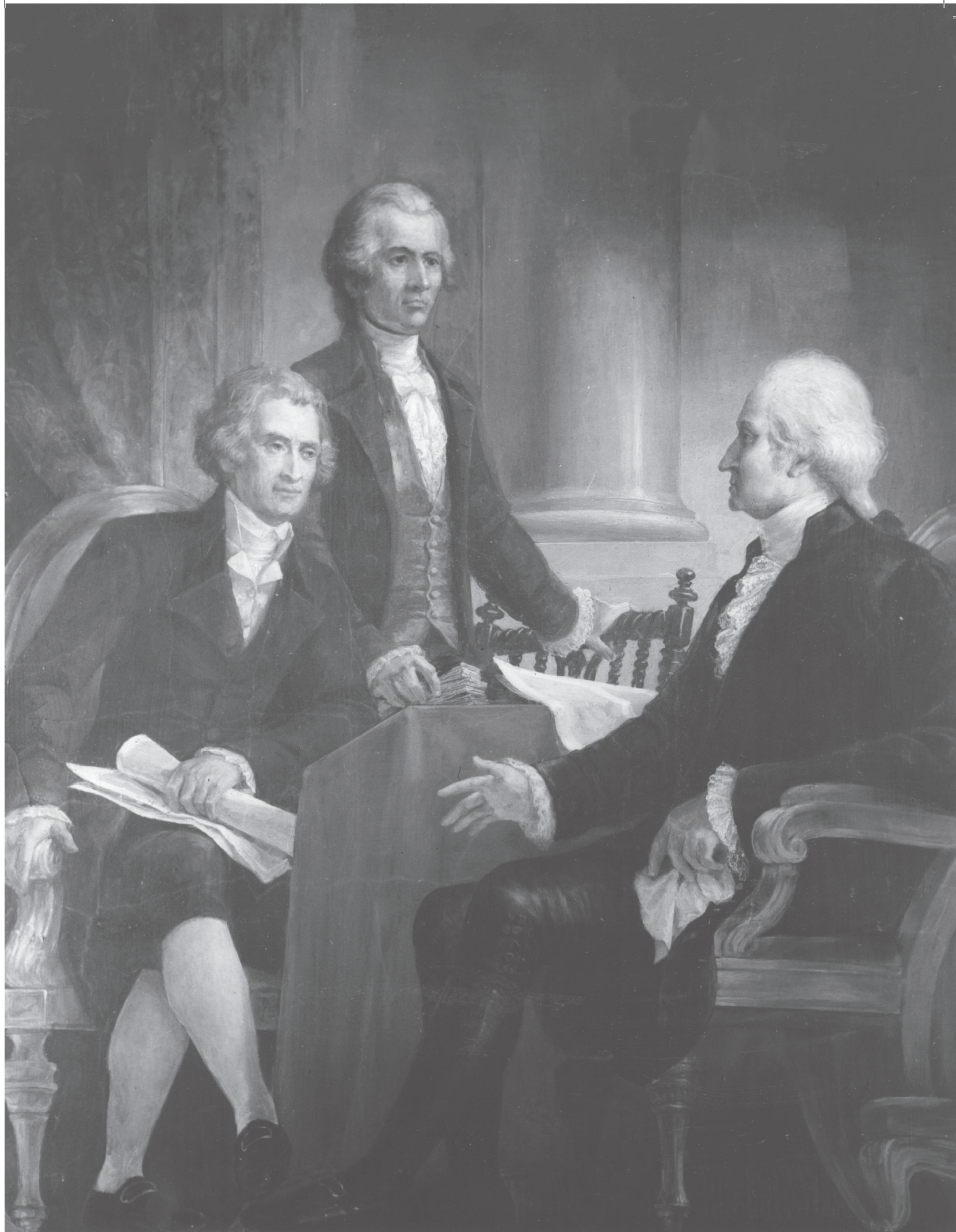


Report *of the*
Commission on
Unalienable Rights

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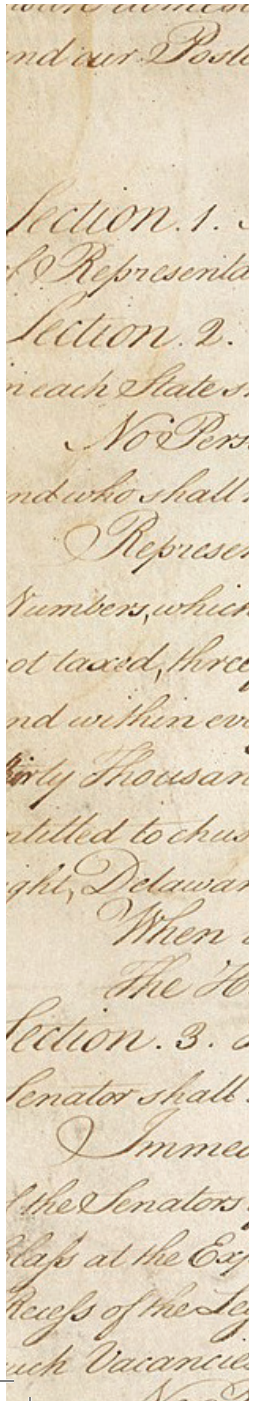


PREFATORY NOTE

As the Commission's work on this Report was nearing its completion, social convulsions shook the United States, testifying to the nation's unfinished work in overcoming the evil effects of its long history of racial injustice. The many questions roiling the nation about police brutality, civic unrest, and America's commitment to human rights at home make all the more urgent a point we had already stressed in the Introduction and elsewhere in this Report: The credibility of U.S. advocacy for human rights abroad depends on the nation's vigilance in assuring that all its own citizens enjoy fundamental human rights. With the eyes of the world upon her, America must show the same honest self-examination and efforts at improvement that she expects of others. America's dedication to unalienable rights — the rights all human beings share — demands no less.

What we say in our Concluding Observations also bears special emphasis in this moment: "One of the most important ways in which the United States promotes human rights abroad is by serving as an example of a rights-respecting society where citizens live together under law amid the nation's great religious, ethnic, and cultural heterogeneity." Like all nations, the United States is not without its failings. Nevertheless, the American example of freedom, equality, and democratic self-government has long inspired, and continues to inspire, champions of human rights around the world, and American human rights advocacy has provided encouragement to tens of millions of women and men suffering under authoritarian regimes that routinely trample on the rights of their citizens.

In this challenging moment for the nation, the Commission hopes that this Report will nourish that complex combination of pride and humility that is among the most elusive and essential prerequisites for a foreign policy — and a domestic policy — grounded in America's founding principles.



In today's multipolar world, it is plain to see that the ambitious human rights project of the past century is in crisis.

I. INTRODUCTION

In the mid-20th century, after two world wars marked by unprecedented atrocities, the moral terrain of international relations was forever altered by a series of actions aimed at setting conditions for a better future. The United States was a major force in each of those transformative moments: the founding of the United Nations with its Charter proclaiming the promotion of human rights as one of its purposes; the Nuremberg trials making clear that a nation's treatment of its own citizens would no longer be regarded as immune from outside scrutiny and repercussions; the unprecedented generosity of the Truman administration's Marshall Plan, which undertook to reconstruct war-torn Europe and was expressly based on the conviction that basic human rights, free markets, and food security are mutually reinforcing; and the approval by the UN General Assembly of the Universal Declaration of Human Rights (UDHR) with its small core of principles to which people of vastly different backgrounds could appeal.

At the heart of that transformative process was the idea that all human beings possess certain fundamental rights, an idea that echoed the United States' own Declaration of Independence. It was an encouraging sign that the already diverse members of the newborn UN accepted the Universal Declaration as a "common standard of achievement," a kind of yardstick by which they could measure their own and each other's progress toward "better standards of life in larger freedom."

But that consensus was fragile. It was testimony to the universal validity of the principles in the Declaration that

no UN member was willing to oppose them openly. Yet eight countries abstained (the six-member Soviet bloc, Saudi Arabia, and South Africa). Even within strong supporter nations like the United States, many people doubted the worth of a non-binding declaration affirming "faith in fundamental human rights" and "in the dignity and worth of the human person." That faith had been sorely tested in recent memory.

Yet to the surprise of skeptics, the human rights idea gathered strength in subsequent decades. It played a key role in the movements that led to the demise of apartheid in South Africa, the toppling of totalitarian regimes in Eastern Europe, and the decline of military dictatorships in Latin America. Its message was carried far and wide by a great army of non-governmental organizations, large and small — a "curious grapevine" that penetrated deep into closed societies. The UDHR became a model for the bills of rights in many post-World War II constitutions. And in the United States, the promotion of human rights became a principal goal of foreign policy, though emphases varied with changing circumstances and the priorities of succeeding administrations.

In today's multipolar world, however, it is plain to see that the ambitious human rights project of the past century is in crisis. The broad consensus that once supported the UDHR's principles is more fragile than ever, even as gross violations of human rights and dignity continue apace. Some countries, while not rejecting those principles outright, dispute that internationally recognized human rights are "universal, indivisible and interdependent and

In short, human rights are now misunderstood by many, manipulated by some, rejected by the world's worst violators, and subject to ominous new threats.



