

FOREWORD: HUMAN RIGHTS, THE RULE OF LAW, AND NATIONAL SOVEREIGNTY

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¶ 1 On July 23, 2000, in London, England, we were the convenors of a conference jointly sponsored by the University of London's Institutes of Advanced Legal Studies, Historical Research, and United States Studies and Northwestern University School of Law, made possible by a grant from the Searle Fund.¹ The title of the conference was *At Century's Dawn: The future and past of human rights and the rule of law*. Five principal papers were presented at that conference, and now appear as articles in this volume of Northwestern University's Journal of International Human Rights.

¶ 2 The five papers explored different aspects of the conference's principal theme, whether "human rights," as then generally understood, were consistent with the basis of the Anglo-American jurisprudential system, the rule of law.² The conference had been convened following NATO's intervention in the Balkans, the first time that organization had used armed force against a U.N. member state without the express authorization of the United Nations Security Council. That intervention was undertaken ostensibly to protect the "human rights" of Balkan minority groups, although it appeared to be in tension with the United Nation's Charter's guarantee of and protection for national sovereignty.

¶ 3 Since the conference, of course, the events of September 11, 2001, resulting in the death and destruction from terrorist acts of several thousand persons in New York, Pennsylvania, and Washington, D.C. led to the current "war on terror," waged through military campaigns by the United States and its allies in Afghanistan and Iraq. All of these activities have led to an increased awareness of human rights issues, as this country seeks to balance its need for security against individual freedoms. All five of the papers presented here do not expressly address issues involved in that balance, but insofar as each of them clarifies what is meant by "human rights," and insofar as each of them does seek to understand how nations and the world can further "human rights" while

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¹ We gratefully acknowledge the generosity of the Searle Fund board, and in particular Dan Searle, Gideon Searle, Henry Bienen, and David Van Zandt, in sponsoring the conference and in underwriting the publication of this volume. Dean Van Zandt, in particular, was with us in London, and gave an opening speech at the conference. We are also very grateful to the editors of the Northwestern University Journal of International Human Rights for offering us this forum for publication and for splendidly editing the contributions.

² As Professor Sir John Baker reminds us in a footnote to his paper in this volume: "[t]he two are linked in the Universal Declaration of Human Rights." Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT'L HUM. RTS. 3, fn.14, at <http://www.law.northwestern.edu/journals/JIHR/v2/3> (2004). (citing Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948): "It is essential . . . that human rights should be protected by the rule of law.")).

simultaneously maintaining national sovereignty and the rule of law, they are indispensable reading of great contemporary relevance.

¶ 4 In the first of these papers, *The Idea of Natural Rights—Origins and Persistence*, Professor Brian Tierney furnishes a working definition, “[n]atural rights or human rights are rights that inhere in persons by reason of their very humanity.”³ Tierney seeks to address the question whether “our modern culture of rights [is] a Western peculiarity with no resonance for the rest of humanity.”⁴ Tierney concludes that in its early stages our current concept of “human rights,” was in fact a Western creation, and that “jurists of the twelfth century, especially the church lawyers, played an important innovatory role.”⁵ Tierney demonstrates how, as a result of what he calls “juristic semantics,” “the little phrase *ius naturale* shifted from an objective to a subjective meaning, [and] an ancient concept of natural law was reshaped into a modern idea of natural rights.”⁶ Tierney’s “church lawyers,” were struggling to define a means of protecting the church against the increasing assertiveness of Kings and Lords, and out of their efforts, carried on pursuant to a “great revival of legal studies,” and a recovery of the jurisprudence of antiquity, came the basis for our modern conception of rights that protect individuals against the assertion of the arbitrary power of governments.

