

***73 FUNDAMENTAL CONSTITUTIONAL RIGHTS IN THE NEW CONSTITUTIONS OF
EASTERN
AND CENTRAL EUROPE [FNal]**

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***74 I. INTRODUCTION**

Within the past two years, several Eastern and Central European countries, and almost all former republics of the Soviet Union, began drafting their new constitutions. Bulgaria, Czech Republic, Estonia, Kazakhstan, Lithuania, Romania, Russia, and Slovakia, have already adopted new basic laws. Additionally, Albania and Poland approved interim constitutions, and amendments introduced to the Hungarian Constitution have purged it entirely of the remnants of its Stalinist legacy. Also, the new Belarusian and Ukrainian constitutions were expected in Spring 1994. One might even say that East-Central Europe has become a major laboratory of constitutional works.

When several countries in the same region engage in constitution drafting, comparative dimensions underlie the procedure. Constitutions do not emerge in a political vacuum. Countries naturally borrow from each other, and borrow heavily during transitional periods when new political entities are emerging. Thus, experts studying the process of transplantation of various constitutional features must consider whether they witnessed the formation of a new constitutional model in East-Central Europe. These experts assessed the extent to which the new constitutions were based on American, European, East or West liberal and democratic traditions, and how much of the communist legacy would be absorbed by the new acts.

A clear response to these questions is particularly important regarding fundamental constitutional rights. The socialist constitutions contained impressive bills of rights; yet, the records of these countries in actually protecting citizens' rights and freedoms were extremely poor. Both the socialist East and the capitalist West claimed that the other's approach to human rights protection was "formalistic." For the socialist jurisprudence, the lack of appropriate protection for economic, social, and culture rights, typical of Western

constitutionalism, meant no protection at all. Socialist jurists *75 professed that equality of political rights and equality before the law, without equivalent guarantees for social and economic rights, created an environment conducive to social inequality, enslavement and exploitation of people, and general social injustice. According to capitalist Western doctrine, the "formalistic" socialist approach to human rights meant only "a paper protection," with no significance whatsoever in reality. An elaborate socialist bills of rights, without an enforcement mechanism, were only decoration, merely resembling a book jacket, and lacking substance.

The drafters of the new post-socialist constitutions faced a difficult task. They tried to implement Western ideals while simultaneously satisfying a people strongly influenced by a socialist upbringing.

The goal of this article is to review the efforts of the drafters. This study analyzes the process of drafting the new bills of rights against the background of the Western experience. The paper consists of two parts. The first examines the genesis of American and European constitutional protection of human rights, including the socialist concept of the bill of rights. The second is an analysis of basic constitutional rights as provided in several new constitutions and constitutional drafts of the countries of former Soviet dominance. The article also examines the actual records of these countries in human rights protection. The conclusions provide some observations on the likelihood of whether the drafters of new constitutions will reach some identifiable consensus, the possibility of a new constitutional model of human rights protection surfacing, and the applicability of the Western concepts of human rights to the East-Central European experience.

II. THE PLACEMENT OF RIGHTS IN THE CONSTITUTION

A. The Origins of the Constitutional Protection of Human Rights

1. Drafting the First Bills of Rights

The concept of natural rights has its foundations in antiquity and was developed in numerous political and legal theories during the Enlightenment. Although many of the ideas on the origin of human rights originated in continental Europe, the belief that a well-governed society should have one framework document providing an extensive coverage for citizens' rights and freedoms is *76 deeply rooted in the British tradition. [FN1] At the end of the eighteenth century, this idea buttressed the American constitutional experience.

The formation of the American Bill of Rights was, in fact, an uneasy process. Although declarations of rights were incorporated into the constitutions of several states, the Philadelphia Convention of 1787 adopted the Federal Constitution without a bill of rights annexed to it.