*Michael R. Pompeo,
Secretary of State*

international institutions, and overuse of rights language with a dampening effect on compromise and democratic decision-making. Meanwhile, more than half the world's population suffers under regimes where the most basic freedoms are systematically denied, or under regimes too weak or unwilling to protect individual rights, especially in the context of ethnic conflict. At the same time, new risks to human freedom and dignity are emerging in the form of rapid technological advances. In short, human rights are now misunderstood by many, manipulated by some, rejected by the world's worst violators, and subject to ominous new threats.

In light of these mounting challenges, U.S. Secretary of State Michael Pompeo determined in 2019 that it was time for an informed review of the role of human rights in a foreign policy that serves American interests, reflects American ideals, and meets the international obligations that the United States has assumed. To that end, he established the Commission on Unalienable Rights, an independent, non-partisan advisory body created under the Federal Advisory Committee Act of 1972.

interrelated." Some, like China, promote a conception of human rights that denies civil and political liberties as incompatible with economic and social measures, rather than treating them as mutually reinforcing. At this moment, even some liberal democracies appear to be losing sight of the urgency of human rights in a comprehensive foreign policy.

Further erosion of the human rights project has resulted from widespread disagreement about the nature and scope of basic rights, disappointment in the performance of

The Commission's charge, as stated in its Charter, "is not to discover new principles, but to furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy." The Charter further states that the Commission's advice is to be "grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights."

Such a mandate is in keeping with both the spirit of the Declaration of Independence and the spirit of the UDHR.

The Declaration of Independence affirms that the primary task of government is to secure the rights inherent in all persons — America’s founders called them “unalienable rights” — while the drafters of the UDHR fully expected the diverse nations of the world to look within their own distinctive traditions to find support for the fundamental principles it outlined.

As elaborated by the Secretary, the Commission’s instructions were to focus on principle, not policy formulation. Recognizing that foreign policy must be tailored to changing circumstances and must necessarily consider many other factors along with human rights, the Commission did not seek to enter into debates about the application of human rights principles to current controversies. Rather, it has striven to bring those principles into focus and clarify common misunderstandings and perplexities, with the aim of assisting those who bear the heavy responsibility for making principled and prudent policy decisions. It is the Commission’s hope that this Report will be helpful to the people who are engaged, day in and day out, with framing a foreign policy worthy of a nation founded on the proposition that all human beings are created equal and endowed with certain unalienable rights. The Commission also hopes that this Report will stimulate discussion among fellow citizens and friends of freedom around the world about securing human rights.

Mindful of the mandate to ground its advice in both the distinctive rights tradition of the United States and the principles of the Universal Declaration, the Commission embarked on a program of studying relevant texts and commentaries, including submissions by individual citizens and non-governmental organizations. It consulted widely, both with State Department specialists and with outside experts and activists representing a broad range of wisdom and experience in the field of human rights and foreign policy. Those who attended its public meetings heard the Commission’s discussions with invited experts, and they were given the opportunity to ask questions of the commissioners and to present their own comments, which enriched the Commission’s deliberations.

The Commission turned first to a review of the principles that have shaped America’s distinctive, dynamic rights tradition over the years. It then reviewed the relationship of those principles to the international principles enshrined in the Universal Declaration of Human Rights

and those incorporated into other instruments which the United States has embraced. This Report presents the observations that emerged from that process as they relate to American foreign policy.

The undersigned Commissioners, like our fellow Americans, are not of one mind on many issues where there are conflicting interpretations of human rights claims — abortion, affirmative action, and capital punishment, to name a few. But with hundreds of millions of men and women around the world suffering extreme forms of deprivation under harsh authoritarian regimes, we are of one mind on the urgent need for the United States to vigorously champion human rights in its foreign policy. With freedom, human equality, and democracy facing strong ideological opposition from powerful states, this is not the moment for the liberal democracies of the world to falter in defending the principles that have enabled them to achieve “better standards of life in larger freedom.” America must rise to today’s challenges with the same energy and spirit that she brought to the building of a new international order in the wake of two world wars.

At the same time, we are keenly aware that America can only be an effective advocate for human rights abroad if she demonstrates her commitment to those same rights at home. The credibility of U.S. advocacy for human rights abroad depends on the nation’s vigilance in assuring that all its own citizens enjoy the full range of fundamental human rights. With the eyes of the world upon her, America must show the same honest self-examination and efforts at improvement that she expects of others.

Just as the Soviet Union did in 1948, China, Iran, and Russia have been quick to charge that our country’s domestic failures destroy its standing to defend universal human rights today. There can be no moral equivalence, however, between rights-respecting countries that fall short in progress toward their ideals, and countries that regularly and massively trample on their citizens’ human rights.

Accordingly, we offer this Report in the spirit of Eleanor Roosevelt when she stood before the UN General Assembly in December 1948 to urge approval of the UDHR. Her passion for international human rights was equaled only by her passion for racial justice at home where, despite severe criticism during World War II, she had repeatedly insisted that the United States could not

The colonists' momentous decision in July 1776 to break away from England in order to govern themselves marked the first time in human history that an independent nation came into existence by affirming a universal moral principle that stood above, and served as a standard for, all government.

claim to be a democracy so long as African Americans did not have democratic rights. In concluding her address that evening, she counseled both determination and humility, quoting Secretary of State George Marshall:

“Let this third regular session of the General Assembly approve by an overwhelming majority the Declaration of Human Rights as a statement of conduct for all; and let us, as Members of the United Nations, conscious of our own shortcomings and imperfections, join our effort in all faith to live up to this high standard.”

The Members of the Commission on Unalienable Rights embrace that high standard. We hope that this report's examination of America's commitment to human rights in light of the nation's founding principles and the international principles that she has embraced will launch a conversation that will improve the ability of citizens — in and out of government — to live up to it.

II. THE DISTINCTIVE AMERICAN RIGHTS TRADITION

The American experiment in free and democratic self-government stems from several sources. The 17th-century British subjects who settled, and built thriving communities along, the eastern seaboard of what they regarded as a new world brought with them a variety of traditions. These traditions both reinforced one

another and pulled in different directions. Eventually, their intertwining gave rise to a distinctive and dynamic national spirit.

Among the traditions that formed the American spirit, three stand out. Protestant Christianity, widely practiced by the citizenry at the time, was infused with the beautiful Biblical teachings that every human being is imbued with dignity and bears responsibilities toward fellow human beings, because each is made in the image of God. The civic republican ideal, rooted in classical Rome, stressed that freedom and equality under law depend on an ethical citizenry that embraces the obligations of self-government. And classical liberalism put at the front and center of politics the moral premise that human beings are by nature free and equal, which strengthened the political conviction that legitimate government derives from the consent of the governed.

Notwithstanding the enduring tensions among them, each of the distinctive traditions that nourished the American spirit contributed to the core conviction that government's primary responsibility was to secure unalienable rights — that is, rights inherent in all persons. The Declaration of Independence proclaims this core conviction, and the Constitution of the United States establishes political institutions to make it a reality. Indeed, much of American history can be understood as a struggle to deliver on the nation's founding promise by ensuring that what came to be called human rights were enjoyed by all persons who lived under the laws of the land.

As in all nations, there has been much in America with which to struggle: slavery; the forcible displacement

of native Americans from their ancestral lands; the discrimination against immigrants and other vulnerable minorities; and the imposition of legal liabilities on, and the withholding of opportunities from, women.

Respect for unalienable rights requires forthright acknowledgement of not only where the United States has fallen short of its principles but also special recognition of the sin of slavery — an institution as old as human civilization and our nation’s deepest violation of unalienable rights. The legally protected and institutionally entrenched slavery that disfigured the United States at its birth reduced fellow human beings to property to be bought, sold, and used as a means for their owners’ benefit. Many slave-owning founders, not least Thomas Jefferson, recognized that in the light of unalienable rights, slavery could only be seen as a cruel and indefensible institution. In contemplating slavery in his Notes on the State of Virginia, he wrote, “I tremble for my country when I reflect that God is just.” Nevertheless, it would take a grievous civil war, costing more American lives by far than any other conflict in the nation’s history, to enable the federal government to declare slavery unlawful. It would take another century of struggle to incorporate into the laws of the land protections to guarantee African Americans their civil and political rights. Our nation still works to secure, in its laws and culture, the respect for all persons our founding convictions require.

It has been the work of Americans down through the generations to understand that unalienable rights, realized in part in the privileges and protections of citizenship, apply to all persons without qualification. Far from a repudiation of, this progress in understanding represents fidelity to, the nation’s founding principles.

