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Institutions Specialized to the Protection of Human Rights in the United States

Lung-chu Chen
New York Law School, lungchu.chen@nyls.edu

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*LUNG-CHU CHEN***

It is an honor and a pleasure to be with you here at the First World Congress on Human Rights. I am particularly glad to be here in Costa Rica, the oldest democracy in Latin America, because of the immense contributions your country has made in the field of international protection of human rights. My admiration goes especially to your leading and persevering efforts in proposing the creation of a United Nations High Commissioner for Human Rights, an equivalent of a global ombudsman. I hope that some day these unceasing efforts will come to fruition for the common interest of all humankind.

I have been asked to speak to you about "Institutions Specialized to the Protection of Human Rights in the United States." As a federal union, the United States does not have an institution known as "ombudsman" at the federal level, though some form of ombudsman has found growing expression and interest in some local communities. The functions traditionally associated with the institution of ombudsman in various countries[1]

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**Professor of Law, New York Law School.

1. A major theme of the First World Congress on Human Rights was the institution

are, however, discharged by some equivalent institutional practices and arrangements in the United States. In order to comprehend the total picture of the protection of human rights in the United States, it is important to relate to the operation of the entire Constitutional system, taking into account the varying functions performed by both governmental and nongovernmental participants.

In many ways, the Constitution of the United States is unique within the family of nations. It is the oldest written constitution; it is a living document, given new meaning and vitality under ever-changing conditions through Supreme Court decisions and formal amendments; and it extends its protections to all citizens, humble as well as prominent.

The text of the Constitution of the United States consists of only seven articles, as originally adopted in 1789, and 26 amendments to the Constitution. Together they contain about 7000 words. But our Constitution is not just the text of these provisions printed in black letters on white paper. Our Constitution is a living constitution; it is a dynamic and continuing process of communication, practice, and decision, beginning even before 1789 and coming down to date, which establishes and maintains the basic features of authoritative decision in the body politic. It is made and continually remade in response to the changing demands and expectations of the people under ever-changing conditions. It reflects not only the shared expectations of the original framers of the Constitution, but also those of succeeding generations, as reflected in the practice and application of the Constitution. Above all, it also reflects the contemporary shared expectations and experience of community members today. It is the totality of this ongoing, cumulative process of communication, experience, and decision, rather than any single component, which establishes authoritative decision makers, projects basic community policies, maintains necessary structures of authority, allocates competences and effective power both verti-

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of ombudsman in comparative perspective. *See generally* INTERNATIONAL HANDBOOK OF THE OMBUDSMAN (G. Caiden ed. 1983). This comprehensive, useful book consists of two volumes, with selected bibliography. *See also* W. GELLHORN, OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966); ESTABLISHING OMBUDSMAN OFFICES: RECENT EXPERIENCE IN THE UNITED STATES (S. Anderson & J. Moore eds. 1972); THE OMBUDSMAN: CITIZEN'S DEFENDER (D. Rowat ed. 1965).

cally in terms of federal-state relations and horizontally in terms of the checks and balances among the three different branches of the federal government, authorizes procedures for making different types of decisions, and thereby generates a continuing flow of prescriptions and applications affecting the quality of life in the shaping and sharing of all values.[2]

Central to this ongoing constitutive process is the overriding concern for, and commitment to, the protection and fulfillment of the human rights of individual persons, as guaranteed by what is known as the Bill of Rights, a vital part of our Constitution. Our Bill of Rights sometimes is understood as having reference to only the first eight or ten amendments to the Constitution. But this is a rather restrictive view. From a comprehensive perspective, the Bill of Rights encompasses not only the first eight or ten amendments to the Constitution, but also all other provisions having to do with the protection of the freedoms and rights of the individual, whether contained in the original articles or other subsequent amendments. The guarantees provided are not static, but dynamic. Like the constitutive process itself, the Bill of Rights represents an ongoing process of communication, practice, and decision from the long past to the present.[3]

In a dynamic sense, our Bill of Rights in action manifests the following features:

First, in terms of *prescription,*[4] the Bill of Rights seeks to protect the most intensely demanded values of human dignity. The fundamental freedoms and rights of the individual are so intensely demanded and highly cherished that they are given special protection by formal constitutional prescriptions.

Second, in terms of *invocation,*[5] special provision is made to enable individuals who allege that their human rights have been violated to challenge putative deprivations and to secure reme-

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2. M. McDOUGAL, THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO 9-51 (1979). *Cf.* H. McBAIN, THE LIVING CONSTITUTION (1927); Clark & Trubek, *The Creative Role of Judge: Restraint and Freedom in the Common Law Tradition,* 71 YALE L.J. 255 (1961); Llewellyn, *The Constitution as an Institution,* 34 COLUM. L. REV. 1 (1934); Miller, *Notes on the Concept of the "Living" Constitution,* 31 GEO. WASH. L. REV. 881 (1963); J. GREY, THE NATURE AND SOURCE OF LAW (2d ed. 1931).

3. For a generalization of the distinctive features of a bill of rights, see M. McDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 314-20 (1980).

4. *See id.* at 87, 261-77, 820-32, 406.

5. *See id.* at 88, 278-89, 357-60, 406-07.

dies before authoritative decision makers. Provision is made for specialized invocation by representatives of the community, such as the Attorney General.

Third, in terms of *application*,[6] provision is made for the applicability of intensely demanded individual rights prescriptions to all decision makers and community members, whether official or nonofficial. Officials at all levels of government, from federal to state to local, are required to observe and promote these rights. Prescriptions designed to protect human rights are buttressed by specialized institutions for application. Allocations of competence are balanced in such a way as to secure independent judicial review of decisions and activities of officials and others who are alleged to have imposed deprivations of human rights.

And, finally, in terms of *termination*,[7] such intensely demanded prescriptions can be changed only with extraordinary difficulty or in the same way in which they were created. Special difficulties are placed in the way of amending or terminating intensely demanded prescriptions about human rights. It is commonly the case that such prescriptions can be changed only in the ways that they are created.

I shall elaborate further point by point.[8]

I turn first, to *prescription*, that is, the projection of authoritative community policies. The fundamental freedoms and rights of the individual are protected by constitutional prescriptions which are well-developed and intensely valued. In the original document of the U.S. Constitution, few references were made to the rights of the individual: structures and relationships within government were the primary concern.[9] The Framers believed that stronger government was necessary, but that the government must not become too powerful. Our Constitution reflects their effort to accommodate these needs and risks. Greater

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6. *See id.* at 88, 289-99, 332-57, 407.

7. *See id.* at 88, 299-307, 360-63, 407-08.

8. For further elaboration of distinctive decision functions, *see* H. LASSWELL, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (1956); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73, 131-54 (R. Falk & C. Black eds. 1969), *reprinted in* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 191, 267-86 (1981).

9. THE FEDERALIST No. 84 (A. Hamilton).

powers were granted to the central, federal, government to cure some of the weaknesses of the earlier confederation, yet the Constitution also assured restraints on governmental power. To the drafters, protection against excessive concentrations of power lay primarily in diffusions of power among a variety of governmental units. Thus, the Constitution allocated powers among the nation and several states, particularly by specifying those powers which the federal government might exercise.[10] Moreover, the less-than-total powers given to the federal government were diffused among three separate governmental branches: the legislative, the executive, and the judicial.