The struggle to ratify the Constitution quickly proved that the Convention erred in not adopting a bill of rights. The public demanded a bill of rights, and the lack of one became a main point in the anti-federalist attack on the Constitution. [FN2] Thomas Jefferson, in his letters from France, argued strongly that the absence of a statement of rights would result in the "elective despotism" of the Congress. [FN3] James Madison favored a bill of rights, although he did not believe the omission to be a major defect of the Constitution. [FN4]

In drafting the Bill of Rights, Madison referred to precedents such as the American Declaration of Independence, state constitutions and bills of rights, ratifying conventions, and British constitutional documents: the Magna Carta of 1215, the 1628 Petition of Rights, and the 1689 Bill of Rights. [FN5] Though the concept of a bill of rights originated from attempts to limit the power of the British crown, Madison claimed Americans had to develop a more advanced *77 bill as the British Constitution did not secure freedom of the press and liberty of conscience, rights highly regarded in America. [FN6] Madison made no reference to the French constitutional experience, and, with the exception of the consular convention and the letter to the French National Assembly announcing Franklin's death, France was hardly mentioned during the first year of debate in the first United States Congress.

The adoption of the French Declaration of Man and Citizen on August 27, 1789, almost two and half years before the ratification of the American Bill of Rights on December 15, 1791, often puzzles researchers looking for the origin of constitutional bills of rights. The passage of the French document before the American one trivialized the American contribution to French constitutional development. The notion of a bill of rights, which could be used as a preamble to a constitution, is an American concept. Americans translated this

idea into the concept of a constitution, a single document providing a basic law superior to any legislative act or statute. [FN7]

On the one hand, it is unquestionable that the preambles of American state constitutions, such as those of Virginia, Massachusetts, and Maryland, as well as their prototype -- the American Declaration of Independence -- strongly influenced the authors of *78 the French Declarations. [FN8] On the other hand, the record demonstrates that the drafting of the American Bill of Rights and the French Declaration of the Man and the Citizen almost paralleled each other. On May 4, 1789, the day before the French Estates General met for the opening plenary session in the great Salle des Menus Plaisirs, Madison informed Congress of his intention to address the subject of amending a bill of rights to the Constitution. [FN9] He submitted his draft on June 8, 1789 while Lafayette presented his proposal to the French Assembly on July 11 of that same year. [FN10] On August 13, 1789, the United States House of Representatives convened as a Committee of the Whole and discussed the report of the Committee of Detail, the working group that took the general principles adopted during the first stage of the proceedings and molded them into a draft document. Then, the Committee of Style, charged with refining the form and style of the draft document and incorporating changes previously made in Convention debate, submitted the report with the third draft of the amendments on August 24-25, 1789, two days before the French Assembly adopted the Declaration of the Rights of Man on August 27, 1789. [FN11] The amendments passed Congress on September 25, 1789.

The American Bill of Rights was not ratified until 1791, but the drafting process was completed before the adoption of the French Declaration. Thus, the draftsmen of the American version of the bill were not influenced directly by the final text of the French document. They may have been familiar with the early drafts of the Declaration and inspired by the French constitutional debates, but a thorough examination of the record does not confirm this thesis. It is true that the American public was enthusiastic about the French Revolution, and the founding fathers were well informed about the European events. There is, however, no evidence *79 that the American draftsmen drew their ideas from French constitutional thought.

2. The French Declaration and the American Bill of Rights

An extensive examination of the French Declaration and the American Bill of Rights reveals similarities and differences between these documents. Both texts emphasize "freedoms from" and rights of the criminally accused. While the American Bill of Rights is solely oriented toward the protection of individual rights, the French Declaration makes meaningful reference to "the common good."

The parallel development of the French Declaration and the American Bill of Rights makes the search for mutual interdependencies between the two acts difficult. To discover the roots of present and future differences in European and American concepts of human rights, it is necessary to take a closer look at: (1) the French Declaration; (2) the American Declaration of Independence; and (3) American state and federal bills of rights. It was in these documents that confluence began, and where both similarities and differences in European and American concepts of human insecurities were revealed.

