the 18th century and into the 19th, writers and jurists believed that rules of international law bound individuals as well as states," 530 he opined, incorrectly, that by the twentieth century a view (shared by a few positivist textwriters) "became firmly entrenched" that "states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations." 531 Greater attention to the guidance offered already by the Supreme Court (as noted above) should

U.S. Supreme Court urging denial of the petition for a writ of certiorari argued: "The panel's inability to agree upon a rationale for its ruling . . . coupled with the length and complexity of the three concurring opinions, leaves the precise basis and scope of the appeals' judgment unclear. Left undisturbed, that ambiguous judgment would have little, if any, precedential value." See Brief for the United States as Amicus Curiae, Jan. 30, 1985, at 8-9, reprinted in 24 I.L.M. 427, 431-32 (Mar. 1985).

527. Tel-Oren v. Libyan Arab Republic, 726 F.2d at 776 (Edwards, J., concurring); see also infra note 540.

528. Id. at 780 n.4; see also id. at 792. Unfortunately, law students have begun to follow such unfounded theory instead of recognizing actual trends in judicial decisionmaking which refute such nonsense. See Note, Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers, 74 GEO. L. J. 163, 167, 190, 196-97 (1985). But see id. at 165 ("human rights norms are now part of the Alien Tort Statute's law of nations clause"). It is also nonsense to argue that individual responsibility, civil and/or criminal, has been limited here or abroad "to a small class of 'crimes against humanity' . . ." See id. at 197, supposedly following the unfounded theory of Professor Hassan noted in Hassan, International Human Rights and the Alien Tort Statute: Past and Future, 5 HOUS. J. INT'L L. 131, 134 n.16, 136 (1982). Professor Hassan's actual remarks, however unempirical, were less restrictive. See Hassan, id. at 136-37.

529. See Tel-Oren v. Libyan Arab Republic at 776, 792; see also id. at 775, 795.

530. Id. at 794, citing United States v. Smith, 18 U.S. (5 Wheat.) 153; Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111.

have led Judge Edwards to abandon his impression that twentieth century persons have no rights or duties "devolved from the law of nations." Unfortunately, he seemed to be unfamiliar with the ample judicial precedent concerning the use of human right precepts and more general international law in private litigation. His conclusion, which is conspicuously out of line with relevant trends in domestic judicial decisionmaking, is more difficult to understand when he recognizes that "a number of [twentieth century] jurists and commentators" disagree with his viewpoint and that, at the international level, the International Military Tribunal also affirmed in the twentieth century that the law of nations "imposes duties and liabilities upon individuals as well as upon States."\(^5\)\(^3\)\(^2\)

Notably absent also from Judge Edwards' analysis was any mention of the fact that human rights law has received even greater attention domestically and internationally in the twentieth century and that, as a part of such law, individuals have the express right to an effective remedy in national tribunals for deprivations of their human rights.\(^5\)\(^3\)\(^3\) Similarly, he, like his colleagues, made no mention of the

\(^5\)\(^3\)\(^2\). Tel-Oren v. Libyan Arab Republic, 726 F.2d at 792; see also Paust, My Lai and Vietnam, supra note 502; Paust, Federal Jurisdiction, supra note 504, at 211-15, 223-25, and references cited therein; Randall, supra note 500, at 492-501, and references cited therein.

\(^5\)\(^3\)\(^3\). See also Tel-Oren v. Libyan Arab Republic, 726 F.2d at 780 n.4 ("Plaintiffs here are not able to point to a right to sue in international law"). On this right, see supra text accompanying notes 466-482. Judge Edwards even goes so far as to say that "the law of nations never has been perceived to create or define the civil actions to be made available," adding: "the law of nations simply does not create rights to sue." 726 F.2d at 778-79. He also stated that "for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations." Not surprisingly, he is unable to cite a single case standing for such invented notions. Of course, article 8 of the Universal Declaration stands in opposition to such rash and erroneous assertions, and so do the many cases and opinions noted above. See, e.g., supra notes 477, 479-480, 483, 486-491, 501, 509.

Strangely, Judge Edwards does recognize: "In obvious contrast is a treaty, which may create judicially enforceable obligations ... Unlike the law of nations, ... treaties establish both obligations and the extent to which they shall be enforceable ... As Judge Bork states, for two hundred years it has been established that treaties by their terms and context may create enforceable obligations." 726 F.2d at 778 n.2. He adds: "a treaty and the law of nations are entirely different animals." Id. A recent student note follows the approach of Judge Edwards. See Note supra note 385, at 958. To be kind, it is far from obvious, however, that they are. More generally, the phrase "law of nations" has been used like the phrase "international law" to cover both custom and treaty-based law. See, e.g., BLACK'S LAW DICTIONARY 999 (international law), 1076 (law of nations) (3d ed. 1933); C. PARRY & J. GRANT, supra note 524, at 210, "law of nations" (is synonymous with "international law"); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) at 560 (argument of counsel: "all the voluntary and customary law of nations"); La Nereyda, 21 U.S. (8 Wheat.) 108, 142 (1823) (argument of counsel quoting The Estrella); The Estrella, 17 U.S. (4 Wheat.) 298, 307 (1819) ("The customary and conventional law of nations"); L'Invincible, 14 U.S. at 248 (argument of counsel: "customary, and conventional law of nations"); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J., opinion) ("The law of nations ... is in part unwritten, and in part conventional"); Ware v. Hylton, 3 U.S. (3 Dall.) at 215 (argument of counsel: "the conventional, or customary, law of nations"); id. at 227 (Chase, J., opinion) ("The law of nations may be considered of three kinds, to wit: general, conventional,
significant brief by the Executive in *Filartiga* quoted above with regard both to private rights and duties under international law. Again, he identified a few of the federal judicial decisions and an opinion of the U.S. Attorney General, all from the twentieth century, which stand as "support for the concept of individual responsibility," and he noted other early cases on this point. He was unable to cite a single federal case supporting his view that it is now "firmly entrenched" that individuals are "not able to assert rights and be held to duties devolved from the law of nations." To be kind to Judge Edwards, his review of the actual trends in decision was far from adequate and his reasoning and conclusions on this point are less than convincing. There are no cases dictating his conclusions, nor has any federal judge previously declared that private duties are nonexistent under international law. Such a statement would, in fact, be patently false.

Seemingly at the base of Judge Edwards' curious remarks about individual responsibility was an unnecessary confusion with respect to the nature and functioning of international legal processes and the role of domestic tribunals in the identification, clarification and application...
of international law, a role demonstrated clearly even in federal judicial opinions since the late 1700s. Judge Edwards seems to have assumed that merely because there had been a lack of full and effective judicial remedies for all private persons at the international level, non-state actors could (and can) assert rights only through diplomatic processes, that states alone were (and are) able to assert rights, and that only states or those acting "under color of state law" were (and are) liable. Not one of these assumptions is correct however, and the actual trends in judicial decision noted above provide sufficient refutation.

In several of our own cases, non-state actors have asserted rights

538. See id. at 792 & n.22. This error is being repeated. See Note, supra note 528, at 176-77 & nn.109-110. But see id. at 177 n.115.

539. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 792, 794. For a related and confused definition of the "law of nations" that is equally erroneous in its insistence on state involvement, see Cohen v. Hartman, 634 F.2d 318, 319 (5th Cir. 1981); see also Note, supra note 502, at 139-41 (recognizing that two earlier cases had adopted a "statist conception of international law" prior to the "seminal" decision in Filartiga).