Our Constitution was adopted in 1789. Originally, it contained only a small number of provisions bearing directly on the rights of the individual, notably: no suspension of the privilege of the writ of habeas corpus by Congress, except in cases of rebellion or invasion threatening public security;[11] forbidding both Congress and states to pass any bill of attainder,[12] any *ex post facto*[13] law; and banning states from adopting any law impairing the obligation of contracts.[14]

At the convention which drafted the Constitution for submission to the original thirteen states for ratification, there was widespread demand for additional constitutional protection of individual—as well as state—rights. Initially, a controversy arose over the way to ensure the widest protection of basic rights and liberties. Fear was expressed that enumeration of individual liberties would effect a limitation of rights to those set down in print. Rights not specified, it was argued, might be denied. The contrary position, upheld by Thomas Jefferson, ultimately prevailed, although the victory did not come until after the end of the Constitutional Convention. In adopting the new Constitution, some states demanded, as a condition of ratification, that the document be amended immediately to include what are now the first ten amendments—the Bill of Rights. These were proposed as constitutional amendments at the first session of Congress and were ratified in 1791.

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10. U.S. CONST. art. I, § 8, cl. 2-4; art. II, § 2; art. III, § 1; art. IV; amend. 16.
11. U.S. CONST. art. I, § 9.
12. U.S. CONST. art. I, § 9.
13. U.S. CONST. art. I, § 9, cl. 3.
14. U.S. CONST. art. I, § 10.

Of importance today are the first,[15] fourth,[16] fifth,[17] sixth,[18] eighth,[19] ninth,[20] and tenth[21] amendments to the Constitution.

The first amendment enunciates the guarantees of freedom of religion, speech, and press and the right of the people to assemble peaceably and to petition the government. First amendment guarantees are fiercely demanded and protected in the United States and it is these values with which we are so often associated by peoples of the world, especially by those who yearn for freedom.

The fourth amendment bans unreasonable searches and seizures, safeguarding the individual's home, person, and property. The fifth and sixth amendments provide far-reaching protections of basic rights for the accused person in criminal cases. Protections include the right to be informed of the nature and cause of the accusation, the right to a speedy public trial by jury, and the right to be represented by counsel and to confront witnesses. Under the fifth amendment, the accused may not be compelled to testify against himself. The fifth amendment also includes the prescription that life, liberty, and property shall not be taken away without due process of law. Once again, in the United States, these guarantees are highly valued, as they stem from our belief that punishment must be accompanied by fairness in procedure, including adequate notice, an opportunity to be heard and to defend through public, impartial judicial proceedings. The eighth amendment prohibits excessive bail and cruel and unusual punishment. The ninth addresses the fears expressed during the ratification debates that an enumeration of rights in the Constitution might somehow be misconstrued as a form of limitation. It provides that the people shall retain other rights not specifically mentioned in the Constitution. And, as a final check on the undelegated powers of the federal government, the tenth amendment reserves to the states and to the people all powers not enumerated in the federal Constitution.

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15. U.S. CONST. amend. I.
16. U.S. CONST. amend. IV.
17. U.S. CONST. amend. V.
18. U.S. CONST. amend. VI.
19. U.S. CONST. amend. VIII.
20. U.S. CONST. amend. IX.
21. U.S. CONST. amend. X.

This original Bill of Rights, as well as our entire Constitution, is not a static document, but has served as the "vehicle of life of a nation."[22] In one sense, it reflects the very minimum desires and protections expected by those who would invoke its mandates. But in the larger sense, since its inception, it has shaped the politics and policies of our nation, and its meaning is to be found in our experiences.

The Constitution, as a government charter, provides an outline of organization, a projection of our nation's basic beliefs. Many of its provisions are formulated at a high level of generality; hence, the necessity for the document's interpretation and reinterpretation.

Since the ratification of the Constitution in 1789, the United States has moved from a rural society, through an era of industrial growth, and into the space age. During that period of 200 years, our Constitution has shown itself to be sufficiently flexible to meet changing demands and expectations of the people, and the original document has undergone relatively few changes. Where intensely demanded values and policies have needed articulation or clarification, the Constitution has been amended to reflect these values.

While all of these amendments have had an important effect on the fabric of our government and society, a few have had a very substantial impact on human rights in our country. Most notable are the thirteenth,[23] fourteenth,[24] fifteenth,[25] nineteenth,[26] and twenty-fourth[27] amendments. The thirteenth amendment, adopted in 1865, immediately after our Civil War, abolished slavery. Under the fourteenth amendment, adopted three years later, the states were enjoined to provide all persons due process and equal protection of the laws. The amendment forbids the states from infringing upon citizens' privileges and immunities.[28] The fifteenth amendment guarantees the right to

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22. *Presidential Address of Woodrow Wilson, American Political Science Association*, 5 AMER. POL. SCI. REV. 1, 10 (Feb. 1911), *quoted in* 1 C. MAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 44 (1944).

23. U.S. CONST. amend. XIII.

24. U.S. CONST. amend. XIV.

25. U.S. CONST. amend. XV.

26. U.S. CONST. amend. XIX.

27. U.S. CONST. amend. XXIV.

28. U.S. CONST. amend. XIV, § 1. Relative to other portions of the fourteenth amend-

vote against denial or abridgement on the basis of race, color, or previous condition of servitude. The Constitution was not amended again until 1920 when women secured the right to vote through adoption of the nineteenth amendment. In 1964, our right to vote was guaranteed further by the abolition of poll taxes,[29] and recently, in 1971, the right to vote was further expanded when the voting age was reduced from 21 to 18.[30]

Without question, the single most important prescriptive change in our constitutional history has been the fourteenth amendment. Its breadth and scope, and the meaning of its provisions, probably comprise the most important aspect of constitutional law in our country today. Its impact on human rights has been enormous, particularly because it is the major vehicle for the enforcement of our constitutional prescriptions at the state and local level. I shall return to this when I talk about *application.*[31]

Turning to *invocation,* the central question is when human rights deprivations occur, can victims or others bring complaints to appropriate decision-makers for remedy. As Justice Oliver Wendell Holmes noted long ago, a right without a remedy will not be a real right.[32]

In the United States, individual victims of human rights deprivations are, as a matter of practice, afforded standing to bring lawsuits and often they are assisted by non-governmental organizations dedicated to human rights. In addition, special provision has been made to authorize certain governmental agencies to pursue human rights litigation in the public interest. The grant of such authority to organs of the federal government generally derives from an act of Congress or an Executive order. It may be noted in passing that a comparable system of invoking

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ment, the privileges and immunities clause has been interpreted infrequently by the United States Supreme Court. It has been suggested that it is the "least significant of the protections in § 1 of the 14th Amendment." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 374 n.1 (10th ed. 1980). *See, e.g.,* Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978); Toomer v. Witsell, 334 U.S. 385 (1948); Twining v. New Jersey, 211 U.S. 78 (1908). *See also* Zobel v. Williams, 457 U.S. 55 at 71 (1982) (O'Connor, J., concurring).