The French Declaration more notably attached equality to liberty and stressed the importance of this conjunction than did either the American Declaration of Independence or the Virginia Bill of Rights. [FN12] "By bringing the resounding collapse of privileges and feudalism, the [French] popular revolution highlighted equality as the Anglo-Saxons had not done." [FN13] Article 1 of the French Declaration proclaims, "men are born free and equal in rights." [FN14] Equality *80 is also referred to in several of the subsequent articles. [FN15] The French Declaration guarantees equal rights in courts, equal access to governmental positions, and fiscal equality. Even with all of the egalitarian provisions, equality, although emphasized more firmly than in the Anglo-American doctrine, holds "a lesser place than freedom in the [French] Declaration." [FN16]

Among the fundamental principles embodied in the French and American documents, liberty is the most important right. Men are declared free from arbitrary persecution and free to communicate their opinions, provided they respect the same liberty in others. Liberty, property, security, and resistance to oppression are recognized as fundamental individual rights stemming from the nature of human beings. [FN17] Equality was not considered part of these sacred and imprescriptible rights. The French Assembly focused on the condemnation of

the unequal position of estates and privileges of minorities, and following Sieyes' argument, decided not to include social equality among the rights protected by the French Declaration.

***81** Contrary to the second French Constitution of 1793, which stressed the significance of social equality, the majority of the Constitutional Assembly in 1788-1791 was satisfied with the protection of equal freedom. The right of equal freedom was formulated more clearly in the French Constitution of 1791 than in the Virginia Bill of Rights. On the other hand, the Virginia Declaration placed greater emphasis on the frequency of elections, and the right to a jury trial. It was also more concrete in its warning against excessive bail and more explicit in its reference to general warrants, suspension of laws, and standing armies. [\[FN18\]](#)

Religious liberty and tolerance are other areas where the French and American Declarations diverge. A number of deputies of the French Assembly, led by Robespierre, were dissatisfied with the inadequate treatment of religious liberty and religious toleration in the French Declaration. The mild reference to religious toleration was recognized as a failure of the Voltairians during this phase of the Revolution. As a result of these sentiments, at the end of 1789 and in 1790, the French Assembly adopted several acts drastically limiting the dependence of the French Catholic Church on the Pope and tying the clergy to the State's policy. [\[FN19\]](#)

Contrariwise, the American instruments seemed more religiously oriented. The Declaration of Independence refers to "the Creator," and the Virginia Bill of Rights contains references to Christian and moral virtues. [\[FN20\]](#) Americans were not only more dedicated to religion than the French, they were also especially determined not to grant priority to any particular creed. France remained a predominantly Catholic country, but with an "air of atheism."

As is often suggested, the populistic character of the French Declaration of Rights was more specious than real. While the American Declaration of Independence states that governments derive "their just Powers from the Consent of the Governed," [\[FN21\]](#) the French text is more explicitly Rousseauistic by proclaiming that ***82** "law is the expression of the general will." [\[FN22\]](#) However, both declarations are Rousseauistic only in these phrases. [\[FN23\]](#) They were manifestos of developing liberalism proclaiming a victory for individualistic philosophy, and recognizing the individual to have certain fundamental rights. Individual autonomy was proclaimed as being worthy of constitutional protection, an individual was declared the best judge of his own well-being, and the interests of the community were recognized as the sum of individual interests.

The framers of both declarations followed Rousseau's concept of the general will only in name. The American Declaration of Independence focused on the reasons why the original thirteen States of the Union severed their colonial allegiance. The interpretation of the principle of the popular origin of power is left to constitutional regulation, which fully recognizes a representative form of government. The French Declaration, which was itself conceived as a preface to the Constitution, more explicitly explains the idea of representation. For most of the deputies, sovereignty was indivisible and inalienable, but the sovereign people could exercise their power through elected representatives. Sieyes' opinion, that deputies were representatives rather than simply "intermediaries," prevailed in the Assembly. He stressed that the will of the majority of the deputies meant the sum of the individual wills. It was Sieyes who, in his popular pamphlet *Quest-ce le Tiers Etat?* argued, "individual wills are the sole elements of the general will . . . [and] it is useless to talk reason if, for a single instant, this first principle, that the general will is the opinion of the majority, and not of the minority, is abandoned." [\[FN24\]](#)

In summary, the resemblance between the French and American declarations is remarkable. Both acts recognize that society should be organized on principles of liberty, individual autonomy, representative government, and the power of the majority combined with the rights of minorities. However, even with these similarities, ***83** the declarations differ in the emphasis given to particular rights.