Judge Edwards also stated that "[c]lassical international law was predominantly statist" and the fact "[t]hat the International Court of Justice permits only party-states to appear in cases before the court highlights this outlook." 726 F.2d at 792 n.22. Again, he demonstrates confusion here with respect to the nature and functioning of international law both at the international and domestic levels. It does not follow that merely because private claims cannot be brought directly before the I.C.J. that they can be brought nowhere else. Further, "classical" international law of the eighteenth and nineteenth centuries, as demonstrated herein by actual trends in decision, was not "predominantly statist," although remedies at the international level were primarily state-controlled. Within the overall process, domestic courts and other remedial processes were expected to play and did play a primary role with respect to individual claims; see also Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27-28 (U.S. courts are competent to apply international law in case where private foreign claims are brought against U.S. Executive, and such domestic remedies must first be exhausted before private claim can be taken up by foreign state). Here, Judge Edwards would turn history on its head to deny private claims and remedies in domestic courts, but history cannot be thus manipulated. The trends in actual decision with respect to private claims, private violations, and private remedies should no longer be ignored. Importantly also, not one of the writers that Judge Edwards cites for his viewpoint addressed actual trends in judicial decision at the domestic level. See 726 F.2d at 792-94, and references cited therein. All referred to remedies available at the international level; and, significantly, the early textwriters disagreed among themselves on this latter question. See infra note 601. This is the area of disagreement that Judge Edwards got a glimpse of, not remedies at the domestic level.

540. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 792-93. This error is being repeated. See Forti v. Suarez-Mason, 672 F. Supp. 1351, 1546 (N.D. Cal. 1987); Kirgis, Comment, 82 AM. J. INT'L L. 323, 329, 330 n. 31 (1988); Note, supra note 528, at 190, 194, 196-98, also quoting Blum & Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga, 22 HARV. INT'L L. J. 53, 110 n.240 (1981) (erroneously suggesting a need for acts to be "sufficiently state-related"). But see Note, supra note 528, at 198 (human rights law is violated by nonstate actors re: terrorism); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J., opinion) ("Alien Tort Statute ... may conceivably have been meant to cover only private, nongovernmental acts...", although relevant customary international law thought not to "reach private, nonstate conduct of this sort for the reasons stated by Judge Edwards in Tel-Oren ... at 791-96 . . ."); Forti v. Suarez-Mason, 672 F. Supp. at 1540-41 ("defendant's contention that the law of nations extends only to relations between sovereign states is unsupported" and "[t]he Second Circuit has expressly disavowed this . . . purely private torture will not normally implicate the law of nations . . .").
under international law in our domestic tribunals. And in several U.S. cases, private individuals who were not acting "under color of state law" were recognizably liable both civilly and criminally for violations of international law. Indeed, Judge Edwards' purported distinction between private liability flowing from acts "under color of state law" and acts "separate from any state's authority or direction" had simply been invented, for there are no cases or opinions of our Attorneys General even suggesting such a dichotomy, much less that individual responsibility under international law is somehow less clear or proper if the private actor was not acting "under color of state law." If anything, purely private conduct is more clearly san-

541. See supra notes 483, 485-491, 500-501, 503, 511, 514, 519; see also supra notes 516-518.
542. See supra notes 483, 486-491, 500-503, 511-513, 519; see also 2 J. Kent supra note 28, at 3 ("The law of nations . . . is equally binding in every age, and upon all mankind"); E. VatteP, supra note 411, at preliminaries, § 11 (all persons are "bound to the performance of their duties towards the rest of mankind"); A. Gentili, supra note 11 (pirates "had violated the common law of nations . . . Piracy is contrary to the law of nations"); supra notes 516-518.
543. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 793; see also id. at 776, 780 n.4, 792, 794-95.
544. He nearly blames Professor Louis Sohn for this invented dichotomy. See id. at 793, citing Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am. U. L. Rev. 1, 9-11 (1982). Actually, Professor Sohn made no such distinction but asserted instead that today there can be doubt "that individuals are punishable." See id. at 11. It is true that Professor Sohn had stated, quite incorrectly, that events at the end of World War II "completely changed the status of individuals under international law" (see id. at 9); and Judge Edwards followed suit: "Commentators routinely place the origin of this development [i.e., individual liability] at the Nuremberg Trials." Tel-Oren v. Libyan Arab Republic, 726 F.2d at 793, citing Sohn supra at 9-11. But, again, Professor Sohn made no distinction between those acting "under color of state law" and those who do not. Moreover, as our own judicial decisions from the time of Respublica v. De Longchamps and Henfield's Case demonstrate, Professor Sohn's assertion about the "origin" of individual responsibility (Edwards' phrase) or the "complete change" of individual status (paraphrasing Sohn) is simply incorrect. Individual responsibility was recognized at least since 1474 and, in our own country, in hundreds of cases from the time of the American Revolution. See, e.g., Paust, After My Lai, supra note 502, at 106, 108-118, and references cited therein.

Importantly also, Sohn's article should have provided sufficient guidance to Judge Edwards concerning "the liability of private individuals" in the twentieth century. Compare 726 F.2d at 792-94 with Sohn, supra at 10-11 & nn.30 and 35. Professor Sohn rightly noted that such liability exists also at the international level, although many of the treaties he cited are by their terms enforced primarily in domestic tribunals, so it is not proper to associate even Sohn's erroneous statement about the "origin" of such responsibility with the confusion evident in Edwards' opinion about sanctions available at the international level and the relationship between a lack of full and complete remedies in the international arena and supposedly "logical" conclusions that there are no rights "to be free from the private acts of individuals" or "to assert in a federal court." 726 F.2d at 780 n.4. Edwards seems to note that, here at least, Sohn is innocent. See id. at 792 ("shift since 1945 in individual rights and duties under international law"), 793 ("individual liability . . . well-implanted in the law of nations"). It is a bit of a mystery, however, why Edwards chose to follow the older and erroneous views of a few positivists (i.e., Korowicz and Lauterpacht, see 726 F.2d at 794) instead of Sohn's, the treaties cited by Sohn, and the other writers, cases and opinions noted by Judge Edwards which recognize the fact of individual liability under international law (see 726 F.2d at 792-94). The dichotomous myth invented by Judge Edwards has also recently misled others. See Note, supra note 385, at 961. But see id. at n.117 (noting no distinction between state and non-state actors under the 1949 Genocide Convention and 1926 Slavery Convention).
tionable, since there is not even a possible hint of any claim to immunity in such cases.

It is worth stressing here, however, that when international law has been violated, even those acting in the name of the state should not be entitled to immunity.545 Judges Edwards and Bork were both in


As recognized implicitly in the U.N. Charter and the Universal Declaration of Human Rights, the pretended cloak of sovereignty ends where human rights begin. See generally Paust, Federal Jurisdiction, supra note 504, at 221-25, 229-31, and references cited therein; 79 PROC. AM. SOC'Y INT'L L. 363, 378 (1985); Note, supra note 502, at 168; see also supra note 466; Universal Declaration of Human Rights, art. 21(3); Paust, Authority: From a Human Rights Perspective, 28 Am. J. Jurisprud. 64 (1983); Paust, Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test, 9 Yale J. World Pub. Ord. 178 (1982); United States v. Von Leeb (The High Command Case)(1948); 11 TRIALS
error, therefore, when they stated that jurisdiction over Libya is neces-

OF WAR CRIMINALS 462, 489 (1950) ("International law operates as a restriction and limitation on the sovereignty of nations.") One such condition involves the duty of every state, through joint and/or separate action, to respect and observe "human rights and fundamental freedoms in accordance with the Charter." See 1970 Declaration on Principles of International Law, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970); see also U.N. CHARTER, preamble, arts. 1(3), 55(c), 56; Paust, Effective Litigation, supra note 182, at 235-38, and references cited therein. For these reasons, it should be universally recognized that an illegal act is incapable of protection by the judiciary. To hold otherwise would be to further illegality, to give it extraterritorial recognition and legal effect, to fulfill its illegal nature at the hands of a court of law. This a court of law must not do. Thus, a violation of law poses the one necessary exception to immunity, one implicit necessarily in any truly legal system; see also supra notes 477 and infra 578-579.