29. U.S. CONST. amend. XXIV, § 1.

30. U.S. CONST. amend. XXVI, § 1.

31. *See* text accompanying notes 62-87, *infra.*

32. O. HOLMES, THE COMMON LAW 169 (M. Howe ed. 1963).

public lawsuits operates within the states and local communities.

In terms of governmental institutions, the Department of Justice ranks first. The Department of Justice, headed by the Attorney General, is the primary federal department having responsibility for legal affairs.[33] The Department represents the government in legal matters, conducts, through the Solicitor General, all Supreme Court suits in which the United States is involved and provides legal advice to Executive agencies and to the President. A principal strategy of the Department is *litigation,* the bringing of complaints before appropriate courts, or participating in others' lawsuits, to secure compliance with the law in the protection of human rights.

Within the Department, the Civil Rights Division primarily is responsible for securing compliance with civil rights laws. The Civil Rights Division is one of the Department's six litigating divisions—along with the Civil, Criminal, Anti-trust, Tax, and Lands and Natural Resources Divisions. It is the principal agency of the federal government in enforcing civil rights laws in the courts. The Civil Rights Division, established in 1957, is responsible for the enforcement of Federal civil rights laws "prohibiting discrimination on the basis of race, national origin, religion, and in some cases sex, age or handicap in the areas of voting, education, employment, housing, credit, the use of public facilities and accommodations and in the administration of federally assisted programs."[34]

With the steady expansion of the Attorney General's authority to enforce civil rights laws in new areas, the Civil Rights Division is charged with the responsibility of securing compliance with the Civil Rights Acts of 1957, 1960, 1964, and 1968; the Voting Rights Act of 1965, as amended in 1970, 1975, 1978, and 1982; the Equal Credit Opportunity Act; and provisions concerning civil rights contained in numerous other statutes.[35] These statutes were enacted by Congress to fortify the equal

33. It is the function of the Attorney General to advise the President on questions of law. 28 U.S.C. § 511 (1976). He is also to counsel the heads of executive and military departments. 28 U.S.C. §§ 512-514 (1976). In litigation in which the United States, its agent or officer is a party, litigation is conducted by the Department of Justice, except as otherwise authorized by law. 28 U.S.C. § 516 (1976).

34. United States Government Manual 1981/82 at 340.

35. 28 U.S.C. § 509 (1976 & Supp. V 1981).

protection of the laws mandated by the fourteenth amendment of the Constitution.

The famous Civil Rights Act of 1964[36] outlaws racial discrimination in public accommodations and employment and strengthens federal power to enforce school desegregation. The Voting Rights Act of 1965[37] was designed to eliminate discriminatory practices including physical harrassment and intimidation, literacy tests, poll taxes, English-only elections, and gerrymandering by dominant racial groups. The Act creates permanent protections for minority voting rights nationwide and special protections designed to eliminate voting rights violations in areas where abuse was notorious. Special protection was achieved through the preclearance requirement: political districts showing a pattern of severe voting discrimination prior to November 1964 are required to obtain prior authorization or approval by either the Attorney General or the United States District Court for the District of Columbia for changes in voting procedures or practices. Without such preclearance, changes are not permissible and cannot be legally enforced. The Fair Housing Act of 1968 abolishes discrimination in residential housing.[38]

Division efforts in the 1960's focused on cases of overt racial discrimination and coercion against blacks in different value sectors. The Division fought in the courts to end employment practices that barred the hiring and promotion of blacks. Litigation was waged to eradicate segregation in public transportation, motels, restaurants, parks, and other public facilities. In the area of education, the Division sought to cope with the problems of students and faculty in officially segregated black and white schools. Where civil rights workers and others asserting their federal rights had faced violent opposition, the Division acted to file criminal charges.

In this early period, viewed as a whole, issues addressed in the field of civil rights were rather sharply drawn and the remedies required were easy to fashion. Important civil rights concepts owe their origin to this formative period.[39]

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36. 42 U.S.C. §§ 2000a-2000h-6 (1976 & Supp. V 1981).

37. 42 U.S.C. §§ 1973-1973bb-1 (1976 & Supp. V 1981).

38. 42 U.S.C. §§ 3601-3619, 3631 (1976 & Supp. V 1981).

39. Days, *Earning Respect*, in 7 AMERICAN ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, PRIVATE HIGHER EDUCATION: THE JOB AHEAD 3-7 (1979). *See also* L.

In contrast, contemporary forms of discrimination are likely to be covert, defying easy detection, and presenting difficult problems of proof in court. For example, in the area of employment, Division litigators handle cases involving the complex issues of affirmative action in hiring and promotion and employee testing practices. In the area of fair housing, challenges are directed toward a variety of discriminatory activities. The Division challenges the refusal of mortgage lenders to make loans to persons residing in predominantly black or low-income neighborhoods—a practice called "redlining." Action is taken against realtors who engage in the discriminatory practices of racial steering and block busting. Lenders who pursue sex-biased credit policies (requiring as a condition of a loan, for example, that a woman sign a pledge not to become pregnant during the period of the loan, if her income is to be used for repayment), are the object of Division litigation efforts.[40]

Intent to discriminate is seldom apparent in this new generation of civil rights cases. Intent must frequently be ascertained by reference to all the relevant factors in a given context, especially: disproportionate impact of the action, absence of permissible purpose, and radical deviation from the normal pattern of behavior and activities.[41]

Action against discrimination today is not restricted to protection of the rights of black citizens. Other groups affected by discrimination, including women, Native Americans, Asian Americans, Hispanics, institutionalized persons and handicapped persons, have increasingly asserted civil rights demands. Broadened Division activity reflects this contemporary reality.

In addition to the Civil Rights Division of the Department of Justice, there are a number of other federal agencies involved in civil rights areas. They include: the Equal Employment Opportunities Commission, the Office for Civil Rights in the Department of Health, Education, and Welfare, the Office of Federal Contract Compliance in the Department of Labor, the Civil Rights Commission, and a number of civil rights offices in other

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BARKER & T. BARKER, JR., CIVIL LIBERTIES AND THE CONSTITUTION, CASES AND COMMENTARIES, 396, 414-15 (4th ed. 1982); J. BASS, UNLIKELY HEROES, 323-26 (1981).

40. *Id.*

41. *See* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229 (1975).

agencies charged with more limited responsibilities.

Worthy of special notice is the Equal Employment Opportunity Commission, commonly known as EEOC. It is a powerful independent government unit with primary responsibility in the area of the elimination of employment discrimination.

The Equal Employment Opportunity Commission was created by the famous Title VII of the Civil Rights Act of 1964,[42] an Act described as "[t]he single most far reaching law ever enacted by the Federal Government to eliminate employment discrimination."[43] The Act, which EEOC is to enforce, prohibits discrimination on the basis of race, color, religion, sex, or national origin by employers, employment agencies, and labor organizations. As currently amended, the Act applies to the full range of employer-employee relations, including recruitment, hiring, promotion, discharge, classification, training, and compensation. Employers covered include private businesses as well as most federal, state, and local government employers.