Progress toward the securing of rights for all has often been excruciatingly slow and has been interrupted by periods of lamentable backsliding. While no inexorable laws of history guaranteed the success of the American experiment in ordered liberty, 244 years after the nation’s birth the United States can be proud of the freedom, toleration, and diversity it has achieved. At the same time, the nation must be humble in light of the work that remains to be done. The pride and the humility alike reflect the nation’s founding conviction that human beings are equally endowed with inherent rights and its enduring commitment to the constitutional form of government that was established to secure them.

The idea that there are different classes of humanity with different privileges and immunities dies hard, however. America’s long and difficult struggle can provide instruction and inspiration for the cause of human rights today. The American experience suggests that the securing of unalienable rights begins with the independence and sovereignty that enable a people to determine its own course and take responsibility for its decisions.

A. THE DECLARATION OF INDEPENDENCE

The colonists’ momentous decision in July 1776 to break away from England in order to govern themselves marked the first time in human history that an independent nation came into existence by affirming a universal moral principle that stood above, and served as a standard for, all government. That principle — that all human beings are by nature free and equal — has roots in beliefs about human nature, reason, and God and has profound ramifications for politics.

The main purpose of the Declaration of Independence was to announce the dissolution of the political bonds that tied the Americans to Great Britain and to proclaim that the 13 colonies “are, and of Right ought to be Free and Independent States.” The Declaration justified these drastic steps by means of a long list of allegations of tyrannical rule directed against King George III. Americans sought for themselves what they viewed as the prerogative of all peoples: “to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” Owing in part to this conviction of the equality of peoples and their common interest in freedom, the Declaration views American independence also as a matter of foreign affairs, observing that “a decent respect to the opinions of mankind requires that” the American people “should declare the causes which impel them to the separation.” As Abraham Lincoln highlighted 84 years later, the Declaration’s principal author Thomas Jefferson, in the midst of “the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times.”



The abstract truth to which Lincoln referred stands at the center of the American creed: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”

The Declaration ascribes transcendent foundations to unalienable rights, appealing to both philosophy and faith, reason and revelation. The very notion of rights

inherent in all persons presupposes that human beings have a nature or essence that persists from historical epoch to historical epoch and, notwithstanding the remarkable diversity of nations and peoples, across cultures.

Now, as then, important questions arise about those transcendent foundations. To what extent do unalienable rights rest on the work of a creator Deity? Can faith in such rights be sustained without faith in God? Can unalienable rights be known by all through reason? In

To say that a right, as the founders understood it, is unalienable is to signify that it is inseparable from our humanity, and thereby to distinguish it from other sorts of rights. The most fundamental distinction is between unalienable rights — sometimes referred to as natural rights in the founding era and today commonly called human rights — and positive rights.

Declaration of Independence, John Trumball

the very ideas of human nature, objective reason, and a creator God have come into disrepute among intellectuals, while the view that human beings are entirely explainable in terms of the physical properties of their bodies has grown in popularity.

As we join in the discussion, as old as the republic, about the ultimate sources of unalienable rights, it is also proper to recognize the role of tradition in rooting them in the American spirit. However philosophical debates about reason, nature, and God might be resolved, the Declaration's affirmation of rights inherent in all human beings everywhere has, over the centuries, become deeply woven into American beliefs, practices, and institutions, and undergirds the nation's moral and political inheritance.

The Declaration also holds it to be a self-evident truth that the first task of political society is to ensure that

what ways are unalienable rights bound up with the laws of nature, which tend to revolve around individual freedom, examined by early modern philosophers? In what ways are unalienable rights tied to natural law, which places emphasis on duties and virtues and which is more the province of medieval political philosophy? And in what ways are unalienable rights connected with what is just by nature, the central theme of classical political philosophy? No single answer to these metaphysical questions was decisive in 1776. Still less today, when

unalienable rights are respected: “to secure these rights, Governments are instituted among Men.” The vindication of unalienable rights is indissolubly linked to political institutions and laws — and the community and culture that sustain them. The Declaration adds a self-evident democratic principle: governments capable of securing unalienable rights are rooted in the people, “deriving their just powers from the consent of the governed.”

The Declaration does not specify the precise shape that government must take — indeed, it emphasizes that the people have the right to institute government in such a form as “shall seem to them” to promote their safety and happiness. In this, the Declaration recognizes the inevitable diversity of political institutions and laws by which unalienable rights are secured. While the document attributes to no nation the right to dictate to another its form of government or intervene in its internal affairs, it affirms that all nations’ political institutions and laws should be judged by their ability to secure the rights that individuals everywhere share.

To say that a right, as the founders understood it, is unalienable is to signify that it is inseparable from our humanity, and thereby to distinguish it from other sorts of rights. The most fundamental distinction is between unalienable rights — sometimes referred to as natural rights in the founding era and today commonly called human rights — and positive rights.

Unalienable rights are universal and nontransferable. They are pre-political in the sense that they are not created by persons or society but rather set standards for politics. They owe their existence not to the determinations of authorities or to the practices of different traditions but to the fundamental features of our humanity. They are not founded merely on custom, law, or preference. Human beings never lose their unalienable rights — though they can be violated — because such rights are essential to the dignity and capacity for freedom that are woven into human nature.

In contrast, positive rights are created by, and can only exist in, civil society. Positive rights owe their existence to custom, tradition, and to positive law, which is the law created by human beings. Because custom, tradition, and positive law vary from country to country, so too do positive rights. In the same country, positive rights may evolve over centuries, may be legislated at a distinct

moment, and may be revised or repealed in accordance with the ruling authority’s decisions.

To say that positive rights are not universal, however, is not to deny their importance, and to say that they are distinct from unalienable rights is not to deny that the two can be closely connected in political affairs. Unalienable rights provide a standard by which positive rights and positive law can be judged, while positive rights and positive law make the promise of unalienable rights concrete by giving expression to and instantiating unalienable rights. This can be seen in the American political tradition: the unalienable rights proclaimed in the Declaration are secured by the Constitution, which is the work of a particular people.

Rights, whether unalienable or positive, do not exist in a vacuum. They imply responsibilities, beginning with the responsibility to respect the rights of others. Rights, moreover, incline us to community, since they govern our relations with fellow human beings and are best protected and most effectively exercised in civil society. In addition, from the point of view of the founders, securing unalienable rights is the leading feature of the public interest. And the effective exercise of rights depends on the virtues, or certain qualities of mind and character including self-control, practical judgment, and courage that enable people to benefit from freedom; respect the rights of others; take responsibility for themselves, their families, and their communities; and engage in self-government.

According to the Declaration of Independence, the requirements of politics set limits within civil society on man’s natural freedom to act on conclusions about the justice of laws and of government. In a free society, the laws will leave a vast range of human activity to the conscience of each. At the same time, individuals are expected to obey duly enacted laws that issue from the agreed upon political framework, including those laws they find foolish or even contrary to the public interest.

But citizens cannot relinquish entirely their natural freedom to evaluate the justice of laws. Indeed, the Declaration holds it to be another self-evident truth that if “any Form of Government becomes destructive of” unalienable rights, “it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing

“For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.”

George Washington, Letter to the Jews of Newport, 1790

its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

In the American constitutional tradition, this right of the people to alter or abolish government is both essential and highly restricted. If, as Jefferson writes, “a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism,” then it is the people’s “right, it is their duty, to throw off such Government, and to provide new Guards for their future security.” Only, however, in the extreme and dire circumstance in which a government has lost its legitimacy by systematic conduct that denies the very idea of unalienable rights are citizens released from the limitations to which they agreed to be bound as members of a free society and justified in establishing a new form of government to secure their rights.

The aim must always be to restore political society. The civil liberty that political society makes possible — the rights to travel; to enter contracts and agreements; to possess, use, purchase, and dispose of property; to the protection of person and property; to the equal application of criminal laws; and to fair and equal treatment in court — enables individuals to live safely in their families and communities and to enjoy their unalienable rights.

Foremost among the unalienable rights that government is established to secure, from the founders’ point of view, are property rights and religious liberty. A political society that destroys the possibility of either loses its legitimacy.

For the founders, property refers not only to physical goods and the fruit of one’s labor but also encompasses

life, liberty, and the pursuit of happiness. They assumed, following philosopher John Locke, that the protection of property rights benefits all by increasing the incentive for producing goods and delivering services desired by others.

The benefits of property rights, though, are not only pecuniary. Protection of property rights is also central to the effective exercise of positive rights and to the pursuit of happiness in family, community, and worship. Without the ability to maintain control over one’s labor, goods, land, home, and other material possessions, one can neither enjoy individual rights nor can society build a common life. Moreover, the choices we make about what and how to produce, exchange, distribute, and consume can be tightly bound up with the kinds of human beings we wish to become. Not least, the right of private property sustains a sphere generally off limits to government, a sphere in which individuals, their families, and the communities they form can pursue happiness in peace and prosperity.

The importance that the founders attached to private property only compounds the affront to unalienable rights involved at America’s founding in treating fellow human beings as property. It also explains why many abolitionists thought that owning property was a necessary element of emancipation: only by becoming property-owning citizens could former slaves exercise economic independence and so fully enjoy their unalienable rights.