Acts taken in violation of international law are not and cannot be acts performed in the exercise of a state's legitimate sovereign authority since no state has the authority to violate international law. Moreover, such acts are recognizable treated also as if they are outside the sovereign function and are like merely "private" acts which are not entitled to immunity. See, e.g., Letelier v. Republic of Chile, 488 F.Supp. 665, 673 (D.D.C. 1980) (cannot claim sovereign immunity because no lawful discretion exists to perpetrate conduct in violation of international law); M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 703 n.537 (1961); Wright, Legal Positivism and the Nuremberg Judgment, 42 AM. J. INT'L. L. 405, 410-11 (1948); Wright, War Criminals, 39 AM. J. INT'L. L. 257, 265-66 (1945), and references cited therein; see also Estate of Domingo & Viernes v. Philippines, No. C82-1055V (W.D. Wash. 1985), appeal denied, DC CV-82-1055 DSV (9th Cir. 1985); Persinger v. Iran, 690 F.2d 1010, 1019 (D.C.Cir. 1982) (advance sheets; opinion excluded from bound volume) (no discretion to violate international law), reprinted in 22 I.L.M. 404, 412 (1983), vacated on other grounds, 729 F.2d 835 (D.C. Cir. 1984); The Pesaro, 277 F. 473, 477 (S.D.N.Y. 1921), and references cited therein; La Jeune Eugenie, 26 F. Cas. at 846 ("no nation can rightfully permit [a violation] . . . no nation can privilege itself to commit a crime against the law of nations"); Henfield's Case, 11 F. Cas. 1099, 1104 (C.C.D. Pa. 1793) (No. 6360) (foreign "sovereign having no right to command what is contrary to the law of nature"); H.R. REP. 94-1487, at 6605, 6613, 6616 ("private" acts of government are meant to be outside grant of immunity); Olsen by Sheldon v. Mexico, 729 F.2d 641, 645 (9th Cir. 1984) (no immunity for "private or commercial acts (jure gestionis)"); cert. denied sub nomine United Mexican States v. Olsen, 469 U.S. 917 (1984); International Military Tribunal at Nuremberg, quoted in M. McDougal & F. Feliciano, supra ("the State . . . moves outside its competence").

Similarly, there is no threat to a foreign state's legitimate "independence" posed by application of the precept of non-immunity for violations of international law because no state is "independent" in an absolute sense and no state's relative "independence" allows it to violate international law. Thus, no state is "independent" of international law; see also Olsen by Sheldon v. Mexico, 729 F.2d at 650 (F.S.I.A. reflects realities of interdependence and jurisdiction thereunder does not pose and impermissible affront to sovereignty); The Peterhoff, 72 U.S. (5 Wall.) 25, 57 (1866) ("we administer the public law of nations, and are not at liberty to inquire what is for the particular . . . disadvantage of our own or another country"); H. Wheaton, ELEMENTS OF INTERNATIONAL LAW 119-20 (3d ed. 1846) (even outside military intervention could be permissible because sovereignty was not absolute even within a state's own territory and it could not be exercised in a manner "inconsistent with the equal rights of other States."); Wildhaber, Sovereignty and International Law, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 425, 430 (Grotius, Vattel, Locke), 432 437-38, 440-41 (R. MacDonald & D. Jonston eds. 1983).

Additionally, the recent Supreme Court opinion in Amerada Hess can be distinguished when a private lawsuit rests upon a human rights claim. In such a case Article 8 of the Universal Declaration expressly guarantees the right to an effective remedy in domestic tribunals, a right and guarantee that has become part of our treaty obligations under the U.N. Charter as well as a right and obligation under customary international law. See supra notes 369-70 and accompanying text, and supra text accompanying notes 466, 480-85; Paust, Effective Litigation, supra note 182, at 228-30, 234-37, 239, 257. By initially interpreting the F.S.I.A. in a manner that denies the private right to an effective remedy for human rights violations, one would set up a conflict between such an express right to a remedy (based in treaty law) and the F.S.I.A., one of the
sarily barred by the Foreign Sovereign Immunities Act, although plaintiffs may not have been adequately aware of the norm of nonimmunity for violations of international law to properly present their claim.

Judge Edwards also erred when he attempted to impose limits on the applicability of the Alien Tort Statute. He assumed that torts that do not occur on U.S. territory, that do not amount to "universal crimes," or that where not committed abroad by "American citizens" would necessarily involve "disputes wholly involving foreign states." He added that such limits are consistent with extraterrito-

circumstances recognized by the Court that will trigger the § 1604 exception. See Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683, 691 (1989) ("This exception applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA," when international agreements "create private rights of action"). Moreover, courts should interpret statutes (like the FSIA) consistently with international law if at all possible. See, e.g., Paust, Rediscovering the Relationship, supra note 359, at 400 n.9. Thus, proper interpretation of § 1604 should help guarantee the express right to an effective remedy for human rights violations. Even if there is an unavoidable clash with the statute, application of the "rights under treaties" exception to the last-in-time rule and/or the preference for the primacy of customary international law will allow the right to an effective remedy to prevail. On these latter doctrines, see id., at 410-14, 418-45.

Further, it is the judiciary that has been granted the power (indeed, the textual commitment) under Article III of the Constitution to apply treaty law in cases or controversies before the courts. See Paust, Self-Executing Treaties, supra note 359, at 760 n.1, 777 & n.101. The same holds true with respect to customary international law. See Paust, Rediscovering the Relationship, supra note 359, at 420 n.55; infra note 570. Additionally, the courts have no power to rewrite § 1604 of the FSIA as if it granted an immunity for public acts in violation of international agreements. Courts should also interpret federal statutes consistently with and in order to effectuate international law, and should interpret the Alien Tort Statute and the Foreign Sovereign Immunities Act accordingly; see also Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d at 425-27, rev'd, 109 S.Ct. 683 (1989); Paust, Rediscovering the Relationship, supra note 359 at 400 n.9. In particular, such legislation should be interpreted in order to effectuate the express human right to an effective remedy guaranteed in Article 8 of the Universal Declaration and our treaty obligations under the U.N. Charter.

Judge Blackmun also complained of the lack of an adequate briefing in Amerada Hess. See 109 S.Ct. 683, 692 (Blackmun, J., concurring in part).

In their opinions, Edwards and Bork merely provide their conclusions. Lack of further cites or discussion suggests unfamiliarity with the claim of nonimmunity under the FSIA for violations of international law and relevant cases or other citations. Judge Edwards even nearly admits a lack of "working familiarity" with international law and its incorporation into domestic law. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 782. Unfortunately, most lawyers and judges have never taken a course on international law, much less a course or seminar on human rights law; see also D'Amato, Book Review, 34 J. LEGAL EDUC. 742 (1984); Gordon, American Courts, International Law and "Political Questions" Which Touch Foreign Relations, 14 INT'L LAW. 297, 309-11 (1980); Lillich, Comment, The Teaching of International Human Rights Law in U.S. Law Schools, 77 AM. J. INT'L L. 855 (1983); Q. WRIGHT, supra note 359, at 81; Paust, Comment, Foreign Affairs are Foreign to Me, INT'L PRAC. NOTEBOOK 11 (I.L.A. June 1980). Justice Blackmun also complained of the lack of an adequate briefing in Amerada Hess. See 109 S.Ct. 683, 692 (Blackmun, J., concurring in part).

546. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 776 n.1 (Edwards, J.), 805 n.13 (Bork, J.). Judge Bork made the same error in another recent case, although there was no mention of section 1604 of the Foreign Sovereign Immunities Act and the precept of nonimmunity for violations of international law and the federal cases supporting that precept. See Persinger v. Iran, 729 F.2d 835, 843 n.12 (D.C. Cir. 1984) (Bork, J., opinion).

rrial jurisdictional competence under international law.\textsuperscript{549} Unfortunately, he did not consider fully the objective territorial basis of jurisdiction, the protective basis, or the universality principle.\textsuperscript{550} Whether or not violations of human rights are "universal crimes,"\textsuperscript{551} it is clear that universal jurisdiction is appropriate and that in no way do human rights violations ever constitute "disputes wholly involving foreign states."\textsuperscript{552} Violations of human rights are matters of international concern.\textsuperscript{553} Additionally, customary international law allows jurisdiction over "the settlement of claims between persons — nationals or aliens — present in the territory"\textsuperscript{554} under the well-recognized fiction that civil claims follow the person or, as recognized by the Second Circuit in \textit{Filartiga}, that such claims are transitory.\textsuperscript{555} Judge Edwards simply ignored these points from \textit{Filartiga} and may not have been adequately briefed about the customary rule.