The basic enforcement procedure of the EEOC is as follows: first, individual complainants file claims with the Commission at local offices.[44] Next, the EEOC proceeds with its own investigation for which it has the power to subpoena witnesses and documents. If the Commission discovers indications that there has been a violation of Title VII, a charge may be filed in federal district court against the alleged offender and, further, temporary relief sought for the victim of the alleged discrimination. The above process, however, is subject to two caveats. In jurisdictions in which an enforceable fair employment practices law exists, the case must be deferred to the local rights enforcement agency for sixty days. The Commission is also responsible for efforts at conciliation between the parties. The court, upon a finding that the employer has violated Title VII, may impose such remedies as "hiring, reinstatement, promotion, awards of back pay, retroactive seniority, and any other equitable relief

42. 42 U.S.C. § 2000e–2000e-15 (1976).

43. U.S. COMMISSION ON CIVIL RIGHTS, PROMISES AND PERCEPTIONS, FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION. A REPORT OF THIRTEEN STATE ADVISORY COMMITTEES TO THE U.S. COMMISSION ON CIVIL RIGHTS 17 (1981).

44. *See* 42 U.S.C. § 706e (1976). If the EEOC is unable to secure voluntary compliance within 30 days, it notifies complainant and complainant may bring a civil action against the employer. *Id.*

the court deems appropriate."[45]

Turning to non-governmental human rights organizations, their importance in performing the function of invocation cannot be overemphasized. They either take the initiative for, or assist, litigation in defense of the rights of the individual. Although there are many non-governmental organizations, they differ significantly in membership, goals, areas of activity, resources, strategies, and effectiveness. Some address a single topic, region, or group of persons, while others focus on a wider range of issues and concerns.

In terms of emphasis on court litigation as a fundamental strategy of operation, the NAACP Legal Defense and Educational Fund (Legal Defense Fund) is a major organization.

The Legal Defense Fund was founded in 1939 by the National Association for the Advancement of Colored People (NAACP), an organization closely identified with the effort to enhance protections for blacks in the United States. The organizations have operated under separate boards of directors since 1957 and have come to perform different roles in the human rights movement.[46] The NAACP has remained our nation's largest civil rights membership organization. The Legal Defense Fund has focused on civil rights litigation. Legal Defense Fund's first Director-Counsel was Thurgood Marshall, who later became Solicitor General of the United States, and is now an Associate Justice of the Supreme Court.

After its victory in 1954 in the landmark case of *Brown v. Board of Education,* which outlawed segregation in public schools, the Fund has maintained an active program of litigation to make that decision effective.[47] The Legal Defense Fund lawyers have handled a host of important cases decided by the United States Supreme Court in the area of school desegrega-

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45. U.S. COMMISSION ON CIVIL RIGHTS, PROMISES AND PERCEPTIONS, FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION. A REPORT OF THIRTEEN STATE ADVISORY COMMITTEES TO THE U.S. COMMISSION ON CIVIL RIGHTS 20 (1981). *See also id.* 19-20 for a description of the EEOC enforcement process.

46. Recently, the two organizations have engaged in litigation over the right to use the initials N.A.A.C.P. *See* N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Education Fund, Inc., 559 F. Supp. 1337 (D.C. 1982). *See also* N.A.A.C.P. Legal Defense & Education Fund, Inc., Memorandum To Colleagues in the Civil Rights Movement (May 29, 1982).

47. *See generally* N.A.A.C.P. LEGAL DEFENSE & EDUCATION FUND, INC., 1981-82 ANNUAL REPORT.

tion, involving such issues as transfer of pupils, faculty desegregation, school boards' affirmative responsibility to integrate schools, and busing as a remedial device in school desegregation plans. They represented the late Dr. Martin Luther King, Jr. in the settlement following the historic Montgomery March.[48] In recent years the Fund has made important contributions toward outlawing capital punishment through court battles.

Another organization of great importance is the American Civil Liberties Union, commonly known as the ACLU. Founded in 1920, the American Civil Liberties Union is a membership organization with over 200,000 members nationwide. The organization has a rich history of litigation for the extension of human rights, particularly in the area of the first amendment, including the freedom of expression and freedom of religion. It was as an ACLU volunteer lawyer that Clarence Darrow represented a public school teacher who violated a Tennessee state statute forbidding the teaching of scientific doctrines of evolution in public schools. This was the famous case of the Scopes trial.[49]

ACLU volunteer lawyers have participated in a variety of landmark court decisions in the first amendment area. As a staunch defender of constitutional rights, the ACLU is known for its courage and willingness to fight for the rights of unpopular social and political groups. For instance, the ACLU not too long ago was involved in the Skokie cases in defense of the freedom of speech and assembly of the National Socialist Party of America, popularly known as the American Nazi Party, when the Party was forbidden by the Village of Skokie in Illinois from activities of assembly and demonstration.[50] Skokie has a large population of persons who were victims of the Holocaust. The involvement of the ACLU was bitterly attacked and many of its supporters withdrew financial and other support. But the ACLU was emphatic in stating that while it disagreed most strongly with the objectives and ideals espoused by the American Nazi

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48. Branton, *The Effect of Brown v. Board of Education*, 23 How. L.J. 131, 132 (1980).

49. Ennis, *A.C.L.U.: 60 Years of Volunteer Lawyering*, 66 A.B.A.J. 1080 (September 1980). *See also* Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1925).

50. *See* Smith v. Collin, 439 U.S. 916 (1978). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1275-78 (1980); Cohen, *Right To Be Offensive: Skokie—the Extreme Test: National Socialist Party*, 226 NATION 422-28 (1978).

Party, it strongly defended the freedom of speech and assembly of the American Nazi Party. The ACLU takes its cases with the conviction that "Constitutional principles are tested most when the persons asserting them are most despised."[51]

In 1963, when racial violence in the Southern states focused public attention on the issue of racial discrimination, President John F. Kennedy called upon leading lawyers to aid the struggle for black citizens' equal rights. The Lawyers' Committee for Civil Rights Under Law was formed by prominent members of the legal community in response to the President's appeal. Lawyers' Committee attorneys have fought for enforcement of voting guarantees for blacks under the Voting Rights Act of 1965, against the granting of federal tax exemptions to private segregated schools, and for strengthening protections for those who organize and support civil rights boycotts and protests.[52]

In employing the strategy of litigation, these groups have relied especially on the development of individual test cases with a personal victim as a party in each litigation, and on the class action in which one or more individuals sue on behalf of a group having similar claims. Another notable strategy is participation in a particular litigation in the form of *"amicus curiae,"* "friend of the court." A friend of the court is a person who, permitted to appear in a lawsuit, provides information to the court on a point of law about which the court is doubtful. An *amicus curiae* is not a party to the lawsuit, and must not have a personal stake in the outcome of the case. Granting appearance as a friend of the court is within the discretion of the court.[53]

Although the *amicus curiae* is generally an attorney, others, such as ordinary citizens, boards of education, and labor unions, have been allowed to appear. The appearance may take the form of an oral statement in open court, an affidavit, or a brief. It is within the discretion of the court whether or not to accept the views or suggestions of the *amicus curiae*, and the *amicus curiae* has no legal recourse if the court refuses to accept his views.

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51. Ennis, note 49 *supra*, at 1083.

52. Lawyer's Committee for Civil Rights Under Law: It has been twenty years . . . (pamphlet printed in 1983 describing activities of Lawyers' Committee for Civil Rights during the past twenty years).