Religious liberty enjoys similar primacy in the American political tradition — as an unalienable right, an enduring limit on state power, and a protector of seedbeds of civic virtues. In 1785, James Madison gave classic expression to

its centrality in founding-era thinking in his “Memorial and Remonstrance Against Religious Assessments.” Quoting the Virginia Declaration of Rights’ definition of religion, Madison wrote, “we hold it for a fundamental and undeniable truth, ‘that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.’” Freedom of conscience in matters of religion is unalienable “because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men.” While government may practice intolerance and enforce orthodoxy, it can never, in Madison’s view, coerce true

pursue, consistent with the like right of others, what is fitting, proper, and good.

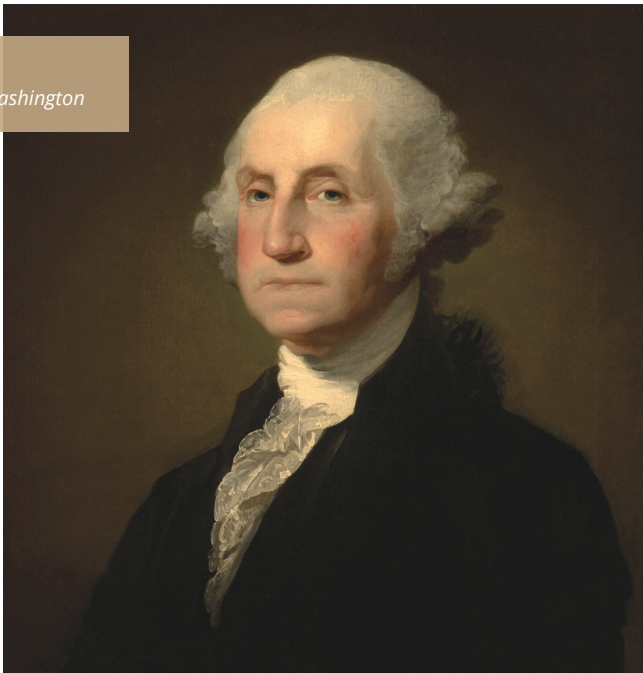
Some mistakenly suppose that so generous a conception of liberty must rest on skepticism about salvation and justice. Why give people freedom to choose if God’s will and the imperatives of justice are knowable? In fact, a certain skepticism is involved, but it is directed not at faith and justice but at the capacity of government officials to rule authoritatively on the deepest and greatest questions. The Madisonian view of religious liberty — like the view to which Jefferson gave expression in his Virginia Bill for Religious Freedom — proceeds from a theistic premise about the sources of human dignity even as it denies the state the power to dictate final answers about ultimate matters.

Drawing on the modern tradition of freedom and their Biblical heritage, the American founders saw themselves as intellectual and political pioneers of religious liberty. When in 1787, two years after his Memorial and Remonstrance, Madison and his colleagues at the Constitutional Convention in Philadelphia incorporated into the new charter of government a ban on religious tests for public office, America took a step that no other nation had ever taken. In 1788, at a parade in Philadelphia celebrating the ratification of America’s new system of government, Dr. Benjamin Rush, who signed the Declaration, marveled at the sight of the religious leaders of the city’s diverse faiths walking arm in arm. “There could not have been a more happy emblem contrived” of the Constitution, Rush observed, because it “opens all its power and offices alike, not only to every sect of Christians, but to worthy men of every religion.”

religious belief or compel genuine religious worship. That is because faith and worship performed under the threat of violence, lacking conviction and holy intent, cannot qualify as the discharge of religious duty.

Madison maintains that religious liberty is also unalienable “because what is here a right towards men, is a duty towards the Creator.” The duty to exercise reason in determining the content and scope of one’s religious obligations is akin to the duty to exercise reason in determining the content and scope of justice and the obligations that it imposes. Governments that respect unalienable rights preserve the ability of those who live under them to determine and

President George Washington captured the new path his young nation was taking in his 1790 letter to the Jews of Newport. Unlike Europe, which still imposed liabilities based on religion and regulated the public expression of faith, the United States guaranteed people irrespective of their faith the equal enjoyment of religious freedom: “All possess alike liberty of conscience and immunities of citizenship.” The United States secured religious freedom not grudgingly but graciously: “It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only



President
George Washington

that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.”

B. THE CONSTITUTION

The genius of the Constitution, which was drafted in 1787 and came into effect in 1788, was to establish a unique design for a government capable of securing the unalienable rights affirmed by the Declaration of Independence. The Constitution translates the universal promise of fundamental rights belonging to all persons into the distinctive positive law of the American republic.

According to the Preamble, the Constitution’s aims are manifold: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” In seven austere articles, the original Constitution — the drafting and ratification of which were themselves extraordinary acts of self-government — sets forth institutional arrangements that enabled the people to rule themselves while respecting freedom and equality.

The primary means by which the Constitution enables the people to secure those blessings is through the structure it gives to, and the limitations it imposes on, government. Limited government is crucial to the protection of unalienable rights because majorities are inclined to impair individual freedom, and public officials are prone to putting their private preferences and partisan ambitions ahead of the public interest. This is not to deny the capacity for public-spirited action on the part of the people or public officials, but to recognize the need for institutional safeguards for rights because of the unreliability of high-minded motives. Nor is it to overlook that, within its limits, government must act energetically and effectively to secure rights.

The Constitution’s complex framework operates to constrain momentary whims and passing fancies of any given majority or officeholder; to cool the passions of public servants as well as of the people and redirect politics

toward constitutionally appropriate goals; and to induce compromise among the factions that inevitably arise in free societies. Government so moderated is not therefore passive or sluggish. Indeed, the Constitution’s design aims to channel energy toward the vindication of rights.

A product of extended deliberation and complex negotiations, the American charter incorporates a variety of institutional arrangements — some of classical pedigree, some of distinctly modern vintage, some of hybrid design — to secure rights by limiting government. These include the enumeration of the federal government’s legitimate powers; the division of power first between state and federal levels and then among three branches of the federal government; a unitary executive; a bicameral legislature; an independent judiciary; and, added three years after the original Constitution came into effect, a Bill of Rights.

Consider a few of these. The Constitution limits government to secure rights by confining the exercise of government power to specified undertakings and purposes. For example, the Constitution protects freedom of speech in the first place by declining to give Congress the power to pass laws prescribing or proscribing beliefs, utterances, and publications.

Another way the Constitution limits government for the sake of liberty is through federalism, which disperses power between the national government and the state governments. Each level of government has its prerogatives and advantages. The Constitution — along with the laws enacted and the treaties ratified under its authority by the federal government — is “the supreme law of the land.” At the same time, the Constitution leaves state governments, which stand closer to the voters, wide latitude to legislate for the people’s general welfare. This allows majorities in each state to adopt laws that best suit their communities — to serve as “laboratories of democracy,” as Supreme Court Justice Louis Brandeis observed in the 20th century. It must be acknowledged that under the banner of states’ rights, states exploited federalism to shield slavery and prolong discrimination. Nevertheless, over the long run the constitutional dispersion of power between the U.S. government and the governments of the states has permitted, to a remarkable degree, individuals and communities throughout the land to pursue happiness as they understand it.

A third way the Constitution limits government to secure rights is by separating political power into three distinct branches, to each of which it gives the means to check and balance the other two. To enact a law, for example, the legislative branch requires the signature of the president, in whom the executive power is vested, or a super majority in both houses of Congress. To wage war, the president, who is commander in chief of the armed forces, depends on Congress for declaring war and for funding that Congress can provide or withhold. The Supreme Court may hold as unconstitutional laws duly enacted by Congress and signed by the president, even as the president nominates judges to the federal judiciary and the Senate confirms them. Such checks and balances are designed to enable members of any one branch to thwart the efforts by another branch to accumulate sufficient power to invade the people's rights.

Careful institutional design, however, cannot alone secure unalienable rights and the host of other positive rights through which they are realized. Public virtue — meaning the willing subordination of private interest to the common good — is also necessary. Hence the importance of the civic-republican experience, deeply rooted in the country's self-governing townships, and the strong families, religious communities, and variety of voluntary associations that stand between the citizen and the state. These bodies also foster private virtue including what Alexis de Tocqueville in *Democracy in America* called “self-interest well understood,” which involves cultivation of the self-discipline and skills crucial to the achievement of one's goals.