With respect to questions about the legality of torture and terrorism, Judge Edwards missed the point that despite a lack of consensus on the outer limits of proscription, there are core areas of agreed pro-

\textsuperscript{549} Id.

\textsuperscript{550} On these bases for extraterritorial jurisdiction, see, e.g., Paust, \textit{Federal Jurisdiction}, supra note 504, at 201-02, 204-14, and references cited therein.


\textsuperscript{552} See, e.g., Paust, \textit{Federal Jurisdiction}, supra note 504, at 221-25, and references cited therein; see also Randall, supra note 500, at 67, 494, 500.

\textsuperscript{553} Supra note 552. For a pre-U.N. view, see also E. Borchard, \textit{The Diplomatic Protection of Citizens Abroad or the Law of International Claims} 14 (1922) (even the use of force is permissible "in exceptional circumstances" when human rights are habitually violated); supra notes 11, 166-67, 544.

\textsuperscript{554} See J. Sweeney, C. Oliver & N. Leech, \textit{The International Legal System} 128 (2d ed. 1981); \textit{see also} \textit{The Federalist} No. 82 (A. Hamilton) ("The judiciary power of every government . . . in civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of the most distant part of the globe."); Wroth, \textit{The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction}, 6 AM. J. LEGAL HIST. 250, 264-67, passim (1962) (early practice in Massachusetts was to blend admiralty \textit{in rem} jurisdiction against a vessel found within the state with common law personal jurisdiction over transitory claims against a person found within the state so that personal obligations followed one's property into the state in addition to following one's person); see also Talbot v. Commanders and Owners of Three Brigs, 1 U.S. (1 Dall.) 95 (1787) (common law court refusal to distinguish jurisdiction of prize court and itself); supra note 480.

It was also recognized early in our history that "by the law of nations" a private person "whose property has been illegally captured [in violation of international law], may pursue and recover that property in whatever country it is found . . . ." See Miller v. The Ship Resolution, 2 U.S. (2 Dall.) at 4. Thus, the private right in property taken in violation of international law is "transitory" or follows the property; see also supra J. Sweeney, C. Oliver & N. Leech.

\textsuperscript{555} See \textit{Filartiga} v. Pena-Irala, 630 F.2d at 885. The jurisdictional bases for \textit{Filartiga} under international law were thus: (1) universality (human rights), and (2) territorial (with the fiction that claims follow the person, \textit{see supra} note 554). On transitory torts, \textit{see also} Forti v. Suarez-Mason, 672 F. Supp. at 1540 n.6; Randall, \textit{supra} note 500, at 61-62 & n.298, 67.
hibitation. 556 One core area of prohibition is especially verifiable, that involving violations of human rights law. 557 For this reason, it would have been relatively easy to avoid matters of dispute and to find that terrorist attacks on children, for example, are clearly prohibited as violations of human rights law. Judge Edwards was correct, however, in recognizing that the Alien Tort Statute provides a forum for private causes of action involving violations of international law 558 as well as a domestic cause of action. 559 He also noted correctly that the Filartiga opinion established (although not for the first time) several propositions:

First, the "law of nations" is not stagnant and should be construed as it exists today among the nations of the world. . . . Second, one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators. . . . Third, international law today places limits on a state's power to torture persons held in custody, and confers


557. See, e.g., Lillich & Paxman, State Responsibility for Injury to Aliens Occasioned by Terrorist Activities, 26 AM. U. L. REV. 217, 305, 308-09, 312 (1977); Paust, Terrorism and the International Law of War, supra note 556; Paust, Federal Jurisdiction, supra note 504, at 194, and references cited therein; see also Friedlander, Terrorism and International Law: What is Being Done?, 8 RUT.-CAM. L. J. 383, 387-88 (1977); Randall, supra note 500, at 526 & n.251; Note, Terrorism as a Tort in Violation of the Law of Nations, 6 FORDHAM INT'L L. J. 236, 243-44 (1982). Importantly also, in human rights law torture is one matter that is prohibited per se, that is, without possible justification. See, e.g., European Convention, supra note 478, arts. 3 and 15(2); American Convention, supra note 481, arts. 5(2) and 27(2); 1966 Covenant on Civil and Political Rights, supra note 481, arts. 4(2) and 7; Universal Declaration, supra note 3, art. 5.

558. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 777, 779-80; see also id. at 782-88. On this point, see Paust, Litigating Human Rights, supra note 468, at 83-86, 91, 94, and references cited therein; Randall, supra note 500, at 18 n.66, 50, 479-88, 494, 499; Note, supra note 502, at 145 n.107, 147, 159.

559. See supra note 558; see also Forti v. Suarez-Mason, 672 F. Supp. at 1539-40. It is not inconsistent to recognize that the statute provides a domestic cause of action although the human right to an effective remedy is based in international law and is incorporable also in other ways (e.g., through the constitution, other statutes and the common law). Cf. Note, supra note 502, at 161, 166.
“fundamental rights upon all people” to be free from torture. ... Fourth, section 1350 opens the federal courts for adjudication of the rights already recognized by international law. ... 560

In response to the last quotation, Judge Bork offered what seems to have been his main point of disagreement with Judge Edwards:

[F]ar from rejecting the four propositions [Judge Edwards] ... extracts from Filartiga, I accept the first three entirely and also agree with the fourth, but in a more limited form — namely, “section 1350 opens the federal courts for adjudication of rights already recognized by international law” but only when among those rights is that of individuals to enforce substantive rules in municipal courts. 561

In Judge Bork’s view, the Alien Tort Statute requires that a plaintiff demonstrate a right to sue or a right to a remedy under international law 562 and, thus he argues, the statute itself does not actually provide a right of action or function as domestic implementing legislation of such a nature. 563

As Judge Edwards pointed out, however, “[t]here is simply no basis in the language of the statute, its legislative history or relevant precedent to read section 1350 as though Congress had required that a right to sue must be found in the law of nations.” 564 He added, quite appropriately: “[t]he language of the statute is explicit: by its express terms, nothing more than a violation of the law of nations is required to invoke section 1350. Judge Bork[’s invented] ... restriction ... is not even suggested by the statutory language.” 565 “Indeed,” Judge Edwards continued, “a 1907 opinion of the United States Attorney General” expressly recognized that section 1350 provides both a right to sue and a forum.” 566

As the U.S. Attorney General confirmed, private plaintiffs can sue private defendants for a violation of international law under the Alien

560. 726 F.2d at 777, citing Filartiga v. Pena-Irala, 630 F.2d at 881, 884-85, 887; see also Amerada Hess v. Argentine Republic, 830 F.2d at 425; Forti v. Suarez-Mason, 672 F. Supp. at 1539, passim; Commonwealth v. Hawes, 76 Ky. (13 Bush) at 702 (a treaty is “a living law”).

561. 726 F.2d at 820 (Bork, J., concurring).

562. See id. at 800, 820; see also id. at 801, 811. Contra Randall, supra note 500, at 18 n.66, 43 n.191, 46, 50, 479-88, 494, 499; Note, supra note 528, at 175; Case Comment, Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act, 70 MINN. L. REV. 211, 221-23 (1985); infra notes 564-568. Of course, with respect to human rights such a right exists. On the supposed need for express sanctions, see also infra note 597.


564. See 726 F.2d at 779. Judge Edwards’ point is all the more valid when one realizes that early expectation was that the law of nations was enforced primarily by the municipal law of each country, law that can be shaped to facilitate or improve execution of the law of nations. See, e.g., supra text accompanying note 525.

565. 726 F.2d at 779; see also supra text accompanying notes 525 and infra 571-573.