53. *See generally* Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 JOURNAL OF POLITICS 41 (1967).

The rules of the United States Supreme Court have enabled individuals, organizations, and government attorneys to file briefs and/or make oral argument in the Supreme Court. For example, in *University of California Regents v. Bakke*,[54] more than 110 organizations and individuals filed *amicus curiae* briefs before the Court.[55] The *Bakke* case involved the constitutionality of a special admissions program for minority applicants to the Medical School of the University of California at Davis. Thus, the frequent involvement of human rights organizations in Supreme Court cases in the form of *amicus curiae* has often given litigation "the distinct flavor of group combat."[56] Indeed, the participation of human rights organizations as *amici curiae* has become a most remarkable form of group representation in Supreme Court cases.

Another organization I would like to mention is the Lawyers' Committee for International Human Rights, based in New York. Among its many tasks is the use of the domestic judicial process in the United States to promote international human rights. It has been most active in refugee and asylum cases, especially problems involving thousands of refugees from Haiti. When the Haitian refugees were subject to mass detention in the United States in 1981, the Committee brought a class action lawsuit on behalf of a nationwide class of Haitians in detention.

Thanks largely to their efforts, United States District Court Judge Eugene P. Spellman, in June 1982, ordered the class of almost 2,000 Haitians released from detention on the grounds that the government, in undertaking its detention program, had failed to comply with the requirements of the Administrative Procedure Act.[57] All of the detained Haitians have now been re-

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54. University of California v. Bakke, 438 U.S. 265 (1978).

55. W. MURPHY & C. PRITCHETT, COURTS, JUDGES AND POLITICS, 395 (1979).

56. Vose, *Litigation as a Form of Pressure Group Politics*, 319 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 20 (1958).

57. Louise v. Nelson, 544 F. Supp. 973, 1004 (S.D. Fla. 1982). The central question raised by this action was whether an excludable citizen may be incarcerated and denied parole during pendency and on appeal of his claim for admission to this country. The court held that nonresident aliens are entitled to the same constitutional protections afforded all persons within the territorial jursidiction of the United States; that they may not be deprived of their liberty without due process, nor denied parole solely because of their race or national origin. The Immigration and Naturalization Service's (INS) policy of detaining Haitians until those aliens established, to the satisfaction of the Service, a prima facie claim for admission, was held to violate the Administrative Procedure Act in

leased and provisionally placed in various localities around the country, pending a final determination of their individual claims for political asylum. Consequently, the Lawyers' Committee has waged a nationwide campaign to recruit and train volunteer lawyers to represent the released Haitians in their individual applications for asylum.[58]

What is especially significant is that the Lawyers' Committee has invoked both transnational and national human rights prescriptions relating to the protection of refugees in the course of litigation. This emphasis on the interplay of national and transnational human rights laws symbolizes a new direction in human rights litigation within the United States. This emphasis has been greatly inspired by the famous decision of *Filartiga v. Pena-Irala*[59] by Judge Kaufman of the United States Court of Appeals for the Second Circuit. In the *Filartiga* case, Judge Kaufman applied international human rights law to establish that freedom from torture is protected under customary international law, which forms a part of the law of the land in the United States. Therefore, the alleged act of torture committed in Paraguay by a local police chief against a Paraguay national became an actionable tort before United States courts under the Alien Torts Claim Act.[60] The death victim's father and sister

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that the INS had failed to give the affected parties required notice and opportunity to comment on the policy before adoption and had failed thereafter to publish the policy in the Federal Register thirty days before its scheduled implementation. Therefore, the court found the detention policy in question to be null and void. The incarcerated Haitian nationals were held to be entitled to release on parole pending a determination of their claims for admission.

In a later ruling, however, Judge Spellman held that those Haitians who had escaped from detention prior to the above decision were not eligible for parole pursuant to the court's determination. Louise v. Nelson, 560 F. Supp. 899 (S.D. Fla. 1983).

58. THE LAWYERS' COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, SUMMARY OF THE HAITIAN REFUGEE PROBLEM IN THE U.S. AND THE RESPONSE OF THE LAWYERS' COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS 4-5 (1982).

59. 630 F.2d 876 (2d Cir. 1980).

60. 28 U.S.C. § 1350 (1976). The statute requires that the plaintiff allege a "violation of the law of nations" in order to pass the jurisdictional threshold. In *Filartiga, see supra* note 59, the court held that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute." *Filartiga*, 630 F.2d at 888. The court concluded that through international accords and unilateral action, the nations of the world have made it clear that domestic human rights violations are prohibited by international law. *Id.* at 889.

who lived in New York brought the lawsuit against Pena when he was held in custody pending deportation for illegal overstay in the United States. The litigation was assisted by the Center for Constitutional Rights, another non-governmental human rights organization.

Finally, it may be noted that in the United States an individual victim who is claiming a deprivation need not enlist the aid of an organization or agency—he can bring his own claim before the court. Often, he is assisted by a lawyer, who is, quite often, an advocate of constitutional rights. But this is not a requirement. Given a wide range of important roles played by the lawyer in the United States, the legal profession is in a sense a professional corps of ombudsmen. As de Tocqueville aptly observed a long time ago, in the United States, important political and social issues are sooner or later transformed into legal issues for judicial litigation and adjudication.[61]

Turning now to *application.* The application of prescriptions in particular instances is, of course, of crucial importance to human rights. This is the ultimate outcome sought in all human rights policies. As important as it is to challenge unlawful deprivations, it is equally urgent to secure applications that both put basic community policies into controlling practice and mobilize a continuing consensus, in support of prescription, toward the greater future protection and fulfillment of human rights.[62]

Of the utmost importance in this regard is the role of the Supreme Court of the United States. The Supreme Court has become the ultimate guardian of the freedoms and rights of the individual in the United States. Vital to this role is the power of judicial review, a power that can be exercised, in deciding cases and controversies properly brought before the Court, to review relevant laws, regulations, or acts involved, federal or state, and declare invalid any act that is repugnant to the Constitution.

This power, first established in the famous case of *Marbury v. Madison*[63] in 1803, has made the Supreme Court the ultimate

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61. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 99-105 (G. Lawrence trans., J. Mayer ed. 1969).

62. M. MCDOUGAL, H. LASSWELL, & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 289-92 (1980).

63. 5 U.S. (1 Cranch) 137 (1803).

arbiter of the meaning of our laws in defense of the Constitution as the supreme law of the land.

Because of this power of judicial review, the bulk of the business of the United States Supreme Court has come to consist of scrutinizing the action of government officials, such as the police, the regulatory agencies, and at times even Congress itself. In effect, in our country, the Supreme Court is the most highly specialized institution for the protection of human rights. In the words of a commentator:

> The Supreme Court of the United States is different from all other courts, past and present. It decides fundamental social and political questions that would never be put to judges in other countries—the boundaries between church and state, the relations between the white and Negro races, the powers of the national legislature and the executive. One could easily forget that it is a court at all. Its public image seems sometimes to be less that of a court than of an extraordinarily powerful demigod sitting on a remote throne and letting loose constitutional thunderbolts whenever it sees a wrong crying for correction.
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> But the Supreme Court is not a demigod, nor even a roving inspector general with a conscience. It is a court, and for all its power it must operate in significant respects as courts have always operated. It cannot, like a legislature or governor or President, initiate measures to cure the ills it perceives. It is . . . a substantially passive instrument to be moved only by the initiative of litigants. In short, the Court must sit and wait for issues to be presented to it in lawsuits.[64]

Aside from the constitutional requirement of deciding only cases and controversies rather than rendering advisory opinions,[65] the Supreme Court has exhibited considerable caution

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64. A. LEWIS, GIDEON'S TRUMPET 11-12 (1964).