In *The Federalist*, the unsurpassed commentary on the Constitution, James Madison highlights the dependence of the American experiment in free and democratic government on the character and competence of its citizens. For the most part, *The Federalist* concentrates on explaining how the new government incorporates institutional arrangements that deal with the vulnerabilities of freedom and democracy in a manner consistent with freedom and democracy. “In the extent and proper structure of the Union,” Madison writes in *Federalist* No. 10, “we behold a republican remedy for the diseases most incident to republican government.” But institutional remedies are “auxiliary precautions,” Madison emphasizes in *Federalist* No. 51. Because “a dependence on the people is, no doubt, the primary control on the government,” the securing of rights

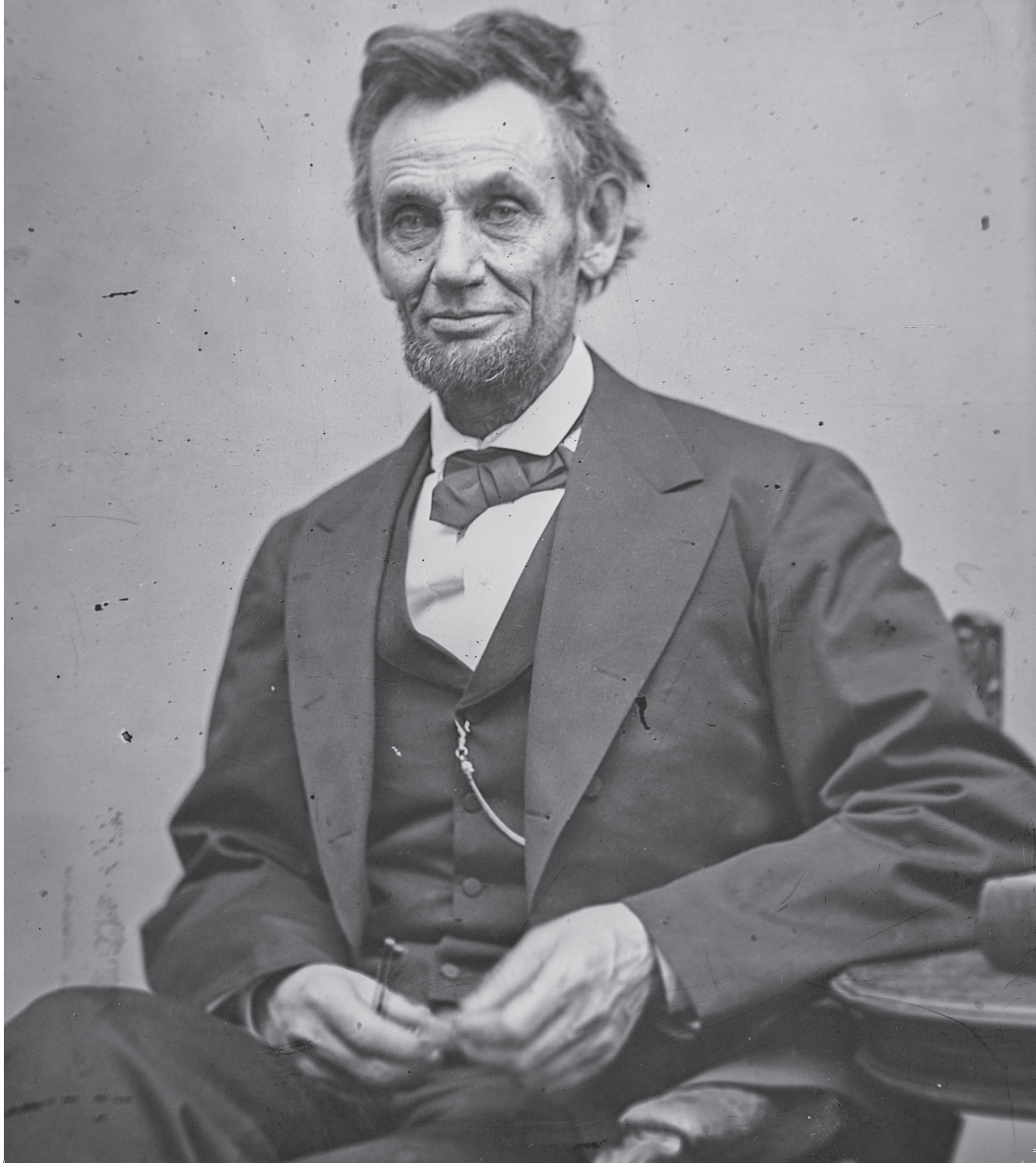
cannot be separated from the virtues — private as well as public — of the citizens, who must hold their elected representatives accountable.

In the 55th installment, Madison underscores the tight link between securing freedom and citizens' character. While acknowledging the weaknesses of human nature, he also emphasizes citizens' capacity, and the Constitution's need, for virtue: “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.” Whereas monarchy depends on the virtues of one person, and aristocracy on the virtues of the few, a republic — that is, representative government grounded in unalienable rights — relies on the virtues of the people since, as citizens, all share in the responsibilities of self-government.

While recognizing that virtue was indispensable to the protection of rights, the Constitution's framers aimed to minimize dependence on excellent character. Led by Madison, they fashioned a government that would have the energy and institutional means to protect individual freedom but not enough authority or leeway to impair the people's rights. As Alexander Hamilton argued in *Federalist* No. 84, “the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” Hamilton meant that the Constitution's structure would do more to protect the people's rights — unalienable and positive — than would any formal list of privileges and immunities.

Nevertheless, in 1791, three years after the Constitution's ratification, the young nation added a Bill of Rights. The enumerated rights in the first ten amendments to the Constitution gave symbolic heft and concrete backing to the limitations on government power incorporated into the Constitution's structure. They also did more. By reinforcing the original Constitution's safeguards against arbitrary government action, they ensured ample room for democratic politics. The guarantees afforded by the Bill of Rights against government overreach — along with the more general safeguards built into constitutional structure — allowed for the development of an engaged citizenry, without which government cannot be expected to secure freedom under law.

President
Abraham Lincoln



The First Amendment’s protection of religious freedom, for example, promotes not merely toleration for a diversity of faiths and forms of worship but welcomes persons of all faiths as full citizens. Its guarantees of freedom of speech, press, peaceful assembly, and petition of government enable citizens of diverse views to exchange opinions, to hear and be heard, and to hold their leaders up to public scrutiny. Through the constant interplay of advocacy and criticism, citizens can acquire the information necessary to form reasoned views of the leading issues of the day, to choose suitable representatives, and to determine when representatives have worn out their welcome and must be replaced.

Similarly, the Second Amendment’s “right of the people to keep and bear arms” is bound up with “a well-regulated militia” — that is, a local association created to defend the community. The right to self-defense, in the American tradition, both provides opportunities for citizens to develop habits of self-reliance and protects against a tyrannical state.

The Third Amendment through the Eighth Amendment ensure the people’s ability to secure a stake in the community and discharge the obligations of private and public life. The Third Amendment safeguards the sanctity of the household by preventing government from commandeering houses in peace time and lawlessly in war. The Fourth Amendment shields the people from “unreasonable searches and seizures” and warrants that lack “probable cause.” The Fifth Amendment guarantees that no person shall “be deprived of life, liberty, or property, without due process of law” and prohibits the taking of private property for public use without “just compensation.” The Sixth Amendment’s and Seventh Amendment’s guarantees of the right to trial by jury in criminal cases foster a knowledgeable and responsible citizenry directly involved in deliberations and judgments crucial to the fate of fellow citizens and the community’s well-being. Such a citizenry is better able to exercise wisely the rights to life, liberty, and the pursuit of happiness. The Eighth Amendment promises that imprisonment and punishment will be proportional to allegations and judicial findings.

The Ninth and Tenth Amendments emphasize that neither the Bill of Rights nor the Constitution of which it is a part are exhaustive. The Ninth Amendment’s affirmation of unenumerated rights retained by the people

and the Tenth Amendment’s assertion of powers reserved to the states or the people underscore the dependence of citizenship in a free society on the pre-political rights from which the people’s pre-political powers derive. These amendments also call attention to the never-ending task of interpretation concerning the reach of rights and the extent of political power. That task falls to all branches of government and to the people, from whom all political power derives and for the sake of whose rights it is legitimately exercised.

In a June 1789 speech to Congress in favor of a Bill of Rights, Madison stressed that despite different origins, freedom is a function of positive rights elaborated in various legal codes as well as of rights that belong to all human beings. “Trial by jury,” he observed, “cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”

C. LINCOLN’S RETURN TO THE DECLARATION

Despite the protections afforded by the Bill of Rights and more broadly by the structural features of the federal government, the original Constitution betrayed the promise of unalienable rights by giving legal protection to slavery. While many opposed slavery in the founding era, it had become apparent to those who met in Philadelphia in the summer of 1787 to draft a new charter of government that the Constitution could not be ratified and the union could not be preserved unless the institution of slavery was permitted. The wisdom of that compromise is still debated. Nevertheless, the very compromise that gave slavery legal protection created a political framework through which the United States would ultimately abolish slavery and enshrine in law equality without regard to race.