566. See 726 F.2d at 780. The opinion added that a “remedy exists.” 26 Op. Att’y Gen. 250, 253 (1907); see also Forti v. Suarez-Mason, 672 F. Supp. at 1539-40; supra note 562.
Tort Statute, and the statute provides both "a right of action and a forum."\textsuperscript{567} Following suit, Judge Edwards also declared that "section 1350 itself provides a right to sue."\textsuperscript{568} Thus, the statute can function as relevant domestic implementing legislation with respect to treaty-based rights and obligations that are not otherwise of a "self-executing" nature.\textsuperscript{569} Customary law, of course, would be inherently "self-executing."\textsuperscript{570}

Additional recognition of the point that the statute provides a remedy can be found in the first opinion to address the new statute.\textsuperscript{571} There, the Attorney General affirmed the early expectation that when private individuals were injured by private U.S. citizens as the result of a violation of a treaty, "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by civil suit in the courts of the United States; jurisdiction being expressly given" by the statute.\textsuperscript{572} As one federal court also recognized, when the plaintiff is directly injured by a violation of international law, "he may bring an action in tort therefore."\textsuperscript{573} Similarly, another federal court has recognized that "[o]nce a tort can be considered to be in violation of the law of nations, §1350 allows immediate access to a federal court."\textsuperscript{574}

\textsuperscript{567.} See 726 F.2d at 780, quoting 26 Op. Att'y Gen. 250, 252-53 (1907). This opinion was also quoted previously in Paust, Litigating Human Rights, supra note 468, at 94. The opinion added that a "remedy exists." 26 Op. Att'y Gen. 250, 253 (1907).

\textsuperscript{568.} 726 F.2d at 780; see also Forti v. Suarez-Mason, 672 F. Supp. at 1539-40.

\textsuperscript{569.} Importantly, the Alien Tort Act performs the very role that implementing legislation plays by providing a cause of action and a remedy even when no express right to a remedy pertains in a given case at the international level and/or in a particular treaty. Some text writers have missed this point. See, e. Randall, supra note 500, at 50 n.243, 490, 499. On "self-executing" treaties, see also Paust, Rediscovering the Relationship, supra note 359, at 402-403 n.13; Paust, Self-Executing Treaties, supra note 359.

\textsuperscript{570.} See, e.g., Duponceau, quoted in Henfield's Case, 11 F.Cas. at 1122 n.6 ("law of nations, being the common law of the civilized world . . . acts everywhere proprio rigore"); Paust, Effective Litigation, supra note 182, at 236, 240, 244; Paust, Litigating Human Rights, supra note 468, at 96. Constitutionally, such authority derives most directly from Article III, section 1 ("The Judicial Power") and section 2, clause 1 ("all cases . . . arising under . . . the Laws of the United States," since customary international law is part of the law of the United States), and Article VI, clause 2; see also Restatement (Third) Foreign Relations Law of the United States § 111, Reporters' Note 4 (1987); supra note 546.

\textsuperscript{571.} 1 Op. Att'y Gen. 57 (1795).

\textsuperscript{572.} Id. at 59.

\textsuperscript{573.} Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961); see also M'Grath v. Candalero, 16 F. Cas. at 128 ("If an alien sue here for a tort under the law of nations or a treaty . . . the suit will be sustained"); Paust, Litigating Human Rights, supra note 468, at 94 n.89.

\textsuperscript{574.} Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966). Plaintiffs in Tel-Oren also pointed out that in no other case has there been even a hint! that one should "prove the existence of a private right of action outside the statute itself." Petition for a Writ of Certiorari in the Supreme Court of the United States, Tel-Oren v. Libyan Arab Republic, at 16 n.8, citing, as examples, Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978); Nguyen Da
Importantly, the breach of international law need not have been "a tort only," nor even a "tort" at the international level. It was sufficient that a violation of international law occurred that was potentially recognizable as a civil "tort" under relevant domestic law; and numerous acts were potentially recognizable as a "tort" or as leading to a private cause of action. In 1802, two opinions of the Attorney General provided additional evidence of early expectations concerning civil liability for violations of international law. The first of these recognized that a lawful seizure of a prize of war was not "tortious" and thus, that the captors were not "liable." The second opinion noted that an ordinary fraud and theft of goods and a ship by the captain from its owners involved no violation of international law. Nonetheless, the Attorney General seemed to note that theft can be a "tortious act" and can also be a continuous act for purposes of jurisdiction. Indeed, in an important early Supreme Court case on the nonimmunity of foreign sovereigns for violations of international law, the Court recognized that property taken "tortiously" by a foreign sovereign (because its capture by the foreign sovereign on the high seas as a prize was actually in violation of the law of nations) is subject to judicial control and disposition when brought subsequently within our territorial jurisdiction. The Supreme Court recognized further that it

Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975). Indeed, in Huynh Thi Anh, the Sixth Circuit stated that Congress constitutionally can "create a federal common law of torts for aliens." 586 F.2d at 629. Thus, the court impliedly recognized that Congress did so in enacting section 1350.

575. As the district court said recently in Filartiga, "[t]he word 'tort' has historically meant simply 'wrong' or 'the opposite of right,'" and, thus, the 'tort' to which the statute refers [seems to] mean a wrong 'in violation of the law of nations.'" 577 F. Supp. at 862; see also supra text accompanying notes 490, 573, and infra notes 576-578, 583; Randall, supra note 500, at 32-4.


578. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350-55 (1822); see also The Apollon, 22 U.S. at 373 (violation of law of nations by the U.S. was a "marine tort"), 377 (violation was a "trespass") (1824); The Estrella, 17 U.S. (4 Wheat.) 298, 299-301, 304, 307-09 (1819) (exception to immunity of privateer with commission from government of Venezuela when the neutral nation examines "whether a trespass has been committed on its own neutrality by the vessel which has made the capture"—i.e., treated like a violation of the law of nations exception to immunity when such vessel acts "illegally"); L'Invincible, 14 U.S. (1 Wheat.) 238, 257-58 (1816) (exception to immunity of privateer with French commission where neutral's own rights under law of nations are invaded); Dole v. New England Mutual Marine Ins. Co., 7 F. Cas. at 847 (pirate "cannot upon any ground claim immunity from the tribunal").

Presenting nearly the same issues as those related in The Santissima Trinidad, was a case arising out of the impermissible action of a German warship of the Imperial German Navy during World War I addressed in Berg v. British and African Steam Navigation Co. (The Prize Ship "Appam"), 243 U.S. 124, 153-56 (1917), quoting from The Santissima Trinidad, 20 U.S. (7 Wheat.) at 154-55. There, alien private plaintiffs were allowed to sue for "restitution . . . conformably to the laws of nations and the treaties and laws of the United States" for the German government's violation of both the law of nations and relevant treaties. Importantly, the Supreme Court recognized jurisdiction and the right to a remedy despite the intervention of the German ambassador and claims that the U.S. court lacked jurisdiction and that since other pro-
did not matter that the violator of international law was a public or private perpetrator,\textsuperscript{579} and international law was to be applied despite any lurking "foreign affairs" implications. As noted previously, state courts had also recognized civil remedies for private violations of international law, including the "tortious" nature of such violations.\textsuperscript{580}

It is also significant that Judge Bork's view runs counter to more general expectations at the time of the enactment of the Alien Tort Statute that, as expressed by Madison in The Federalist, "a right implies a remedy."\textsuperscript{581} As noted above, Chief Justice Marshall recognized the duty of government to afford protection of the laws whenever an individual receives an injury, and he quoted Blackstone for the well-recognized "rule, that where there is a legal right, there is also a legal remedy by suit, or action at law."\textsuperscript{582} Additionally, when natural law proceedings had been instituted in Germany, the U.S. court should decline jurisdiction. \textit{See id.} at 147, 152. The Court also noted that "an illegal capture would be invested with the character of a tort." \textit{See id.} at 154. There, as in \textit{The Santissima Trinidad}, the capture took place on the high seas.