¶ 5 Professor Tierney also reminds us that it may sometimes be too facile to see an opposition between the assertion of individual rights and the continuing needs of the community in the maintenance of the rule of law. He reminds us that among the purposes of jurisprudence, after all, is to secure the rights of individuals, and that his twelfth century churchmen “could have agreed with a modern philosopher, Jacques Maritain, when he wrote that ‘there is nothing more illusory than to pose the problem of the person and the common good in terms of opposition.’”⁷

¶ 6 Professor Sir John Baker, in *Human Rights and the Rule of Law in Renaissance England*, further develops this theme of the symbiotic relationship between the rule of law and human rights by reminding us that the most important “human right” is the rule of law itself. As do the papers of Professors Glendon and Cassel, Professor Baker reminds us that we have not (and perhaps never will) arrive at a situation where our governments or our supra-national organizations fully secure “universal human rights,” especially when we are threatened by “hidden enemies.” But Baker nicely asserts that the fact that the security measures that appear to infringe these “rights,” are “controversial nevertheless shows that the old philosophy of the rule of law is not moribund; indeed, it still applies in most everyday situations and is regarded as the ideal.”⁸

³ Brian Tierney, *The Idea of Natural Rights—Origins and Persistence*, 2 NW. U. J. INT’L HUM. RTS. 2, fn.2, at <http://www.law.northwestern.edu/journals/JIHR/v2/2> (2004).

⁴ *Id.* at ¶ 1.

⁵ *Id.* at ¶ 5.

⁶ *Id.*

⁷ *Id.* at ¶ 17 (quoting JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 67 (1966)).

⁸ Baker, *supra* note 2, at ¶ 1.

¶ 7 Professor Baker, in a manner similar to that of Professor Tierney, then proceeds to explore “the hypothesis that these ‘human’ rights are not such a new departure as is fashionably supposed, but rather an attempt to restate and refine assumptions which have long been present in the [English] common law.”⁹ He reminds us that in the seventeenth century great champions of the common law like Sir Edward Coke and his colleagues in the House of Commons began “collectively to assert the ‘rights’ of the people,” in order to counter the threat of Stuart absolutism.¹⁰ Moreover, Baker explains that “these ancient rights of which parliamentarians spoke were not universal “human” rights or rights derived from some abstract regime superior to municipal law,” but instead were “the rights and liberties of Englishmen, inherited by birth like other forms of franchise or property, guaranteed over the centuries by charters of liberties and statutes of due process, and believed to be superior to such rights as might belong to the peoples of benighted nations.”¹¹

¶ 8 Baker thus elaborates a particularly English strain of “human rights law,” and shows the flourishing of this strain in a time, the early English Renaissance, commonly thought to be characterized by the arbitrary rule of Henry VIII. Though Baker quite nicely stresses the unique features of the English experience, again, as did Tierney, he does help us understand that:

[t]here are two basic features of human rights law for which comparisons might be sought in an earlier age. First, there is the substantive content of the corpus of rights as now understood, in the sense of the broad moral or legal assumptions which they represent. Second, and more fundamental from the lawyer’s point of view, there is the notion that some of those rights are (or ought to be) so fundamental that they are somehow entrenched against legislative interference.¹²

¶ 9 These two features, Baker reminds us, “represent some kind of higher law, antecedent morally—if not historically—to man-made law,” and further that “[a] precondition for both of these notions is the existence of a political constitution which embodies or recognises what is commonly labeled the Rule of Law —meaning, in broad terms, that rulers are obliged to govern according to known principles of law and not in a despotic or arbitrary manner.”¹³ In the rest of his paper Professor Baker shows convincingly that “[t]here is a case for saying that none of these three phenomena [a corpus of substantive rights, the entrenchment of those rights against legislative interference, and the maintenance of the rule of law to secure those rights] were alien to English law in the Renaissance period.”¹⁴

⁹ *Id.*

¹⁰ *Id.* at ¶ 2.

¹¹ *Id.* at ¶ 3.

¹² *Id.* at ¶ 4.