Analyzed against this background, the American Bill of Rights is a pragmatic act deprived of theoretical divagations on the meaning and limitations of liberty, interrelations between liberty and equality, and interdependencies between liberty and the idea of limited government. The American document is simply a list of civil liberties [\[FN25\]](#) or "negative rights" which the individual citizen may assert against the government. As Judge Posner states, "[Our] Constitution is a charter of negative rather than positive liberties . . . The men who wrote the Bill of Rights were not concerned that the federal government might do too little for the people, but that it might do too much to them." [\[FN26\]](#) In time, the American Supreme Court developed a system to enforce constitutional rights. The United States

seemed to monopolize the export of the ideas of constitutional protection and judicial enforcement of human rights.

The French Revolution generated a multiplicity of emotions and focused public attention on the struggle for civil rights and liberties; yet, French constitutionalism seemed to deemphasize the role of Constitutional rights. The Constitution of 1795 supplemented the Rights of Man with nine paragraphs on the duties of the citizen, while subsequent Napoleonic constitutions were more pragmatic, eliminating the sections on the Rights of Man along with a great quantity of the ideology that had sanctioned them. [FN27] However, for decades to come, the French Declaration still remained a philosophical manifesto for a free world. Its vital influence stemmed from the assertion that "all men are born free and equal in rights" and that their rights are inalienable.

B. Bills of Rights in Modern **Constitutions** of the **Nineteenth** and Twentieth **Centuries**

In the **nineteenth century**, the recognition of the **fundamental rights** of man influenced the development of European **constitutionalism**. [FN28] The first European **constitutions** [FN29] seemed to follow ***84** the American structure by providing a list of typical "Thou Shall Nots." For example, the **Constitution** of Sweden, adopted in 1809, stated in a single article that

The King . . . shall not deprive anyone nor cause anyone to be deprived of life, honor, personal liberty, or well-being unless he has been legally tried and condemned; he shall not deprive anyone nor permit anyone to be deprived of any real or personal property without trial and judgment in accordance with the provisions of Swedish law; he shall not disturb or cause to be disturbed the peace of any person in his home; he shall not banish any person from one place to another; he shall not constrain nor cause to be constrained the conscience of any person, but shall protect every-one in the free exercise of his religion. . . . [FN30]

The Swedish constitution also guaranteed freedom of the press, within the limits determined by the law, and prohibited the establishment of preventive censorship. [FN31] Similar civil liberties were listed in the Constitution of Spain in 1814, and in a separate chapter in the Constitution of Norway of 1814. [FN32] The drafters of the Constitution of Belgium of 1831 moved the chapter on "Belgian Citizens and Their Rights" to the very beginning of the text and delineated a detailed list of rights. [FN33] Bills of rights were also incorporated into the constitutions of Liberia in 1847, the Kingdom of Sardinia in 1848, Denmark in 1849, Prussia in 1850, and Switzerland in 1874. After the First World War, bills of rights were adopted by most of the new European states, the Latin-American countries, and the Asiatic states. [FN34]

***85** Although there was a general preoccupation with **constitutional** protection of human rights, the American and European approaches to **fundamental rights** differed in the second half of the **nineteenth century**. This is exemplified in the differences between the American Bill of Rights and the French Declaration. Following the American and the French revolutions, the other European countries developed their own concepts of **fundamental constitutional rights**.