579. 20 U.S. (7 Wheat.) at 351; \textit{see also supra} cases cited in notes 545, 578. It is not irrelevant that in a reverse circumstance, when foreign plaintiffs sue the United States for a violation of the law of nations by seizure of a foreign ship in foreign territory, the private plaintiffs are entitled to damages, including attorney fees, travel expenses to bring suit, and punitive damages for an intentional act committed in violation of international law. \textit{See, e.g.}, \textit{The Apollon}, 22 U.S. (9 Wheat.) 362, 371, 374, 376-79 (1824); \textit{see also Cook v. United States}, 288 U.S. 102, 120-21 (1933); \textit{The Paquete Habana}, 175 U.S. 677 (1900) (seizure of foreign vessel by U.S. in time of war in violation of customary international law — recovery of money damages and costs); \textit{The Flying Fish}, 6 U.S. (2 Cranch) 170, 178-79 (1804). The British also recognized the liability of their government for related violations of international law. \textit{See, e.g.}, \textit{The Felicity}, 2 Dodson's Rep. 381 (1819); \textit{see also The Acteon}, 2 Dodson's Rep. 48 (1815); \textit{The Maria}, 1 C.Rob. 341 (1799). The Russian Supreme Court ordered compensation to be paid in several cases where Russian naval forces destroyed neutral vessels in violation of international law during the Russo-Japanese War. \textit{See, e.g.}, \textit{F. SMITH, THE DESTRUCTION OF MERCHANT SHIPS UNDER INTERNATIONAL LAW} 91-94 (1917). On the general duty of governments to compensate private owners for the destruction of neutral vessels, \textit{see id.} at 75, 80, 85, 98; \textit{see also id.} at 83-84 ("international law . . . is the inevitable and predominating criterion when other states are concerned," adding: "and commanders acting in accordance with such invalid regulations would be guilty, along with their governments, . . . ."). On this last point, \textit{see also United States v. Pirates}, 18 U.S. (5 Wheat.) 184, 201-02 (1820) (fact that a person who violated the law of nations had a commission from a foreign government did not allow immunity from criminal sanctions); and cases cited \textit{supra} in notes 545, 578.

These cases actually represent further evidence of a shared expectation among nation-states that immunity is not permissible for acts in violation of international law even if immunity might otherwise exist for more ordinary tortious acts engaged in by the same government completely within its own territory. Importantly also, suits against the U.S. government for its violations of international law were possible at least since 1824. This demonstrates not only the recognition of nonimmunity of governmental acts in violation of international law, but also individual standing, a cause of action, and the right to an effective remedy in domestic courts.

580. \textit{See, e.g.}, cases cited \textit{supra} in notes 486-490.

581. \textit{See THE FEDERALIST} No. 43 (J. Madison).

582. \textit{See supra} text accompanying note 375; \textit{see also D'Amato, Judge Bork's Concept of the Law of Nations Is Seriously Mistaken, 79 AM. J. INT'L L.} 92, 95, 101 (1985) ("having a cause of action refers to having 'recognized legal rights' that a litigant claims were invaded" and phrase "cause of action" did not become a term of art until 1848); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (private "claims under a treaty" are "causes") to
was at stake, many of the early judges recognized the right of individuals to sue in "tort" under the expansive "action on the case." By the early 1770s, for example, Massachusetts courts had recognized that "if one is under obligation from the ties of natural justice to pay another money and neglects to do it — the law gives the sufferer an action upon the case . . . mere justice & equity is sufficient foundation for this kind of equitable action."583 In view of the early acceptance of such expansive forms of action for "tortious" injuries suffered, it would have been incredulous to assume that Congress would abandon the "indisputable rule" that recognition of a right necessitates recognition of a remedy and to require that the plaintiff in tort prove both that a right and a right to a remedy existed at international law. If anything, such a right to sue was necessarily implied.

With respect to a common law basis for private remedies, Judge Bork argued next that although it is "unexceptionable" that international law has always been a part of the common law of the United States, he "cannot accept" the point that even in the absence of a statute "common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights."584 It is apparent, however, that Judge Bork was unfamiliar with the many cases and opinions noted above which allowed a private cause of action or remedy for violations of international law in the absence of statutorily-based actions or remedies. Again, as a representative affirmation of this point, the Supreme Court of Kentucky had expressly recognized that, for a violation of international law, "the common law . . . provides an adequate remedy" and that to sustain a private action "it is not necessary to invoke any statu-

583. Palfrey v. Palfrey, quoted in W. CUSHING, supra note 65, at 92, 98-99; and in W. NEL- 
      SON, supra note 65, at 55. The narrow confines of trespass were found too inhibiting and eight- 
      eenth century tort actions were soon based also on action on the case, a catchall notion intended 
      to serve justice. See generally Gregory, Trespass to Negligence to Absolute Liability, 37 VA. L. 
      REV. 359 (1950); Nelson, The Reform of Common Law Pleading in Massachusetts 1776-1830: 
      U.S. at 159 ("all . . . trespasses committed against the general law of nations, are enquirable,
      and may be proceeded against, in any nation. . . .")

584. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 810; see also id. at 801. Bork seems 
also to have missed the point evident from Huynh Thi Anh that since "Congress has the constitu- 
      tional authority . . . to create a federal common law of torts for aliens," Congress impliedly did so 
      in enacting section 1350. See supra note 574.
As part of what seems to have been an overall strategy to deny relief, Judge Bork also made the erroneous assertion that "international law does not... recognize the capacity of private plaintiffs to litigate its rules in municipal courts..." Not only is such a statement out of line with predominant trends in actual litigation and the widespread expectation that it is both appropriate and desirable for private plaintiffs to litigate such matters domestically, but Judge Bork ignored the express right to an effective remedy in national tribunals documented in the authoritative Universal Declaration of Human Rights. Curiously, he also ignored relevant guidance from the Executive branch which affirmed quite clearly that "it has long been established that... individuals may sue to enforce their rights under international law" and that the "international law of human rights similarly endows individuals with the right to invoke international law." As a result," the Executive added, "an individual’s fundamental human rights are in certain situations directly enforceable in domestic courts."

While addressing these points, Judge Bork also stated that "[n]either the law of nations nor any of the relevant treaties provides a cause of action that [individuals]... may assert in courts of the United States." Of course, his statement was incorrect and was obvi-
also as an authoritative guide to the content of the human rights provisions of the United Nations Charter. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 809, 818. And, of course, he totally ignored the language of article 8 of the Universal Declaration. On these points, and in contrast to several sub-issues raised by Judge Bork, see also Paust, Effective Litigation, supra note 182, at 234-37, 239-42, 244, and references cited therein.

593. See supra text accompanying notes 589-590. Judge Bork also ignored the Executive recognition, affirmed by the Second Circuit in Filarriga, that the Universal Declaration supplants the U.N. Charter by “specifying and defining the fundamental rights to which all individuals are entitled.” Compare Memorandum for the United States, supra note 370, at 9; and 630 F.2d at 882 with Tel-Oren v. Libyan Arab Republic, 726 F.2d at 809, 818. And Judge Bork did not understand the legal import of a circumstance where the provisions of various treaties point to the existence of the same right or precept. Unlike the Executive and Second Circuit, he assumed incorrectly that treaties not yet ratified by the United States could serve no legal function in our courts. Compare Paust, Effective Litigation, supra note 182, at 230-31, 237 with 726 F.2d at 809-10, 812 (so-called “well-established rule”).

Judge Bork also argued that the Covenant on Civil and Political Rights and the American Convention on Human Rights “expressly oblige states to enact implementing legislation.” 726 F.2d at 818-19. Here he missed the point, however, that these treaty provisions supplement the existence of the more general right to a remedy found in the Universal Declaration and in customary international law. Further, the articles he cited have qualifying phrases that he ignored. For example, article 2(2) of the Covenant states: “Where not already provided for . . . .” And article 2 of the American Convention states: “Where . . . . not already ensured . . . .” It begs the question to assume that such provisions are not partly “self-executing” (e.g., where a constitution, as broadly interpreted for nearly two centuries, already provides for a right to a remedy). Such provisions seem only to seek, as a cautionary measure, to assure any further measures “as may be necessary” if additional domestic measures are “necessary”; see also Iwasawa, supra note 359, at 660, and references cited therein (“The travaux préparatoires indicate, however, that the parties to these treaties never intended to deny their self-executing character by inserting domestic implementation clauses . . . [Such a] clause merely reinforces the customary international law rule that a state . . . . is bound to give every measure necessary to give full effect to the treaty . . . .”); Paust, Self-Executing Treaties, supra note 359, at 775 n.97. Of course, the object and purpose of any human rights treaty includes that of guaranteeing and effectuating human rights and it would be incompatible with the object and purpose of such a treaty to construe any portion thereof in a manner inconsistent with such a purpose and with the general right to an effective remedy guaranteed in the Universal Declaration, as mirrored in such a treaty. By international law, such a purpose-thwarting result is not allowed. See, e.g., Vienna Convention on the Law of Treaties, arts. 18, 19(c), 31(1), U.N. Doc. A/CONF./39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969). This is so even when a treaty is signed but not yet ratified. See id., art. 18 ("obliged to refrain from acts which would defeat the object and purpose of a treaty").