The Constitution alludes to slavery in three of its provisions. For the purpose of apportioning representation in the House of Representatives and imposing direct taxes, Article I, Section 2 distinguishes between “free Persons,” each of whom counts as one, and “other Persons,” each of whom counts as three fifths. (The goal was to reduce the political representation of states that held a portion of their population in bondage.) Article I, Section 9 protected

“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit” until 1808 (when Congress outlawed the slave trade). And Article IV, Section 2 provides that a “person held to Service or Labour in one State under the Laws thereof,” who escapes to another state must on demand be returned to the party to whom the work is due. It is telling that, even as these provisions gave constitutional sanction to ownership in people, the framers deliberately avoided use of the words “slave” and “slavery.” By speaking of slavery briefly and by means of euphemism, the Constitution awkwardly acknowledged the abysmal conflict between owning other people and the unalienable rights on which the American experiment rested.

Many have held that the Constitution is fatally flawed because of its compromise with slavery. In an 1854 Fourth of July rally, prominent abolitionist William Lloyd Garrison denounced the Constitution as “a covenant with death and an agreement with Hell,” and “null and void before God.”

Others insisted that the Constitution contained the seeds of slavery’s elimination. Originally, the former slave Frederick Douglass agreed with Garrison. Later, though, in his own Fourth of July oration, he said, “In that instrument, I hold there is neither warrant, license, nor sanction of the hateful thing; but interpreted, as it ought to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT.” Whether or not that statement was a rhetorical device, for the rest of his life Douglass argued for abolition and equal rights for black Americans within the framework of America’s founding principles.

Abraham Lincoln maintained that the Constitution and the moral and political commitments that informed it made a decisive contribution to the abolition of slavery. The American founding set slavery, he stated in 1858 in Springfield, Illinois, “in the course of ultimate extinction.” The key, according to Lincoln, was the Declaration of Independence’s affirmation of rights shared equally by all. The signers of the Declaration, he had explained the year before, “did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them.” In any case, the founders “had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as

circumstances should permit.” The founders intended “to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”

In 1863, in his solemn, succinct, and luminous address to commemorate the fallen soldiers at Gettysburg, President Lincoln effected a subtle shift in America’s relation to unalienable rights. “Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal,” he declared. Lincoln stressed *dedication* to the nation’s overriding purpose. Plunged into civil war by the controversy over slavery, the nation needed to go beyond *affirming* individual freedom and human equality. The nation was obliged to achieve them. Lincoln summoned the nation “to be dedicated here to the unfinished work” advanced by the soldiers’ noble sacrifices, “to be here dedicated to the great task remaining before us.” That great task consisted in ensuring “that this nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people, shall not perish from the earth.” To preserve America’s experiment in free and democratic government, it would be necessary for the people to engage in politics and reform the law to secure for everyone under the Constitution’s purview the rights inherent in all persons.

In the wake of the Union victory in the spring of 1865, the nation gave formal expression to this new dedication to freedom by thrice amending the Constitution. The 13th Amendment (1865) abolished slavery. The 14th Amendment (1868) established birthright citizenship and provided due process and equal protection of the laws for all persons. The 15th Amendment (1869) prohibited the denial of the right to vote on the basis of race. All three Reconstruction amendments substantially increased the federal government’s power by explicitly making it responsible for securing the rights they announced. All three amendments dedicated the Constitution to the unfinished work of vindicating the unalienable rights the nation’s founders believed to be self-evident.

In response to these transformations, American legislatures in the late-19th and early-20th centuries, like their counterparts in other industrialized countries, began to enact protections for workers that were often framed in the language of rights.



*Elizabeth Cady Stanton
and Susan B. Anthony*

D. POST-CIVIL WAR REFORMS

The protracted struggle for women’s right to vote, which culminated in 1920 in the passage of the 19th Amendment, further advanced the unfinished work of America’s founding. At the country’s birth, married women could not sign contracts, lacked title to their earnings, and possessed no claim to their children in the event of legal separation. Led by Elizabeth Cady Stanton and Susan B. Anthony, the movement to win women the right to vote sought to educate the nation about the implications of the nation’s founding for women’s political standing. Legal liabilities based on sex, they argued, were incompatible with the dedication to unalienable rights.

At the 1848 Seneca Falls convention, which launched the movement, the Declaration of Sentiments stated: “We hold these truths to be self-evident: that all men and women are created equal: that they are endowed by their Creator with certain inalienable rights: that among these are life, liberty, and the pursuit of happiness....” Speaking at the convention, Stanton also framed the issue of women’s suffrage in terms of the Declaration: “[S]trange as it may seem to many, we now demand our right to vote according to the declaration of the government under which we live . . . The right is ours. Have it, we must. Use it, we will.” When Susan B. Anthony was sentenced for the crime of casting a vote as a woman in the 1872 presidential election, she reminded the Court that its “denial of my citizen’s right to vote is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to trial by jury of my peers as an offender against the law, and, therefore, the denial of my sacred rights to life, liberty, and property....”

Changing attitudes toward women in 19th-century America were in part driven by the Industrial Revolution, which had ushered in a far-reaching transformation of the economy and society. The United States shifted from a country where the great majority of the non-slave male population were independent farmers, shopkeepers, and artisans to one in which a majority were wage earners. This created new forms of dependence — on employers — and new forms of independence as workers became more mobile. One consequence was the unraveling of the safety net — for the young, the ill, the disabled, the unemployed, and the elderly — traditionally provided by kinship networks and local institutions in the context of small, tight-knit communities.

In response to these transformations, American legislatures in the late-19th and early-20th centuries, like their counterparts in other industrialized countries, began to enact protections for workers that were often framed in the language of rights. Following the Great Depression of the 1930s, the federal government expanded protections for the neediest members of society, protections that previously had been provided by local governments and private charities. Over the long term, the couching of these legislative provisions for the vulnerable in terms of rights has become commonplace.

These relatively modern kinds of rights are not privileges to act or immunities from government action — like the rights around which the Declaration and the Constitution revolve — in that they entail difficult judgments about the allocation of material resources. They have roots in America’s Biblical and civic republican traditions, and also in the modern tradition of freedom insofar as such rights cultivate the conditions within which freedom flourishes. These kinds of rights, even more than other positive rights, must rely for their implementation on the judgments of elected representatives regarding the just use of limited resources. The legislative branch is thus the primary forum for determining the scope and content of the newer rights to public assistance, social benefits, economic intervention, environmental protection, and the like.

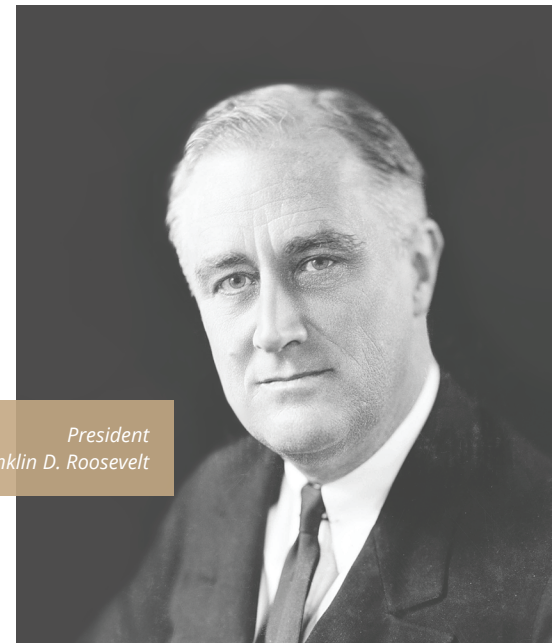
In his January 1944 State of the Union address, President Franklin Delano Roosevelt declared that “true individual freedom cannot exist without economic security and independence.” Roosevelt enumerated a set of aspirational principles that he called “a second Bill of Rights,” and that would have close analogues in the 1948 Universal

Declaration of Human Rights. They included “[t]he right to a useful and remunerative job”; “the right of every family to a decent home”; “the right to adequate medical care”; “the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment”; and “the right to good education.”

In contrast to the civil and political rights that generally limited government power, these new principles were proposed as guidelines for legislative action that would increase government’s scope and responsibilities. Since both the limitation of government power and the exercise of government power are essential to securing life, liberty, and the pursuit of happiness, and because a certain level of material well-being is necessary for freedom, the new economic rights complement the older civil and political rights.

Although Roosevelt stated that these economic principles “have become accepted as self-evident,” their implementation remains contested. Social and economic rights are most compatible with American founding principles when they serve as minimums that enable citizens to exercise their unalienable rights, discharge their responsibilities, and engage in self-government. They are least compatible when they induce dependence on the state, and when, by expanding state power, they curtail freedom — from the rights of property and religious liberty to those of individuals to form and maintain families and communities.

