

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

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

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

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

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

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

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

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

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

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

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

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

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