Despite numerous efforts, the Europeans did not adopt a successful model of **constitutional** review until the second decade of the twentieth **century**, [FN35] forcing the idea of inalienable rights to remain a philosophical abstraction in Europe. [FN36] In the United States the prevailing opinion was that **fundamental rights** were not a gift from society, but were rather natural and inherent. The Europeans believed that rights were granted only by the **constitution**. [FN37] As Wiktor Osiatynski correctly observed, "[a]nother important difference between American and European **constitutional** orders which is worth discussion is that the American order rests on the principle that power is a grant of freedom and the European order rests on the principle that freedom is a grant of power." [FN38]

The European **constitutions** of the **nineteenth century** declared rights were **constitutionally** protected within the boundaries of the laws. The **constitutional** guarantees of rights meant protection against the arbitrariness of governmental decisions, but not against limitations imposed by the legislature. By the end of the **nineteenth century**, the Europeans were inclined to accept the concept of the division of powers. They believed the powers were not equal, and the legislature, being supreme, could judge the limitations on **fundamental rights**. Thus, the European **constitutions** provided elaborate lists of rights which might be exercised only "in the manner expressly provided by law." [FN39]

***86** Following the tradition of French **constitutionalism**, the European basic laws stressed the social duties of citizens, and became replete with positive rights which the individual might claim against the government. The citizens had certain obligations including: military duties, the duty to educate children, and the duty to perform personal service for the state and the municipalities. [\[FN40\]](#) While under the American Constitution the government does not provide economic and social benefits to the citizens, the constitutions of the European welfare states impose numerous positive obligations on the governments. "It shall be the duty of the state and the municipalities to maintain the purity, health, and social welfare of the family. Families of many children shall have the right to compensatory public assistance." [\[FN41\]](#) The Constitution of Finland (1919) provides, "The state shall support, or in case of need shall give grants-in-aid to, institutions for instruction in the technical professions, in agriculture and its allied pursuits, in commerce and navigation, and in the fine arts." [\[FN42\]](#) As Louis Henkin concluded,

economic-social rights generally are not constitutionally protected [[in the United States]. The United States has set an example of commitment and growth in civil and political rights, and has followed Europe in respect of economic-social rights; although President Franklin Roosevelt proclaimed that the commitment of the United States to "freedom from want" would be equal with other freedoms, economic-social rights have not achieved constitutional status in the United States. [\[FN43\]](#)

Furthermore, Europeans showed a greater amount of sensitivity than Americans to the idea of equality of rights. The Constitution of the United States, in its original version, neither guaranteed universal suffrage nor equal rights to women nor prohibited slavery. In 1788, Condorset led the French Societe des Amis des Noirs (The Society of the Friends of Blacks), whose purpose was to disseminate the idea of the abolition of both the slave trade and slavery. Denmark was the first European state to abolish the slave trade by a royal order in 1792. Most European states followed ***87** Denmark's lead in prohibiting the slave trade after the Congress of Vienna in 1814. Before the Nineteenth Amendment to the United States Constitution, granting women the right to vote, became law on August 26, 1920, numerous European countries such as Finland (1906), Norway (1913), Denmark (1915), the Netherlands and the Soviet Union (1917), and Austria, Czechoslovakia, Germany, Poland, and Sweden (1920) enacted legislation guaranteeing a woman's right to suffrage.

The American concept of fundamental constitutional rights served as a model for other countries in the 1920's, when the United States Supreme Court actively developed the philosophy of the First and Fourteenth Amendments. The American interpretation of human rights became particularly influential in several major areas such as due process of law, the right of the criminally accused, the right to freedom of expression, and the right to privacy. After a modest beginning, American courts began producing a significant number of decisions relating to the right of equality of treatment without unfair discrimination. [\[FN44\]](#) American law also had a remarkable impact on the development of the increasing body of international human rights law traceable to World War II and President Roosevelt. As Louis Henkin observed,

A new wave of influence traceable to the United States came with World War II. President Roosevelt encapsulated the idea of rights in his Four Freedoms address, and the United States and its Western Allies incorporated the idea of rights into the aims of the Second World War, into the Nuremberg Charter and the UN Charter, and then into the Universal Declaration of Human Rights and the series of international covenants and conventions that followed. [\[FN45\]](#)

(...)

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FN[\[FN1\]](#). HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 80-88 (1963).