¹³ *Id.*

¹⁴ *Id.*

¶ 10 In his paper, *Natural Rights and Modern Constitutionalism*, Professor Michael Zuckert continues the essentially chronological treatment of this volume by moving to the framing of the United States Constitution, and explaining how the American framers conceived of a means to maintain the rule of law not through the balancing of orders in society, as did the English, but rather through the separation of legislative, executive and judicial powers. As does Baker, Zuckert explores the interconnection of concepts of rights and the rule of law, and in the course of this explanation, he makes “three contributions to the understanding of modern constitutionalism.”¹⁵ These are (1) “to contest the view that Montesquieu was not a natural rights thinker,” (2) to show that Montesquieu’s “version of natural rights decisively shaped his constitutional theory,” and (3) to show “how the American constitution came to contain judicial review as a result of the particular way in which the American founders attempted to adapt Montesquieuan constitutional theory to their own circumstances.”¹⁶

¶ 11 Zuckert’s study of Hobbes, Locke, and Montesquieu leads him to examine two “central dimensions of modern constitutionalism,” derived “from the Lockean natural rights orientation: governments have a definite and limited teleology, to secure rights; they have a limited and precise object. Moreover, governments are not to be exempt from controls and limitations; the controller must also be controlled.”¹⁷ Thus Zuckert, as do other contributors here, links human rights (here “Lockean natural rights”) with the rule of law’s limitations on arbitrary governmental acts. Zuckert shows how Montesquieu thought these two aspects of modern constitutionalism could be best secured by a complex combination of “separated powers, checks and balances, and mixed government.”¹⁸ He then proceeds elegantly to show how Madison and the Constitution’s framers adopted this understanding of Montesquieu’s to the constitutional needs of an American people unwilling to permit a mixed government containing a King and hereditary aristocracy, with what seems like primary reliance on the new institution of judicial review to maintain separation of powers and checks and balances.

¶ 12 In the course of his exposition, Zuckert explains why the Court has always been a source of controversy at the same time it has effectively preserved “modern constitutionalism.” For Zuckert, “[t]here is a built-in disproportion between the [Supreme Court’s] political tasks and the legal tools with which these are supposed to be accomplished.”¹⁹ It can try, as courts have historically done, to decide issues on a narrowly legal basis, “following the rule of the ‘clear mistake’ or applying a strictly originalist approach to cases,” but it must also attempt “to fulfill the broader, political, trans-legal system needs thrown into its lap” by the Constitutional scheme of separation of powers and checks and balances.²⁰ As Zuckert observes, “[r]esponding to that

¹⁵ Michael Zuckert, *Natural Rights and Modern Constitutionalism*, 2 NW. U. J. INT’L HUM. RTS. 4, ¶ 1, at <http://www.law.northwestern.edu/journals/JIHR/v2/4> (2004).

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 19.

¹⁸ *Id.* at ¶ 31.

¹⁹ *Id.* at ¶ 78.

²⁰ *Id.*

dilemma, the Court is constantly driven beyond the bounds of strict legality in order to do its political work, and thus opens itself at frequent intervals to the charge that it has (once again) gotten too big for its admittedly capacious britches.”²¹

¶ 13 Perhaps in the tension that Zuckert discovers between the Court’s political and legal roles is seen something of an eternal conflict between the assertion of individual human rights and the maintenance of the institutions devoted to the rule of law which enforce them. In his close analysis of Madison and Montesquieu’s thought, Zuckert examines this tension at the level of national constitutional government, while Professor Mary Ann Glendon, in her piece, *The Rule of Law in the Universal Declaration of Human Rights*, explores the problem in terms of international law.

¶ 14 Professor Glendon’s statement of these articles’ common theme is that “[i]t is a commonplace that long lists of rights are empty words in the absence of a legal and political order in which rights can be realized.”²² She proceeds to demonstrate how the architects of the 1948 Universal Declaration of Human Rights (“UDHR”) sought to balance their articulation of internationally-valid basic human rights with the maintenance of national and international institutions to secure those rights, including, for example,

a right “to take part in the government of [one’s] country”; a right to “a social and international order in which the rights and freedoms set forth in this Declaration can be realized”; an acknowledgment that everyone’s rights are limited by the need for “meeting the just requirements of morality, public order and the general welfare in a democratic society”; and an express recognition of the importance of the rule of law.²³