The United States accepts the view that the Vienna Convention is presumptively customary. See, e.g., 2 DRAFT RESTATEMENT, Pt. III, supra note 479, introductory notes 1-2, and references cited therein; J. Sweeney, C. Oliver & N. LeeCh, supra note 554, at 951 (2d ed. 1981). In particular, article 18 is among the provisions which are considered to be customary. See, e.g., 2 DRAFT RESTATEMENT, supra, § 312(3) and Reporters’ Note 6, quoting a report of the International Law Commission ([1966] 2 Y.B. Int’L L. Comm’n 172, 202) ("appears to be generally accepted"), citing Certain German Interests in Polish Upper Silesia (Merits), P.C.I.J. (ser.A) No. 7, at 30 (1926); Dalton, Remarks, 78 PROC. AM. SOC’Y INT’L L. 278 (1984) (quoting Sec. of State Rogers: “in his report to the President in 1971 characterized the rule in article 18 as ‘widely recognized in customary international law’”), also citing 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 692-93.

Moreover, Judge Bork ignored the independent right to a remedy recognized in article 25 of the American Convention and the interrelationship between the more general Universal Declaration and the American Convention as one can recognize from a reading of the preamble and articles 29(d) and 64 of the American Convention. See Advisory Opinion on the Definition of Other Treaties Subject to the Interpretation of the Inter-American Court of Human Rights, INTER-AM. C.H.R., No. OC-1/82, Sept. 24, 1982, paras. 32-52, reprinted in 22 I.L.M. 51, 59-65 (1983). Nor did Judge Bork seem to realize that the same provisions of the American Convention necessitate a reading of the 1948 American Declaration of the Rights and Duties of Man,
Further, in view of Judge Bork’s pretense of deference to the Executive branch on such matters because of nearly ever present “foreign affairs” implications,\(^{594}\) it seems to have been quite disingenuous to ignore the most relevant and widely known Executive guidance available in the form of the U.S. Memorandum. Additionally, one can make the counterpoint that “foreign affairs” implications should not be used in order to avoid the application of law.\(^{595}\) Law, after all, is what the courts are bound to apply.\(^{596}\)

As if to ignore the same Executive guidance as well as predominant trends in decision throughout our history, Judge Bork also embraced the tired and hopeless theory of a few textwriters that rights and duties under international law are those of states solely and exclu-

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\(^{594}\) See Tel-Oren v. Libyan Arab Republic, 726 F.2d 799, 801, 803-05, 822. Bork stated that such implications provided “the fundamental reason [for his conclusion] . . . that it is improper for judges to infer a private cause of action . . . .” Id. at 822. And he impliedly warned, despite his judicial oath, that foreign affairs “considerations,” at his hand, “might [even] deprive an individual of a cause of action clearly given by a state, by Congress, by a treaty, or by international law.” Id. at 804.

\(^{595}\) On the related practice of other judges who seemingly engage in the “talismanic incantation” of phrases such as “foreign affairs” in order to avoid the application of law, see Paust, *Is the President Bound*, supra note 395, at 724-32, passim. Not surprisingly, foreign affairs implications (as opposed to relevant international law, the Alien Tort Statute, the Executive Memorandum in *Filartiga*, and so forth) were at the heart of Judge Robb’s stated reasons for his decision in *Tel-Oren*. See *Tel-Oren* v. Libyan Arab Republic, 726 F.2d at 823-27; see also Paust, *Is the President Bound*, supra note 395, at 730-32 (approach of Judge Robb in another case); Note, *supra* note 502, at 170-71, 178 n.284, 179 n.286, 180-85; Note, *supra* note 385, at 950-51 (Judge Bork’s “rejection of the statute,” notwithstanding separation of powers concerns, “amounts to an abdication of the judicial function”), 951-52 (Judge Robb’s use of the political question doctrine is “misplaced,” in “error,” “cannot be justified,” and is “not in accord with precedent”); Case Comment, *supra* note 562, at 236-37 (“such reflex application of the doctrine must be challenged . . . [and] may constitute an unconstitutional abdication of judicial power”); Note, *Separation of Powers and Adjudication of Human Rights Claims under the Alien Tort Claims Act*, 60 WASH. L. REV. 697, 711-13, 715-16 (1985); see also Note, *supra* note 385, at 950 n.57, quoting Judge Edwards in criticism of Judge Bork: “[v]igorously waiving in one hand a separation of powers banner, ironically, with the other hand he rewrites Congress’ words and renounces the task that Congress has placed before him.” 726 F.2d at 790 (Edwards, J., concurring). As another student has recognized: “That the framers of the Judiciary Act of 1789 granted jurisdiction to district courts over tort claims involving treaties and the law of nations indicates that they foresaw adjudication of cases touching on foreign relations and nonetheless granted the judiciary power to hear them.” Note, *supra* note 502, at 183; see also Note, *supra* at 714-15 (Act shows claims intended to be justiciable and “supposed deference is actually an abdication of the responsibility assigned. . . .”); *supra* notes 477, 545.

\(^{596}\) See, e.g., Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1857) (ratified treaty “becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an Act of Congress”); Fernandez v. Wilkinson, 505 F. Supp. at 798-800; Paust, *Is the President Bound*, supra note 395, at 724-34, 750-57, and references cited therein; see also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J., opinion) (“to decline the exercise of jurisdiction which is given . . . would be treason to the constitution”); *supra* notes 460-461, 471-475, 509, 511, 513, 515, 545-546, and infra note 570.
sively.

597. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 805-06, 817. At times, Judge Bork even used qualifiers such as "general rule" or "primary role," thus suggesting exceptions. See id. And at other times Judge Bork was openly aware of the fact that individuals had duties under the law of nations in the 1700s, see id. at 813-15, but he sought to restrict the phrase "law of nations" to a few cases that he could discover from that early time. See id. at 813-15; cf. id. at 815 (drafters "may well have had additional torts in mind"); see also id. at 788-89 (Edwards critical of Bork's approach). Students have been misled. See Note, supra note 502, at 150 n.145. Of course, as this article demonstrates, the "cases" contemplated were far more numerous. On early "offenses," see also Paust, Federal Jurisdiction, supra note 504, at 211-12; A. Gentili, supra note 11 (piracy and "also . . . the general violation of the common law of humanity and a wrong done to mankind"); Talbot v. Jansen, 3 U.S. (3 Dall.) at 159 ("all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation . . . ."); Republica v. De Longhamps, 1 U.S. (1 Dall.) at 115 ("hurts the common safety and well-being of nations"); 1781 Resolution of the Continental Congress, note 502 supra.

Importantly also, Judge Bork's general rationale (see also 726 F.2d at 808-810) was raised as part of a Nazi defense at Nuremberg and was expressly rejected by the Tribunal. In the face of arguments that the 1907 Hague Conventions, and international law more generally, mentioned no crimes or penalties and, therefore, imposed no individual criminal responsibility, the Tribunal affirmed that such responsibility had long been recognized and need not be expressly set forth in international instruments, nor did the types of sanctions available have to be expressly mentioned. See Judgment, International Military Tribunal (Nuremberg) (1946), reprinted in 41 AM. J. INT'L L. 172, 217-21, 248 (1947). The same points are relevant with respect to civil sanctions; see also supra text accompanying notes 486-493, 501, 503, 509, 521-525; supra note 385; but see Rogers, The Alien Tort Statute and How Individuals "Violate" International Law, 21 VAND. J. TRANS. L. 47, 49-50, 52, 56 & n.43 (1988) (seemingly accepting the Borkian-Nazi extreme "statist" view of international law).