FN[\[FN2\]](#). See MELANCTHON SMITH, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK OF 1788 reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 114 (Paul L. Ford ed., 1988). The Anti-federalist Whitehill argued in the Pennsylvania Ratifying Convention of 1787 that "he anticipates annihilation of the state governments which would destroy civil liberties." A. T. MASON, FREE GOVERNMENT IN THE MAKING IN AMERICAN POLITICAL THOUGHT 267-

73 (1965). For the arguments of the Anti-federalist Lenoir in the North Carolina Ratifying Convention, see *Id.* at 275.

FN[FN3]. Letter from Thomas Jefferson to James Madison (Dec. 20, 1788) in *FREE GOVERNMENT IN THE MAKING* 329-30 (Alpheus Thomas Mason ed., 3d ed. 1965). See also Charles Warren, *The Making of the Constitution* 81 (1931).

FN[FN4]. WARREN, *supra* note 3.

FN[FN5]. *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES*, 1 *ANNALS OF CONG.* 431-42 (1934) [hereafter *ANNALS*]. Hannis Taylor wrote: "If anything is certain in the history of any country it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688 and as defined by Blackstone in 1758, passed into our first state constitutions, whose bill of rights set forth, for the first time, in a written and dogmatic form, the entire scheme of civil liberty as it existed in England in 1776"; HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN REVOLUTION* 361 (1911).

FN[FN6]. *ANNALS*, *supra* note 5, at 436. The British Bill of Rights of 1689 did not proclaim freedom of speech. It provided only that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court." EMLYN C.S. WADE, *CONSTITUTIONAL LAW* 8 (1970). The American founding fathers correctly viewed the origins of the bills of rights in the procedures and institutions established to limit the power of government. From this point of view, it is quite natural that they looked for precedents in British constitutional traditions rather than in the history of French absolutism. In fact, however, they overlooked the constitutional experience of other European countries which, like Poland, had a four and a half century tradition of struggle to restrain the king's power and to create institutions fundamental to a constitutional government. The Polish nobility had its "Habeas Corpus Act" much earlier than did the nobility in other European countries, and had its due process clause well established at the beginning of the fifteenth century. See Rett R. Ludwikowski, *Two Firsts: A Comparative Study of the American and the Polish Constitutions*, 8 *MICH. Y.B. INT'L L. STUD.* 121 (1988). See also Wiktor Osiatynski, *Constitutionalism and Rights in the History of Poland*, *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 284-314 (Louis Henkin and Albert J. Rosenthal eds., 1990).

FN[FN7]. For a more profound analysis of the American contribution to the French Declaration of the Rights of Man and Citizen see Rett R. Ludwikowski, *The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions*, 11 *MICH. J. INT'L L.* 167 (1989).

FN[FN8]. As Bernard Fay wrote, "A detailed comparison of the French Declaration of Rights of Man and Citizen with the preambles of these three constitutions brings out a striking resemblance." BERNARD FAY, *THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA* 266 (1927). Blaustein, supporting this opinion wrote, "[t]hus, while the famous French Declaration of the Rights of Man and the Citizen of August 1789, was officially the work of LaFayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage." A. BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 16 (1986).

FN[FN9]. *ANNALS*, *supra* note 5, at 247.

FN[FN10]. *Id.* at 424-48; *THE PAPERS OF THOMAS JEFFERSON* 230-31 (J. Boyd ed., 1959).

FN[FN11]. *ANNALS*, *supra* note 5, at 88, 913; *DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION* 112-14 (F.N. Thorpe ed., 1951).

FN[FN12]. The comments on the comparison of the American Bill and the French Declaration are a lightly edited version of the author's remarks published in *The French Declaration of the Rights of Man and Citizen and the American Constitutional Development*, 38 AM. J. COMP. L. 445, 453 (1990 Supp.).

FN[FN13]. See G. LEFEVRE, *THE FRENCH REVOLUTION FROM ITS ORIGINS TO 1793* 146 (1962). For the most exhaustive comparison of the French Declaration and the Virginia Bill of Rights, see ROBERT R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTIONS* 518-21 app. IV (1959). The comparison brings Palmer to the conclusion that "there was in fact a remarkable parallelism" between both acts. *Id.* at 487.