¶ 15 Glendon praises the “political realism of the men and women who drafted the Universal Declaration,” and indicates that many current human rights advocates may have “forgotten or ignored” how attention to the rule of law and the institutions which secure it are indispensable to the protection of human rights.²⁴ The aim of her essay, she explains, is “to recall the history of the rule-of-law provisions of the UDHR with the hope of shedding some light on current controversies over the respective roles of nation-states and international bodies in bringing human rights to life.”²⁵ Among the many virtues of Glendon’s piece is her effort, through her reading and exposition of the UDHR, both to make clear what are the modern relatively uncontroversial notions of human rights and political participation,²⁶ as well to suggest those “rights” that still have not achieved full

²¹ *Id.*

²² Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT’L HUM. RTS. 5, ¶ 1, at <http://www.law.northwestern.edu/journals/JIHR/v2/5> (2004).

²³ *Id.* (quoting Universal Declaration of Human Rights, *supra* note 2, at Arts. 21, 28, 29, and prmb. (3)).

²⁴ *Id.* at ¶ 2.

²⁵ *Id.*

²⁶ *E.g.*, “rights to life, liberty, and personal security; bans on slavery and torture; rights to legal recognition, equality before the law, and effective remedies for violation of fundamental rights; freedom from arbitrary arrest and detention; guarantees of fair criminal procedures, the presumption of innocence, and the principle of non-retroactivity in criminal law” as well as “freedom of religion and belief; freedom of

acceptance as basic human entitlements governments are instituted to supply.²⁷ Simply to enumerate these “rights” of the UDHR is to demonstrate how some of them may actually be in conflict—how, for example, does one easily reconcile the “right to nationality,” with “freedom of movement and the right of return,” or “the right to seek and enjoy political asylum?” More troubling, how do some of these more commonly accepted rights, which seem to depend for their enforcement on the exercise of national sovereignty and political participation of citizens easily co-exist with the Declaration’s Article 28, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”²⁸

¶ 16 Professor Glendon very nicely exposes the difficulties that the securing of these expansive rights pose for nations like ours, leery of central planning, and even socialist nations reluctant to allow individuals the full panoply of private rights which the UDHR seems to favor. Glendon appears to suggest that the means of reconciling these conflicting needs and tensions, as the framers of the UDHR understood, is to guarantee the rule of law and to adopt a somewhat Burkean tolerance for individual nations to evolve indigenous structures and institutions for the gradual and eventual achievement of many of these rights. For Glendon, then, and for the framers of the UDHR, the articulation of human rights may be as much about aspirations, ideals, and gradual evolution as they are about revolution or instant gratification. As Eleanor Roosevelt, one of these distinguished framers, put it, the “[m]ethods for ensuring the realization of those rights . . . would necessarily vary from one country to another and such variations should be considered not only inevitable but salutary.”²⁹

¶ 17 If the recognition of the need for variations among nations (and, perhaps the preservation of national character) was a crucial and fragile insight of the UDHR’s framers, so, Professor Glendon rightly stresses, was their understanding set forth in Article 29, of the inevitable linkage of individual duties with individual rights:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of

opinion, expression, and communication; freedom of assembly and association; and the ‘right to take part in government . . . directly or through freely chosen representatives.’” *Id.* at ¶¶ 9, 12 (*citing* Universal Declaration of Human Rights, *supra* note 2).

²⁷ Including, apparently, “the right to be free of arbitrary interference with one’s ‘privacy, family, home, or correspondence’ and from arbitrary attacks upon one’s ‘honor and reputation’; freedom of movement and the right of return; the right to seek and enjoy political asylum; the right to a nationality; the right to marry and to found a family, the right of the family as such to ‘protection by society and the State,’ and the right to own property,” as well as “rights to a minimum standard of living, to work, to social security in the event of unemployment or disability, to form and join unions, and to education.” *Id.* at ¶ 11.

²⁸ *Id.* at ¶ 16 (*quoting* Universal Declaration of Human Rights, *supra* note 2, at Art. 28).