Even as FDR was introducing new rights — or drawing out the latent implications of unalienable ones — the United States continued to deprive African Americans of theirs. The abolition of slavery had not ended discrimination based on race. After a relatively brief period of Reconstruction following the Civil War, the former Confederate states adopted new constitutions

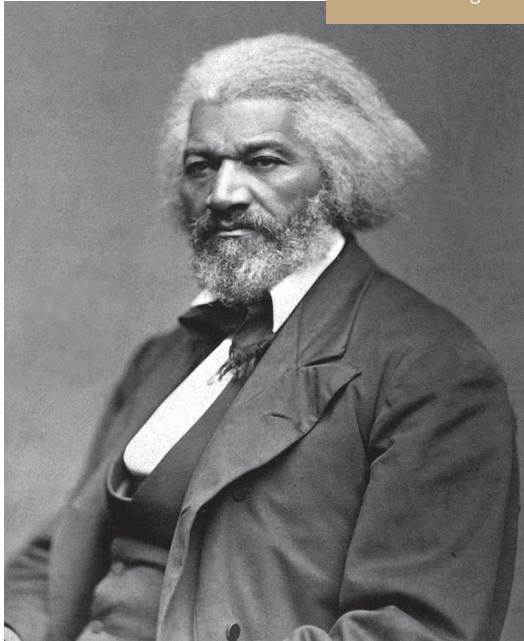


President
Franklin D. Roosevelt

“When these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.”

Martin Luther King, Jr., 1963

Frederick Douglass



and enacted electoral laws that effectively disenfranchised black voters. In addition, in the 1880s these states instituted Jim Crow laws, which imposed mandatory racial segregation in public facilities, on public modes of transportation, and inside retail stores. Even the New Deal’s sweeping reform of labor law excluded agricultural and domestic workers, a large proportion of whom were members of racial and ethnic minorities.

In the aftermath of World War II, the nation took crucial steps to realize more fully the Declaration’s promise. These steps owed much to the growing civil rights movement and embarrassment over the stark contrast between America’s fight for freedom abroad and the country’s legalized subordination of African Americans at home. In 1948, President Harry Truman ordered the desegregation of the armed forces, which paved the way for the civil rights era by enabling young men of different races to know, befriend, and rely upon one another as they served their country side-by-side. In 1954, in *Brown v. Board of Education*, the nine justices of the United States Supreme Court unanimously held

that segregation in public schools was unconstitutional. One year later in Montgomery, Alabama, then-42-year-old Rosa Parks bravely refused to relinquish her seat on a bus to a white passenger. The Supreme Court’s bold decision in *Brown* and Rosa Parks’ courageous action were critical components of a movement that within a decade eliminated in the United States legally mandated race-based discrimination.

Over the course of the struggle, multiple understandings emerged about the relation between America’s founding principles and the quest for civil rights for black Americans. Dr. Martin Luther King, Jr. approached the challenge in the spirit of Jefferson, Douglass, Lincoln, Stanton, and Anthony. King conceived of equal treatment for black Americans under law not as a deviation from America’s founding principles but, as he stated from the steps of the Lincoln Memorial in his 1963 “I Have a Dream” speech, a fulfillment of “a promissory note” which those principles provided to all Americans.

In the spring of that year, in “Letter from a Birmingham Jail,” King had emphasized the importance of America’s founding principles to the achievement of justice for America’s black citizens. He had been jailed after the Southern Christian Leadership Conference and other groups organized non-violent demonstrations and economic boycotts in response to police brutality, lynching, racial disparities in prosecution and sentencing, and other forms of gross racial discrimination throughout the South. King’s letter was prompted by white clergy who reproached him for breaking Birmingham’s prohibition on “parading, demonstrating, boycotting, trespassing and picketing.” Responding from his prison cell, King

Martin Luther King, Jr. delivers "I Have A Dream" speech, 1963



wrote, “We have waited for more than 340 years for our constitutional and God given rights.” He explained that non-violent protests involving violation of unjust laws, coupled with a willingness to accept the prescribed punishment, were sometimes critical to vindicating the rule of law. Such peaceful civil disobedience — designed not to undermine the law but rather to call it to its fundamental purpose — was fully within America’s tradition of unalienable rights, King contended: “[W]hen these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.”

Not all of King’s fellow African Americans agreed that the path to freedom was to be found within America’s constitutional framework. For a time, black-nationalist Malcolm X took a different view, condemning King’s “I Have a Dream” speech on the ground that for many African Americans, life in the United States was more like a “nightmare.” Influenced by forebears such as Marcus Garvey and Elijah Muhammad, black nationalists demanded change sometimes at odds, and sometimes in concert, with the civil rights movement. Some lamented institutional racism and advocated on behalf of black power — arguing that prosperity would be achieved through black sovereignty rather than through integration. Many of these efforts proved ill-conceived but they often had a point that echoed the best in America. For example, in insisting that white people cannot “give” freedom to other races because every man is *born* with such freedom, activists hearkened back to the opening words of the Declaration of Independence. And in shifting focus from “civil” rights to “human” rights, as Malcolm X did in his 1964 “The Ballot or the Bullet” speech, they called on the universal standard affirmed by Jefferson, Douglass, Lincoln, Stanton, Anthony, and King. In that speech, Malcolm X advocated taking “Uncle Sam” to the United Nations so that the world could judge him guilty of violating the human rights of African Americans. Despite their harsh criticism of the American status quo and sharp disagreement with King over tactics necessary to effect change, black nationalists often displayed a strong belief that rights are not illusory, they apply to all human beings everywhere, and that the appeal to them

advanced justice — the very ideas in which the United States was rooted.

It was, however, King’s summons, at once sober and impassioned, to reform American political institutions in light of the founding promise of unalienable rights that culminated in the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. These landmark legislative measures were instrumental in further weaving equality in civil and political rights into the fabric of law in the United States. Much has been accomplished in building a country where each person, as King wished for his children, is judged not by color of skin but by content of character. The brutal killing of an African-American man by a police officer in the late spring of 2020 and the subsequent civic unrest that swept the country underscore that much still must be accomplished. Indeed, appreciation of the work that remains, of its urgency and importance, is itself a crucial element of America’s distinctive rights tradition.

As circumstances change, Americans will continue to debate the scope and implications of America’s grounding in, and dedication to, unalienable rights. This vital discussion about what kind of people and nation we wish to become predates the country’s founding and is a key source of the American rights tradition’s dynamism. As it has since its ratification almost 250 years ago, the Constitution continues to secure the rights that enable the American people to address enduring controversies about how to assess new rights claims, and how to manage tensions among and competing interpretations of existing rights that mark a free and self-governing people.

In the case of civil and political rights, the challenge has been to respect the rights of members of groups wrongly denied them. But as in the case of economic rights, so too with certain social rights: they have proven controversial because they frequently involve a clash of rights claims.

In divisive social and political controversies in the United States — abortion, affirmative action, same-sex marriage — it is common for both sides to couch their claims in terms of basic rights. Indeed, it is a testament to the deep roots in the American spirit of our founding ideas about unalienable rights that our political debates continue to revolve around the concepts of individual freedom and human equality, even as we disagree — sometimes deeply

— on the proper interpretation and just application of these principles.

The increase in rights claims, in some ways overdue and just, has given rise to excesses of its own. Not all government forbearance or intervention that benefits some or even all citizens is for that reason a right, and not every right that democratic majorities choose to enact is therefore unalienable. The temptation to cloak a contestable political preference in the mantle of human rights, which are held to be objectively and universally true, and seek a final and binding judgment from a court, tends to choke off democratic debate, which is itself critical to self-government and therefore to the protection of unalienable rights. At the same time, what may appear to be a new right will sometimes be better understood as reflecting a more refined understanding amid changing circumstances of the implications of America's dedication to unalienable rights.

E. AMERICA'S FOUNDING PRINCIPLES AND THE WORLD

Unalienable rights direct attention to the relation between citizens and the government to which they have consented. Yet as rights inherent in all human beings, they also have implications for the conduct of foreign affairs. Indeed, the Declaration of Independence was inspired in part by “a decent respect to the opinions of mankind,” which compelled the founders to “declare the causes which impel them” to vindicate their unalienable rights by setting up a new form of government.

The implications for foreign affairs of the nation's grounding in human rights are more diffuse and indirect than they are for domestic affairs, but the self-evident truths concerning individual freedom and human equality on which the United States was founded nevertheless should inform and elevate America's conduct in the world.

Dedication to rights and democracy does not confer the authority nor entail the obligation to forcibly change regimes or to otherwise coerce nations to accept the interpretation of unalienable rights favored by majorities in the United States. The American grounding in unalienable rights is not a license to override other people's rights to determine their form of government. But such

dedication does give the United States an interest in supporting liberal democracy as the form of government best suited to protecting rights; in promoting a freer and more open international order, one that is friendlier to claims of human rights and democratic self-government; and in standing with peoples everywhere who seek the dignity that comes from living under a government that respects individual freedom and equality under law.

Promoting unalienable rights abroad can take many forms consistent with the sovereignty of other nation-states. By seeking to make itself a more perfect union, the United States can serve as a model experiment in freedom and equality under law. The United States can, working with friends and partners, preserve a free and open international order that fosters commerce and diplomacy among nations and thereby promotes prosperity and the peaceful resolution of disputes. The United States can exercise influence abroad — with countries that curtail fundamental rights and with people seeking to claim their own — by proudly and persistently reaffirming its dedication to the rights all human beings share, not least by means of high-profile meetings held by senior U.S. officials with courageous dissidents and victims of persecution. The United States can provide foreign aid as well as training in free institutions and education in the principles of freedom to countries undertaking to expand their commitment to rights. The United States can transmit news and commentary to those who live under governments that deprive them of access to robust political debate. And the United States can impose sanctions to deter gross violations of human rights.