FN[FN14]. Declaration des Droits de l'Homme et du Citoyen reprinted in J.M. Roberts, 1 FR. REV. DECL. (1966) [hereinafter French Declaration]. The American Declaration of Independence states, "all men are created equal, that they are endowed by their Creator with certain inalienable Rights." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The Virginia Bill of Rights of 1776 declares that "all men are by nature equally free and independent, and have certain inherent rights." 7 THE FEDERAL AND STATE CONSTITUTIONS 3813 (F. Thorpe ed., 1909) [hereinafter VA. BILL OF RTS.].

FN[FN15]. French Declaration, *supra* note 14, at 171-73.

FN[FN16]. JACQUES L. GODECHOT, *LES REVOLUTIONS 1770-1799* 96 (1963). On the one hand, the idea of equality appealed to an American sense of justice; on the other hand, the forefathers feared that in practice it would collide with individual freedom. Generally, they were satisfied with equality before the law and felt uncomfortable with the French attempts to extend equality to social and economic relations. As John Adams wrote,

By the law of nature all men are men not angels - men and not lions - men and not whales - men and not eagles - that is, they are of the same species. And this is the most that the equality of nature amounts to. But man differs by nature from man almost as much as man from beast. The equality of nature is moral and political only and means that all men are independent.

Quoted in CHARLES D. HAZEN, *CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION* 274-75 (1964). On the limits of American dedication to the creation of an egalitarian society, see RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* 21-22 (1970).

FN[FN17]. In 1789, the French Assembly generally showed a greater sensitivity to egalitarian values than did the framers of the American Declaration. Still, it took several years to turn this sensitivity into a fully expressed egalitarian program. Attacks on private property from such socialists as Mably or Morelly, or Rousseau's well known criticism of law as an instrument of exploitation and his accusation of excessive accumulation and unequal distribution of property, did not find an endorsement in 1789. The Assembly recognized property as sacred in article XVII of the French Declaration, and established a representative system, based on a property qualification. For more exhaustive comments see KINGSLEY MARTIN, *FRENCH LIBERAL THOUGHT IN THE EIGHTEEN CENTURY* 220-58 (J. P. Mayer, 2d ed. 1954).

FN[FN18]. See ROBERT R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION: THE CHALLENGE* 518-20 (1959).

FN[FN19]. The French Assembly issued a series of acts relating to ecclesiastical reorganization. The Decree of December 2, 1789 on the confiscation of Church property and the Civil Constitution of the Clergy, which bound the clergy with the state through prescribed oaths, salaries, and newly-established ecclesiastical districts, were the most significant of these. J. STEWART, DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 167-89 (1951).

FN[FN20]. See PALMER, *supra* note 18, at 250.

FN[FN21]. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

FN[FN22]. French Declaration, *supra* note 14, at art. VI.

FN[FN23]. The concept of "general will" (*la volonté generale*) was anti-individualistic. It was discussed by Montesquieu, Holbach, Diderot, and other philosophers, but Rousseau was recognized as its main proponent. For Rousseau, the general will was indivisible and inalienable, and embodied the interests of society as a whole. For Rousseau's influence on the French Revolution, see J. MCDONALD, ROUSSEAU AND THE FRENCH REVOLUTION 1762-1791 (1965); J. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY (1960); A. MEYNIER, JEAN-JACQUES ROUSSEAU: REVOLUTIONNAIRE (1911).

FN[FN24]. SIEYES, QUEST-CE LE TIERS ETAT?, translated in STEWART, *supra* note 19, at 50.

FN[FN25]. See Norman Dorsen, Civil Liberties, in *Encyclopedia of the Constitution* 263-70 (Leonard Lavy ed., 1986).

FN[FN26]. [Jackson v. City of Joliet, 715 F.2d 1200, 1203 \(7th Cir. 1983\)](#) (citations omitted).