²⁹ *Id.* at ¶ 13 (*quoting* Human Rights Commission, 3d Sess., at 5-6, E/CN.4/SR64 (1947)).

morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.³⁰

¶ 18 Clause (3) of Article 29 obviously raises some difficulties for national sovereignty, since the U.N.'s charter never successfully resolves the conflict it creates between the human rights and the national sovereignty which it seeks simultaneously to guarantee. But one needs only to read the first two provisions of Article 29, and its impressive understanding that personality needs community to develop, to realize the poverty of conception and understanding of highly-individualistic pronouncements like the infamous 1992 "mystery passage" of the United States Supreme Court, recently invoked to find a right to engage in adult consensual homosexual conduct free from criminal penalties.³¹

¶ 19 Glendon closes her piece on a cautionary note, "[w]hat many of today's internationalists have forgotten, or chosen to ignore, is that [the framers of the UDHR] saw the rule of law at the *national* level as the best and surest legal means for protecting human rights."³² For Glendon, then, national sovereignty *and* the rule of law are as indispensable foundations for human rights, as are the international governmental organizations such as the U.N., NATO, or NGO's. Her caution nicely places in context and perspective the concluding essay by Professor Douglass Cassel, who reviews the work of these international organizations in his piece, *The Globalization of Human Rights: Consciousness, Law, and Reality*.

¶ 20 Professor Cassel laments what he regards as "sharp setbacks" for human rights in the four years since his paper was originally delivered, as a result of the war on terrorism, but still finds reasons for "guarded optimism." He describes "a revolution in global human rights consciousness, law and institutions," that has occurred over the last half-century, the period that begins with the UDHR.³³ "Atrocities are still committed," he tells us, "but we now have international legal tools to address them—if we have the will."³⁴ Cassel seeks to determine how this extraordinary change in the last five decades has come to be, and, in particular how in "both a formal and a real sense, basic human

³⁰ Universal Declaration of Human Rights, *supra* note 2, at Art. 29.

³¹ "At the heart of liberty is the right to define one's own concept of existence, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they found under the compulsion of the state." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion of Kennedy, O'Connor, and Souter). The "mystery passage" was cited as justification for the invalidation of criminal penalties for consensual adult homosexual acts in *Justice Kennedy's opinion for the court in Lawrence v. Texas*, 123 S.Ct 2472, 2482, 539 U.S. 558, ___ (2003). The "mystery passage" wrongly assumes that one defines one's own concept of personhood and fails to understand that meaning in life does not come from individual decision but from relationships with one's fellows in society. Conversely, Article 29 of the UDHR makes this clear.

³² Glendon, *supra* note 22, at ¶ 28.

³³ Douglass Cassel, *The Globalization of Human Rights: Consciousness, Law, and Reality*, 2 NW. U. J. INT'L HUM. RTS. 6, ¶ 7, at <http://www.law.northwestern.edu/journals/JIHR/v2/6> (2004).

³⁴ *Id.*

rights are no longer merely national, but global concerns.”³⁵ While Professor Glendon identified as a positive aspect of the UDHR that it stressed duties as well as rights, Professor Cassel attributes much of the accelerated concern with human rights to a mindset that is less interested in community and more interested in individuality, albeit devoted to the rule of law rather than “authoritarian compulsion.”³⁶ Indeed, he concludes that “[i]nternational law today formally recognizes almost all human rights, for almost all persons, in almost all places.”³⁷

¶ 21 Accompanying, and helping to foster this “rights consciousness,” Cassel argues, is “a proliferation of global and regional institutions and mechanisms—reporting requirements, monitoring devices, public hearings, special mediators, investigative bodies, complaint procedures, international courts, admission requirements for international organizations, bilateral and multilateral diplomatic and economic sanctions, and even occasional military intervention.”³⁸ Still, Cassel warns that the “rights revolution” has yet to “triumph on the ground,” as “the 1990’s saw massive ethnic cleansing in the former Yugoslavia, genocide in Rwanda, indiscriminate shelling of civilians in Chechnya, unspeakable brutality in Sierra Leone, unchecked violence in Colombia and the Congo, continued systemic violence against women in many countries, and widespread poverty and growing economic inequality within and between nations.”³⁹