598. See, e.g., 1 L. OPPENHEIM, INTERNATIONAL LAW § 289 (H. Lauterpacht 8th ed. 1955) ("primarily a law between States . . . although individuals are not normally subjects . . . , they have certain rights and duties"); L. Henkin, R. Pugh, O. Schachter, H. Smit, INTERNATIONAL LAW 246 (1980) ("In some circumstances . . . , however, international law has recognized individual responsibility. There are innumerable references . . . .").

599. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 794.

600. See supra notes 530-544 and accompanying text.

601. See, e.g., 1 OPPENHEIM 367 (2d ed. 1912) ("Several writers," including Bonfils, Bluntschi, Fiore, Martens); E. Borchard, supra note 553, at 14 (human rights, rights of the individual); I.C. Hyde, INTERNATIONAL LAW 34-5 (2d ed. rev. 1945) (individuals bound and injunctions of international law are "applicable to the private individual" — "Evidence of this has long been reflected in the statutory law of the United States"); P. Potter, A MANUAL DIGEST OF COMMON INTERNATIONAL LAW 73-74 ("Private individuals inclined to refuse obedience to international law may be proceeded against by other private individuals, or by nations, and one forum is the domestic court"); 133 ("International law provides rights and liabilities for . . . individuals or groups . . . of individuals") (1932); J. Scott, NATIONALITY, supra note 180; J. Scott, supra note 181; I.H. Wheaton, ELEMENTS OF INTERNATIONAL LAW § 19 (8th ed. 1866), reprinted at 26-27 (C.E.I.P. ed. 1936) ("Private individuals . . . may . . . , incidentally, become the subjects of this law in regard to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens") (same point as in Wheaton's 3d ed. 1846, at 54); G. Wilson, INTERNATIONAL LAW 56 (2d ed. Pa. 1902) ("individuals have a certain degree of competence . . . and may come under the cognizance of international law"); T. Woolsey, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 2, § 2 (6th ed. 1897); J.
tionally, the inhibiting myth that Judge Bork would resurrec...
rested on theories about the functioning of law at the state-to-state level, not the trends in actual decision at the domestic level. In sum, it was, and is, simply not true that individuals could not benefit directly from international law or be subject either to civil or criminal sanctions for violations of international law.

Among the most ludicrous of the statements found in _Tel-Oren_, however, is Judge Bork’s assertion that “in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. Clearly, cases [addressing human rights precepts] were beyond the framers’ contemplation.” One can say nothing further about such false, arrogant nonsense after documenting the actual use of human right precepts in the United States from the 1720s through the 1790s and the early judicial and executive opinions that are relevant, but that Judge Bork’s statement is patently erroneous.

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603. See supra note 539. Interestingly also, Lauterpacht thought that states were “principal subjects” because, in his view, international law was “based on the common consent of individual States.” See 1 OPPENHEIM, supra note 598, at 19, quoted in _Tel-Oren v. Libyan Arab Republic_, 726 F.2d at 817. The early British view, however, was that such law is based on the common consent of individuals. See note 28 supra. Moreover, today it is recognized that the primary treaty, the U.N. Charter, was proclaimed in the name of peoples, not states or state elites. See U.N. CHARTER, preamble (“WE THE PEOPLES . . .”).


605. _Tel-Oren v. Libyan Arab Republic_, 726 F.2d at 813, citing mainly: Hassan, _International Human Rights and the Alien Tort Statute: Past and Future_, 5 HOUS. J. INT’L L. 131, 139 (1982); Oliver, _A Brief Replication: The Big Picture and Mr. Schneebaum’s Reply_, 5 HOUS. J. INT’L L. 151, 153 (1982); Hassan, _Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases_, 4 HOUS. J. INT’L L. 13, 19-20, 24-7 (1981). Actually, Professor Oliver added an interesting qualification to his remarks: “Except for evolving developments in the field of human rights, individuals . . . have no standing, internationally . . .” (emphasis added). Moreover, Professor Oliver did not make any of the erroneous statements about early expectations of the Founders concerning human right precepts. These latter errors are now being repeated by certain students. See Note, supra note 502, at 155; Note, supra note 528, at 180 & n.136.
ous. His statement, like those in the writings he cites, rests on fallacious myth without a single reference to the numerous cases, opinions and historic uses of human right precepts in the eighteenth and nineteenth centuries that are documented in the present article.606 Such a statement is dangerous not so much for the reason that shoddy research is perpetuated, but that the judiciary can be further misinformed, that further policy-thwarting decisions might be made, and that others might try to turn history on its head to deny one of the fundamental purposes of our entire system of government and of our constitution — to protect and promote the human rights of individual human beings.

IV. CONCLUSION

Although few in the legal profession may be sufficiently aware, the actual use of human right precepts in U.S. history has been substantial and concern for human rights has been associated with most major politico-legal developments in the United States over the last two-and-one-half centuries. Not surprisingly then, one can also discover a rich, often splendid history of use of human right and equivalent phrases by U.S. courts over the last two hundred years.

The present article documents both the general use of human right precepts in the United States and use by the judiciary. In fact, one of the purposes of the article is to provide the fullest exposition to date of the actual use of "human right" and equivalent phrases by U.S. courts, trends in juridic use, categories of use, and certain factors that seem relevant for further understanding of actual trends and potential uses of the concept of human rights in legal decisionmaking. Primary attention is given to U.S. Supreme Court opinions, although use in lower federal court and early state court opinions is also demonstrated. Interestingly, despite significant attention to human right precepts throughout our history, the use of "human right" and equivalent phrases by the Supreme Court has been five times more frequent since the late 1930s than during the previous history of the Court. Moreover, the trends demonstrate that there has been an increasing use of human right precepts in the last twenty-five years.

Yet throughout our constitutional history a similar pattern of use emerges. It is clear that the Supreme Court, as most courts, most often utilizes human rights as legally relevant standards or juridic aids for interpretation of constitutional, customary or statutory norms. Indeed, use by the judiciary is quite often made with express or implicit

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606. See supra writings cited in note 605.
expectation that human rights are fundamental constitutional rights or legal principles and history demonstrates that there is a human rights purpose behind most of the amendments to the U.S. Constitution and many relevant statutes.

Less frequently, although not less importantly, human rights law has been incorporated directly by the judiciary as the basis or an alternative basis for decision. Yet whether human rights law has been incorporated directly or indirectly as an interpretive aid it is clear that human rights norms can provide useful criteria and content. This is especially so when documented human rights are sufficiently particularized to aid in the identification and clarification of certain rights or to supplement the meaning of relevant constitutional, statutory or other legal provisions by providing a richer, more detailed content. A better understanding of the actual use of human right precepts in our history, including awareness of specific judicial language and the constitutional rights or principles associated with human rights, should also provide useful guidance.

Some of these general points are becoming clearer from writings addressing theories of incorporation of international law into domestic legal process or the more specific practice of litigating human rights in U.S. courts, but attention can now be paid to actual patterns of use. Further, with the present documentation of widespread use of human right precepts by the judiciary throughout our history, any lingering question whether such precepts can be used in private litigation and judicial decisionmaking should shift to the question of how such precepts can be used and how they can be used more effectively. Here again past trends can be most instructive.

Awareness of actual patterns of judicial use can also aid in defeating the myth perpetuated by a few textwriters, and now by the unfortunate language found in deviant opinions in Tel-Oren, that individuals could not sue or be sued in domestic courts for violations of international law. As the present article amply demonstrates, human right claims and claims under more general international law have been made by and against private litigants throughout our history. Moreover, there have been numerous references to the propriety of this practice and, more specifically, to the right of individuals to access to the courts and the concomitant right to an effective remedy.

Perhaps even less widely known in the legal profession is the fact that international law now provides expressly that everyone has the right to an effective remedy in domestic courts for acts violating one's human rights. As part of international law, the right to an effective remedy is also itself a part of supreme federal law under the United
States Constitution. Thus, it is of significant utility in demonstrating to a federal court why private litigants have standing as well as the right to an effective remedy for human right deprivations. The international right actually provides an independent basis for standing and an effective remedy, although its use in U.S. courts would merely supplement a long-term judicial practice of recognizing both the utility of human right norms and private remedies for their deprivation.