FN[FN27]. See Geoffrey Bruun, The Constitutional Cult in the Early Nineteenth Century, in *THE CONSTITUTION RECONSIDERED* 263 (Conyers Read ed., 1938). For the texts of the Constitutions of 1795 and 1799, see STEWART *supra* note 19, at 571-612, 768-79 (1951).

FN[FN28]. LAUTERPACHT, *supra* note 1, at 89-90.

FN[FN29]. The first written European constitution, and the world's second, was the Polish Constitution of May 3, 1791, and it did not have a separate bill of rights. The Constitution changed the rights of the Polish nobility slightly and recognized the rights of the burgers and peasants. Generally speaking, however, the drafters of the Polish constitution were more concerned about the excessive amount of political freedom that the noblemen had, than about the lack of civil liberties of the rest of the Polish population. See Ludwikowski, *supra* note 6; see also Leslaw Kanski, Human Rights in Poland from a Historical and Comparative Perspective, in **CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE** 121 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).

FN[FN30]. Swed. Const. (1809) art. XVI, translated in *2 Modern Constitutions* 223-24 (Walter F. Dodd ed., 1909).

FN[FN31]. Swed. Const. art. LXXXVI.

FN[FN32]. The **constitution** of Norway provides, "the Evangelical Lutheran religion [to] remain the public religion of the state." NOR. CONST. (1814), translated in 2 MODERN **CONSTITUTIONS** 123 (Walter F. Dodd. ed., 1909).

FN[FN33]. BELG. CONST. (1831), translated in 2 MODERN **CONSTITUTIONS** 127 (Walter F. Dodd ed., 1909).

FN[FN34]. LAUTERPACHT, supra note 1, at 89-90.

FN[FN35]. For an analysis of early experiments with judicial review in Europe see Louis Favoreu, **Constitutional** Review in Europe, in **CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD** 38 (Louis Henkin & Albert J. Rosenthal eds., 1990) [hereinafter **CONSTITUTIONALISM & RIGHTS**].

FN[FN36]. Helmut Steinberger's comments on **fundamental rights** in **nineteenth century** Germany. Id. at 202.

FN[FN37]. Id. at 385.

FN[FN38]. Osiatynski, supra note 6, at 156.

FN[FN39]. See Spain Const. (1876) art. IV, VI, IX, XII, translated in 2 Modern **Constitutions** 81 (Walter F. Dodd ed., 1909); Neth Const. (1887) art. V-VII, translated in 2 Modern **Constitutions** 200-01 (Walter F. Dodd ed., 1909).

FN[FN40]. For other examples, see the **constitution** of the German Reich of (1919) arts. CXIX, CXXXII, CXXXIII, translated in HOWARD L. MCBAIN & LINDSAY ROGERS, **THE CONSTITUTIONS OF EUROPE** 199 (1922) [hereinafter Const. of Ger. Reich (1919)]; Fin. Const. (1919), art. LXXV, translated in Howard L. McBain & Lindsay Rogers, **The Constitutions of Europe** 482 (1922).

FN[FN41]. Const. of Ger. Reich (1919) art. CXIX, supra note 40, at 199.

FN[FN42]. Fin. Const. art. LXXXI, supra note 40, at 483.

FN[FN43]. **CONSTITUTIONALISM & RIGHTS**, supra note 35, at 8-9.

FN[FN44]. For more extensive comments on the growing influence of American jurisprudence in the twentieth **century** see Anthony Lester, [The Overseas Trade in the American Bill of Rights](#), 88 *COLUM. L. REV.* 537 (1988); Roger Errera, The Freedom of the Press: The United States, France, and Other European Countries, in **CONSTITUTIONALISM & RIGHTS**, supra note 35, at 63-93; John Paul Stevens, The Bill of Rights: A **Century** of Progress, in **THE BILL OF RIGHTS IN THE MODERN STATE** 13 (Geffrey R. Stone et al. eds., 1992).

FN[FN45]. **CONSTITUTIONALISM & RIGHTS**, supra note 35, at 13; Richard B. Lillich, [The Constitution and International Human Rights](#), 83 *AM. J. INT'L L.* 851 (1989).