¶ 22 Of particular interest in Professor Cassel’s analysis is the distinction he draws between the United States and the United Kingdom. While Professors Baker and Zuckert are able to discover important foundations for human rights and the rule of law in both the English and American traditions, Cassel states that:

[w]ith respect to international human rights law, despite their common rights traditions, the U.K. and U.S. are at radically different stages of development. The U.K. is party in a meaningful way to human rights treaties and courts. London yields to judgments of the European Court of Human Rights, even in controversial cases of public interest. Britain is subject as well to human rights rulings by the European Court of Justice. Although among the last Council of Europe members to do so, Britain recently made European human rights law enforceable in domestic courts . . .

The U.S., on the other hand, is not yet prepared to submit to international human rights law. We refuse to join widely accepted treaties on rights of women and children, on anti-personnel land mines, on an International Criminal Court, and on economic and social rights, as well as our regional human rights treaty. Although we have ratified treaties on genocide, torture, race discrimination, and civil and political rights, we attached debilitating reservations. These provisos conform the application of treaty norms in the

³⁵ *Id.* at ¶ 139.

³⁶ *Id.* at ¶ 9.

³⁷ *Id.* at ¶ 15.

³⁸ *Id.* at ¶ 16.

³⁹ *Id.* at ¶ 18.

U.S. to our national preferences. They also make the treaties largely unenforceable in our domestic courts, while declining to accept even non-binding international complaint procedures, let alone the jurisdiction of international courts.⁴⁰

¶ 23 Professor Cassel's strong implication is that the United States would do well to follow the example of the United Kingdom, and that this country ought better to appreciate "the advantages of international law," especially as "the rising future power of Europe and Asia constrains American unilateralism . . ."⁴¹ There is a very strong idealistic and, indeed, religious dimension to Professor Cassel's piece. He takes very seriously the "basic question, one first posed at the dawn of the Judaeo-Christian tradition: Are we our brothers' keeper?"⁴² His answer to that question would seem to be in the affirmative, but he acknowledges a difficulty in modern democracies, such as the United States, accepting that burden, because "[t]o do so will often entail costs—in domestic political support, sovereignty, trade benefits, investment opportunities, tax revenue and, on occasion, the safety of our soldiers."⁴³

¶ 24 The preservation of traditional national sovereignty does not loom large for Professor Cassel, and most of his paper is a description of the development of institutions and legal doctrines that have led to an undermining of that sovereignty. For him it is now "clear that gross violations of human rights are not within domestic sovereignty."⁴⁴ He stresses that:

[a]lthough recalcitrant nations even now yelp 'national sovereignty' and 'domestic jurisdiction' when called to international account, their legal argument is no longer credible. No government believes it, except perhaps the one attempting to resurrect it as a defense. In international law, human rights have won the war against exclusive domestic sovereignty.⁴⁵

¶ 25 Professor Cassel furnishes an invaluable catalogue of the development of governmental, non-governmental, and international economic institutions which have begun to supersede national governments as enforcers of human rights and promulgators of international "rights consciousness," and he paints an impressive picture of what has been accomplished.

In the last two decades, life expectancy in the developing world rose from fifty-five to sixty-five years. Adult literacy increased from forty-eight percent to seventy-two percent. Infant mortality declined from one-hundred-and-ten to sixty-four per one-thousand

⁴⁰ *Id.* at ¶ 21.

⁴¹ *Id.* at ¶ 23.

⁴² *Id.* at ¶ 27.

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 49.