65. U.S. CONST. art. III, § 2. In 1793, the Supreme Court stated its refusal to render advisory opinions in these terms:

> [The] three departments of the government (being) in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems

dictated by prudential considerations relating to institutional integrity, effectiveness, and limitations. In addition to its discretion in granting or denying certiorari, the Court has developed a host of doctrines and techniques relating to standing,[66] ripeness,[67] mootness,[68] and political question[69] to minimize premature, unnecessary intervention in matters regarded as "hot pota-

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to have been *purposely* as well as expressly united to the *executive* departments. Letter from the Justices of the Supreme Court to President Washington (August 8, 1793), *reprinted in* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1607-08 (10th ed. 1980) (emphasis in original).

66. The standing doctrine was described by Chief Justice Warren as being a question of

> whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable . . . the emphasis . . . is on whether the party invoking federal court jurisdiction 'has a personal stake in the outcome of the controversy' and whether the dispute touches upon 'legal relations of parties having adverse legal interests.'

Flast v. Cohen, 392 U.S. 83, 99-101 (1968). *See also* Valley Forge College v. Americans United, 454 U.S. 464 (1982); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1977); Warth v. Seldin, 422 U.S. 490 (1975), Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974). *See generally* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Brilmayer, *The Jurisprudence of Article III; Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297 (1979); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

67. The ripeness doctrine acts to deter litigation which is brought prior to the existence of a fully-developed case or controversy worthy of judicial review. *See* Roe v. Wade, 410 U.S. 113, 127-29 (1973); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

68. The mootness doctrine requires that a genuine controversy exist between the parties from the time the complaint is filed through final disposition by the Supreme Court in order to be properly justiciable. As such, it is the analytical counterpart of the ripeness doctrine. A familiar case applying the mootness doctrine is DeFunis v. Odegaard, 416 U.S. 312 (1974). *But see* Roe v. Wade, 410 U.S. 113 (1973), where the Court relaxed the mootness bar on the basis that "the normal 266-day human gestation period is so short that the pregnancy will come to term before the unsual appellate process is complete." *Id.* at 125. The "capable of repetition, yet evading review" exception is contained in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). *See also* Note, The Mootness Doctrine in the Supreme Court, 88 HARV. L. REV. 373 (1974).

69. The political question doctrine holds that certain questions are non-justiciable because of their political nature. Various bases are suggested for a determination that a non-justiciable political question exists: that the issue is constitutionally committed to another branch of government; that treatment of the issue would involve matters for which no judicially manageable standards exist; that prudential considerations, institutional propriety or efficiency, dictate referral of the issue to another branch of government. *See* Goldwater v. Carter, 444 U.S. 996 (1979); United States v. Nixon, 418 U.S. 683 (1974); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See also* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976)

toes." But the Court does not shirk its responsibility, when it is convinced of its duty to act.

For instance, reapportionment cases having to do with the line-drawing of electoral districts had for a long time been regarded by the Court as "non-justiciable"—that is, beyond the domain of its adjudicative competence.[70] But when such a hands-off policy appeared to have played into the hands of self-serving political manipulators to the detriment of citizens' equal and effective participation in the political process, the Court stepped in to defend the basic policy that the franchise, as exercised by each citizen, must be of approximately equal weight. The Court brushed aside arguments based on the doctrine of political question by refining that doctrine and pronounced the principle of "one person, one vote" to govern reapportionment cases.[71]

A similar response was manifested in the area of school desegregation. After the monumental decision of *Brown v. Board of Education*[72] outlawing segregation in public schools, the Court allowed local communities a transitional period to take good faith measures to carry out "at all deliberate speed"[73] the mandate of the decision. When it appeared that there had been all deliberate measures of evasion and escape but no speed in desegregation, the Court emphatically intervened by formulating basic guidelines for school desegregation and supervising their implementation by local communities concerned. The traditional argument of political question did not prevail.[74]

It is quite remarkable that the United States Supreme Court, viewed as a whole, has been highly flexible and responsive to the challenges of changing times under ever changing environments. It has on the whole acted on the wisdom of Chief Justice John Marshall that "it is a constitution we are expounding"[75]

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70. Colegrove v. Green, 328 U.S. 549 (1946).

71. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

72. 347 U.S. 483 (1954).

73. Brown v. Board of Education, 349 U.S. 294, 301 (1955) (Brown II provided for implementation of the decision in the first Brown case).

74. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1979); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

75. 1 Cranch 137 (1803).

and has given vitality and meaning to constitutional provisions framed in a high level of generality. Hence, while the text of constitutional provisions remains unchanged for two hundred years, the living constitution in action is constantly evolving in response to the changing needs and demands of the people. In constant growth, it has responded to unfolding crises that could not be foreseen by the Framers. The Court has tended to take a contextual, rather than textualist, approach in interpreting and applying general constitutional provisions to concrete cases.

From the early era of the predominant concern for national unity and nation-building, the Court has moved to the new epoch of human rights in a world of growing interdependence.

Whereas the first eight amendments to the Constitution were once regarded as applicable only to acts of the federal government, they have been made applicable to state action through the ingenious technique of selective incorporation.[76] The standards of protection available at the federal level have thus been made equally applicable to state and local levels. This enhanced protection of the individual through the nationalization of the guarantees of the Bill of Rights has been further fortified by the broadened concept of state action.[77]

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76. As originally enacted, the Bill of Rights protected individuals and the states from actions of the federal government but was not a limitation on the actions of the states. *See* Barron v. The Mayor and City Council of Baltimore, 7 Pet. 243 (1833). Since the adoption of the fourteenth amendment, the extent to which that amendment incorporates the protections of the Bill of Rights, that is, the extent to which it safeguards the fundamental rights and liberties enunciated in the first eight amendments against action of the states, has been a continuing source of dispute. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). Some have argued that the due process clause of the fourteenth amendment incorporated the Bill of Rights *in toto*, but this view has been rejected consistently by the Court. *See* Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting). Instead, the Court has held that the limitations contained in the Bill of Rights constrain the states only on a selective basis. The due process clause of the fourteenth amendment is held to incorporate the Bill of Rights only so far as the protections and rights in question are essential to fundamental principles of ordered liberty. *See* Palko v. Connecticut, 302 U.S. 319 (1937). Nevertheless, the case by case consideration of the incorporation issue has resulted in a gradual accretion of incorporated rights. Today, most of the rights recognized to exist under the Bill of Rights have been deemed sufficiently fundamental to merit incorporation in the fourteenth amendment, gaining thereby protection against action by the states.