⁴⁵ *Id.*

live births. Access of rural populations to safe drinking water increased from thirteen percent to seventy-one percent.⁴⁶

¶ 26 For Cassel, however, “the rights revolution still has far to go before its values of dignity, security, equality and liberty are realized for most people.”⁴⁷ Among the difficult question Professor Cassel raises by implication, however, is how does one weigh the costs of the diminishment of national sovereignty or even national culture that would be paid to purchase the triumph of individual human rights its advocates seek? Professor Glendon’s framers of the UDHR would be disinclined to surrender the one to further the other. Professor Baker may be less sanguine about the superiority of the political conclusion the U.K. has reached with regard to Human Rights. He explains that:

as a result of activities in Strasbourg, the conception of human rights in the United Kingdom has undergone a transformation. They are no longer seen as a set of essentially British ideas, rooted in history, shared by other civilised nations, and framed into a code chiefly for the purpose of export to less favoured parts of the globe. They have become instead a source of ammunition for overturning domestic judicial precedent and legislation by recourse to vaguely defined concepts, sometimes interpreted in a mechanical way without reference to history, and an unlimited selection of loosely related ideas from around the world. The obvious danger of this newer movement is not merely uncertainty—which, paradoxically, is itself inconsistent with the rule of law—but the increasing politicisation of an unelected judiciary. Whether that is a fair price to pay for a formal check on Parliament will be one of the great issues for the United Kingdom in the present century.⁴⁸

¶ 27 Something similar to the question Professor Baker poses might be asked about the recent possible tendency of the United States Supreme Court, in reviewing and possibly invalidating the action of state legislatures to look for guidance in what has been done in the European Community.⁴⁹ These, then, are five uniquely informative and provocative papers, whose highly nuanced character has only been hinted at in this brief introduction. These five scholars have produced papers which require us really to come to grips with not only the questions of what are human rights, and what is their likely future evolution, but, indeed the very purpose of the preservation of such rights. All of these authors, it would seem, understand (although with varying levels of emphasis) that human rights are about more than selfish individualism, and that their preservation has been and ought to be linked with the preservation of community. Indeed, perhaps it does not go to far to suggest that in these papers one can find something of Oliver Wendell

⁴⁶ *Id.* at ¶ 98.

⁴⁷ *Id.* at ¶ 100.

⁴⁸ Baker, *supra* note 8, at ¶ 23.

⁴⁹ Lawrence, 123 S.Ct. 2472, 2481, 539 U.S., at ___ (*citing* the European Convention on Human Rights, and its application in *Dudgeon v. U.K.*, 45 Eur. Ct. H. R. (1981)).

Holmes, Jr.'s much vaunted "echoes of the infinite,"⁵⁰ of humankind's continual striving for justice, but also of the elusive values such justice seeks to foster.

¶ 28 Perhaps the greatest service rendered by these five papers is to expose the strong tensions between and among "human rights," "the rule of law," and "national sovereignty." They lay bare the paradox of our modern conceptions of and striving for international human rights. This is that what makes the preservation of those purportedly "universal" rights ultimately worthwhile is the generation of values that may flow as much from diverse cultures and peoples as from universal conceptions. National sovereignty is, at some level, essential to produce and maintain those values, but the institutions of international human rights, as Glendon reminds us,⁵¹ threaten that sovereignty in a manner that is unprecedented in the modern age.

⁵⁰Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

⁵¹"A growing number of scholars have raised their voices against the sort of internationalism that waxes enthusiastic over the idea of supranational institutions in readiness to over-ride national constitutions and democratic legislation in the name of human rights. Robert Araujo has argued that an internationalist program of that type ultimately undermines all human rights, because sovereignty—the exercise of free self-government by a people—is itself a fundamental human right, one that is essential for the protection of all the fundamental rights to which it is inextricably linked." Glendon, *supra* note 22, at ¶ 34 (citing Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477(2001)). "In a similar vein, Kenneth Minogue contends that the problem with insufficiently differentiated internationalism is that it aims not only to transcend the nation state but to over-ride the politics of democratically constituted states. This project, he bluntly states, "cannot . . . be anything other than a bid for power by a new class of power holders.'" *Id.* (quoting Kenneth Minogue, *Transnational Interest*, AM. OUTLOOK, Spring 2000, at 54). See Stephen B. Presser, "Liberty Under Law" *Under Siege*, 45 ORBIS 357 (2001).