77. *See, e.g.*, Shelley v. Kramer, 334 U.S. 1 (1948) (judicial enforcement of restrictive covenants sufficient basis for finding state action). *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 164 (1972) (licensing by state liquor authority not state action for pur-

Thanks to the equality revolution begun by the Warren Court, the equal protection clause of the fourteenth amendment has become the major vehicle in extending equal protection to all members of the community—to blacks, to women, to aliens, to non-marital children, to handicapped persons, to the elderly, and so on. The fourteenth amendment provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the law." These few words have been given real life meaning in many volumes of the Supreme Court Reports. In unequivocal terms, the Court has outlawed invidious group differentiations irrelevant to a person's capabilities and contributions. Recently, the Court even invalidated a Texas statute permitting local school boards to deny free education to school-aged children of *illegal* aliens as violative of the equal protection clause of the fourteenth amendment.[78]

The really difficult issues in the area of equal protection today relate to what is known as the affirmative action program, or as some people call it, "reverse discrimination." The issue was highlighted by the case of *University of California Regents v. Bakke*,[79] in which the Court struck down the quota reserved for minority applicants for admission to the Medical School of the University of California at Davis. But the Court also took the occasion to emphasize that race can be taken into account in devising programs to achieve genuine equality by remedying the effects of past discrimination. That remedial, temporary measures designed to achieve genuine equality, devoid of stigmatizing intent, are permissible has gained further support in the later cases of *United Steelworkers of America v. Weber*[80] and *Fullilove v. Klutznick*.[81] Because of the far-reaching ramifications of affirmative action programs of all kinds, debate goes on as to whether our Constitution is "color blind" or "color conscious"—the real answer is "genuine equality" that serves the

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poses of a finding of unconstitutional racial discrimination by a private club); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state action present where restaurant within a public parking facility refused to serve Black customers). See generally, Henkin, *Shelley v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

78. Plyler v. Doe, 457 U.S. 202 (1982).

79. 438 U.S. 265 (1978). *See generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

80. 406 U.S. 164 (1972).

81. 448 U.S. 448 (1980).

common interest.

Another component of the fourteenth amendment is the due process clause which stipulates that no state shall "deprive any person of life, liberty, or property, without due process of law." The term "liberty" is critical. In what is known as the *Lochner*[82] era in the early twentieth century, the Court gave excessive importance to the "liberty of contract" under the laissez-faire philosophy, with emphasis on freedom of choice in regard to the wealth value. With the coming of the New Deal, the *Lochner* approach was discredited.[83] Most recently, there has been a revival of "substantive due process." The Court was able to establish a constitutional right of privacy in the famous case of *Griswold v. Connecticut*[84] decided in 1965. In this case, the Connecticut law forbidding the use of contraceptives, as applied to a married couple, was declared unconstitutional for having violated the right of privacy of the couple involved. In our Constitution, there is no explicit provision for a right of privacy. But, the Court was able to establish this right by developing a penumbra theory based on most of the provisions of the Bill of Rights, including the ninth amendment, or alternatively, based on the due process clause of the fourteenth amendment. The right of privacy thus established in the context of marital relations has been further extended to the non-marital context of intimate personal relations.[85] As case law evolves, it appears that "privacy" has both restrictive and broad references. In its restrictive sense, it means informational privacy, control of information about oneself. In its broad reference, it is emerging as a functional equivalent of "the right to be let alone,"[86] personal autonomy, freedom of choice. This personal autonomy is said to include at least a pregnant woman's power to control over her

82. Lochner v. New York, 198 U.S. 45 (1905).

83. Nebbia v. New York, 291 U.S. 502 (1934). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 370 (1937).

84. 381 U.S. 479 (1965).

85. *See, e.g.*, Belotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972). *See generally* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Kalvin [*sic*], *'Privacy and Freedom'—A Review*, 23 REC. N.Y.C.B.A. 185, 187 (1968).

86. 1 COOLEY, TORTS 34 (4th ed. 1932). *See generally* Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discusses the derivation of the right to be let alone from common law principles); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (discusses the four distinct kinds of invasion which comprise the law of privacy).

own body. Hence, the controversial decision of *Roe v. Wade*[87] in 1973, recognizing the right to abortion as a component of the right of privacy. The scope and contours of the right of privacy are still evolving as further litigation unfolds.

In sum, the flexible, contextual approach of the Court has resulted in more human rights protection for more people in more areas, extending to all important value sectors.

I turn now to *termination.* Termination means putting an end to an existing prescription.[88] Since the constitutional prescriptions for the protection of human rights of the individual are so intensely demanded and so highly cherished, modification or termination of such prescriptions has been made extremely difficult.

Article V of our Constitution provides the formal procedures for amending the Constitution. In general, a proposed amendment to the Constitution must first be adopted by a two-thirds vote of both Houses of Congress, and then "ratified by the Legislatures of three-fourths of the several States." Article V also provides another amending procedure in the special convention method, but this procedure has never been invoked. Although two-thirds votes by both Houses may not be too difficult to obtain, securing ratification by the Legislatures of three-fourths of all the fifty states, requiring a minimum of thirty-eight state ratifications, appears to be a formidable barrier.

This explains in part why there have been only twenty-six amendments to the Constitution in the nearly 200-year history of the document.[89] The most recent example is of course the defeat of the Equal Rights Amendment (commonly known as ERA) that seeks to ensure that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This defeat came after the very long, intense efforts of promotion by women's groups and many

87. 410 U.S. 133 (1973).

88. *See* McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made,* 6 YALE STUDIES IN WORLD PUBLIC ORDER 249 (1980).

89. A proposed amendment to the Constitution to treat the District of Columbia as a state for purposes of representation in Congress, Presidential elections, and Article V of the Constitution was passed by Congress in 1978. It must be approved by three-fourths of the states by August 22, 1985 if it is to become effective. At present, only twelve states have approved the amendment. *See* 1983 U.S. CODE CONG. & AD. NEWS F1 (April 1983).

other groups.[90] It is important to note, however, that this defeat does not mean women are not given equal protection in the United States. Quite to the contrary. Women in the United States do enjoy equal protection. What it means is simply that instead of relying upon a new constitutional amendment designed exclusively to ban sex-based discrimination, the equality for sexes will continue to be secured under the equal protection clause of the fourteenth amendment through judicial processes, and through statutory enactments and implementation, both federal and state.[91]

Because of the tremendous difficulties involved in the formal amendment procedure, not infrequently attempts are made, through the legislative device, to modify or dilute the human rights protection expounded in Supreme Court decisions. Supreme Court decisions, as may be recalled, contribute greatly to the growth of the living Constitution in the United States, and enjoy high authority. Given the Court's ultimate authority in constitutional interpretation, the human rights protection extended by Supreme Court decisions, in principle, cannot be taken away or diluted through a congressional statute.[92]

Nevertheless, attempts at such modification or termination have not been lacking. Recently, for instance, several such proposals have been introduced before the Congress for enactment. What have come to be known as "right to life" bills are introduced before the Congress in an attempt to take away or dilute the woman's right to control her body, i.e., the right to abortion, a right encompassed by the right of privacy supported largely by the due process clause of the fourteenth amendment, as enunciated in *Roe v. Wade*. In that decision, the Court pronounced a

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90. The Equal Rights Amendment has been reintroduced. *See* S.J. RES. 10, 98th CONG., 1st Sess. (1983); H.R.J. Res. 1, 98th Cong., 1st Sess. (1983).

91. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). For a discussion of constitutional doctrine concerning sex discrimination, see generally J. BAER, EQUALITY UNDER THE CONSTITUTION 121-26 (1983).

92. In *McCulloch v. Maryland*, the Supreme Court stated:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

17 U.S. 316, 421 (1819). *See also* Katzenbach v. Morgan, 384 U.S. 641 n.10 (1966). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 261-72 (1978).

trimester formula: (1) During the first trimester of pregnancy, the woman and her physician have the right to terminate the pregnancy, with the method of their own choice. (2) During the second trimester, the state can prescribe regulations governing the abortion procedure, such as qualifications for persons competent to perform abortions, and requirements that abortions be performed in a hospital or clinic. The community interest in protecting the health of the mother is considered compelling. (3) During the third trimester, after the fetus becomes viable, i.e., capable of sustaining life outside the mother (approximately at the end of the sixth month of pregnancy), the state can regulate or even bar abortions altogether unless they are necessary to save the life of the mother. At this stage, the state's compelling interest is, obviously, the protection of potential life.[93]

Ever since this decision was rendered in 1973, the decision itself, while authoritative, has been highly controversial. It has generated very intense emotions and bitter debate, pitting anti-abortion groups ("pro-life" groups) against pro-abortion groups. These bills, controversial as they are, have met strong opposition in Congress, which questions the constitutionality and wisdom of these proposals. The appropriate course to effect change, it is widely agreed, is through a constitutional amendment, not a legislative enactment.[94] But, as indicated, the path of formal constitutional amendment is full of formidable barriers.

However, the path of formal constitutional amendment has recently been initiated with regard to prayer and other religious activity in public schools. The first amendment of our Constitution contains the following provision:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In defense of the paramount policy of the separation of church and state inherent in this provision, the Supreme Court of the United States, in 1962, held that it was unconstitutional for

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93. Roe v. Wade, 410 U.S. at 164-65.

94. *See* S.J. Res. 3, 98th Cong., 1st Sess. (1983) (proposal by Sen. Hatch). *See also* S.J. Res. 4, 98th Cong., 1st Sess. (1983) (proposal by Sen. Baker); S.J. Res. 8, 98th Cong., 1st Sess. (1983) (proposal by Sen. Helms); H.R.J. Res. 15, 98th Cong. 1st Sess. (1983) (proposal by Rep. Emerson); H.R.J. Res. 26, 98th Cong., 1st Sess. (1983) (proposal by Rep. Hansen); H.R.J. Res. 73, 98th Cong., 1st Sess. (1983).

state officials to compose a prayer and require its recitation each school day, even though the prayer was non-denominational in content and students who did not wish to participate would be excused.[95] In the following year the Court again held it unconstitutional to require a reading from the Bible or a recitation of the Lord's Prayer.[96] These and other related decisions have caused considerable uproar. After successive attempts at modification through the legislative route failed, a serious effort through a constitutional amendment has been under way. Recently, a proposed amendment to the Constitution has been introduced before the Congress, a proposal that has the support of President Reagan. The proposed amendment reads as follows:

> Nothing in this Constitution shall be construed to prohibit prayer or other religious activity in public schools. Neither the United States nor any State shall require any person to participate in prayer or other religious activity, or influence the form or content of any prayer or other religious activity in such public schools.[97]

These efforts in seeking termination or modification of existing constitutional prescriptions embodied in Supreme Court decisions, difficult as they are, also illustrate that the ongoing process of constitutional decision never really ceases. While Supreme Court decisions enjoy ultimate authority, they are not, in a profound and dynamic sense, really final and immutable. The Court decisions are constantly subject to critical appraisal and reappraisal, especially by the legal community and the press. The practical effect of a decision goes beyond the parties di-

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95. Engle v. Vitale, 370 U.S. 421 (1962). The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." *Id.* at 422.

96. Abington School District v. Schnepp, 374 U.S. 203 (1963).

97. H.R.J. Res. 133, 98th Cong., 1st Sess. (1983). The Senate has formulated a similar proposal which states: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States to participate in prayer." S.J. Res. 73, 98th Cong., 1st Sess. (1983).

See also S. Res. 88, 98th Cong., 1st Sess. (1983) (proposal by Sen. Tepsen); S. Res. 784 & 785, 98th Cong., 1st Sess. (1983) (proposal by Sen. Helms); H.R. Res. 183, 98th Cong., 1st Sess. (1983) (proposal by Rep. Holt); H.R. Con. Res. 5, 98th Cong., 1st Sess. (1983) (proposal by Rep. Holt); H.R. Con. Res. 13, 98th Cong., 1st Sess. (1983) (proposal by Rep. Neal).

rectly involved in a particular constitutional litigation, often generating expectations in members of the community at large. Decisions which lack overwhelming stable support of the people are apt to be challenged, and, in the long run, are bound to be changed.

In an open, democratic, pluralistic society, such an appraising function is vital. It is a function designed to evaluate the process of decision in terms of the policy objectives of the larger community and to identify the participants responsible for past successes and failures. This function is open to non-officials as well as officials. For instance, a large part of the work of the United States Commission on Civil Rights, an independent governmental agency concerned with civil rights matters, has to do with this function.[98] And, of course, the important roles played by scholars, practitioners, commentators, and opinion makers in this regard cannot be overemphasized.

In performing critical appraisal, it is absolutely essential that a flow of dependable, relevant information is available. This points to the importance of the informational function—the function of gathering, processing, and disseminating information relevant to value deprivations and fulfillments and to decision-making. This function is open to officials and non-officials. The press, in command of the modern media of mass communication, is especially important in exposing and publicizing facts of violations of human rights and in mobilizing public opinion in support of the defense and fulfillment of human rights. Hence the indispensability of a free and independent press, and the very special protection under the first amendment afforded to the press in the United States.

The freedom of expression is enjoyed not only by the press, but is extended to every person within the United States. This generic freedom, including the freedom of association, assembly, and petition, is enjoyed and highly cherished by everyone, acting both as an individual and as a member of a group. Because of this freedom it has been possible for people to join together to form and maintain all kinds of organizations—civic groups, in-

98. For a discussion of recent developments in the work of the Commission, see Plotkin, *Prologue to the Report by the Washington Council of Lawyers*, 1 N.Y.L. SCH. HUM. RTS. ANN. 99 (1983).

terest groups, and pressure groups of all kinds—for all kinds of human rights causes. The workings of these groups have contributed immensely to the promotion of the cause of human rights through advocacy and agitation for new legislation or other action.

It is people and government working together, both the private and public sectors working hand in hand, in performing all the distinctive and related decision functions—information, promotion, prescription, invocation, application, termination, and appraisal—that have made the protection of human rights a living reality in the United States, despite all the shortcomings we have had and continue to have.

In an open, democratic society like the United States, the protection of human rights is not just the business of judges and other governmental officials. It is everyone's business. It is too important a business to leave it just to the government, or any single governmental agency. Human rights can flourish, only when every member and every sector of the community are vigilant in defending and protecting them. The achievement of human dignity requires eternal vigilance.