Diplomacy is always to be preferred but is sometimes inadequate. The United States must remain prepared, always as a last resort, to defend its sovereign independence and territorial integrity, a right the nation's Declaration ascribes to all peoples. And in today's interconnected world, the defense of freedom at home may require the United States to come to the aid of friends of freedom abroad in repelling the aggression of freedom's enemies.

Perhaps the United States' most explicit commitment to promoting abroad the rights all human beings share received expression in the undertaking that culminated in December 1948 with the approval in the UN General Assembly of the Universal Declaration of Human Rights. By taking that step, the United States affirmed the correspondence between its founding convictions

By elevating human dignity and freedom and basic claims of justice to matters of general international concern, the Universal Declaration gave voice to the conscience of global humanity for the first time in history.



UN General Assembly approves UDHR, December 10, 1948

The UDHR's 30 articles articulate a fairly small number of rights. It includes only those that were capable of attaining a near-universal consensus among the diverse nations represented at the United Nations.

and the UDHR's universal political standard. In the post-World War II, atomic-age world — rendered smaller and more interconnected by successive revolutions in transportation and communications — Americans embraced the obligation to foster, as the UDHR states, “universal respect for and observance of human rights and fundamental freedoms.” Since then, much of American diplomacy can be seen as a struggle to integrate the obligation to advance human rights around the world with the variety of other obligations that go into the formation of a coherent foreign policy suitable for the world's most prosperous and powerful liberal democracy.

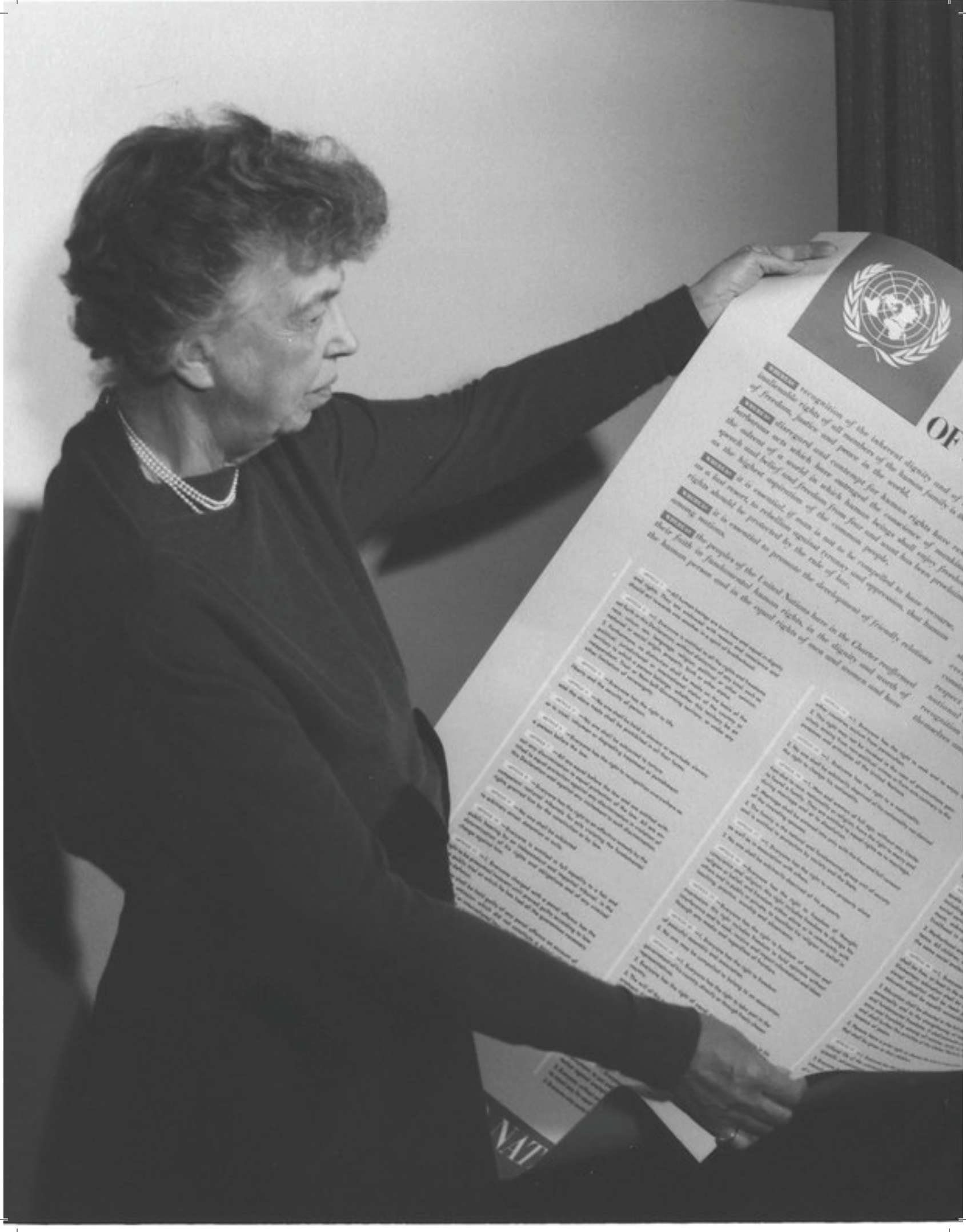
III. U.S. COMMITMENTS TO INTERNATIONAL RIGHTS PRINCIPLES

The idea that certain principles are so fundamental as to apply to all human beings everywhere was, as we have seen, embedded in the American founding, and has an ancient pedigree in the world's religious and philosophical traditions. Yet the question of what universality might mean in the modern world loomed large in 1945 when the newly founded United Nations embarked on the preparation of what was then called an “International Bill of Rights.” So large, in fact, that UNESCO convened a group of the world's best known philosophers in 1947 to study whether an agreement on basic principles was “conceivable among men who come from the four corners of the earth and who belong not only to different cultures

and civilizations, but to different spiritual families and antagonistic schools of thought.”

After consulting widely with Confucian, Hindu, Muslim, and Western thinkers, the UNESCO philosophers reported that “certain great principles” were widely shared, though “stated in terms of different philosophic principles and on the background of different political and economic systems.” Their survey indicated that some things are so terrible in practice that almost no one will publicly approve them, and that there are certain goods so widely valued that almost no one will publicly oppose them. That was enough, in their view, to make agreement on an international declaration possible. Such a document, they advised, should not aim “to achieve doctrinal consensus but rather to achieve agreement concerning rights, and also concerning action in the realization and defense of rights, which may be justified on highly divergent grounds.”

On December 10, 1948, the philosophers' assessment was validated when the UN General Assembly approved the Universal Declaration of Human Rights without a single dissenting vote. On that solemn occasion, the chair of the Commission that had presided over its drafting reminded the delegates that the rights in UDHR were statements of principles yet to be realized. “[I]t is of primary importance,” Eleanor Roosevelt said, “that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. *It is a Declaration of basic principles of human rights and freedoms, to serve as a common*



OF

PREAMBLE recognition of the inherent dignity and of the inalienable rights of all members of the human family is the basis of freedom, justice and peace in the world.

SECTION I **ARTICLE 1** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

ARTICLE 2 Everyone has the right to life, liberty and security of person. No one shall be subjected to arbitrary arrest, detention or exile. No one shall be deprived of his nationality.

ARTICLE 3 Everyone has the right to life, liberty and security of person. No one shall be subjected to arbitrary arrest, detention or exile. No one shall be deprived of his nationality.

ARTICLE 4 No one shall be held in slavery or servitude; slavery and the slave trade, including trade in children, shall be prohibited in all their forms.

ARTICLE 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Slavery and the slave trade, including trade in children, shall be prohibited in all their forms.

ARTICLE 6 Everyone has the right to recognition as a person before the law.

ARTICLE 7 All are equal before the law and are entitled without any discrimination to equal protection of the law. All are equal before the law and are entitled without any discrimination to equal protection of the law.

ARTICLE 8 Everyone has the right to an effective remedy by the competent national authorities for the violations of his fundamental freedoms proclaimed in this Declaration.

ARTICLE 9 No one shall be subjected to arbitrary arrest, detention or exile.

ARTICLE 10 Everyone has the right to a fair and public hearing by an independent and impartial tribunal in the case of any dispute of his legal rights.

ARTICLE 11 Everyone has the right to a fair and public hearing by an independent and impartial tribunal in the case of any dispute of his legal rights.

ARTICLE 12 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 13 Everyone has the right to free movement and residence within the borders of each state.

ARTICLE 14 Everyone has the right to leave any country, including his own, and to return to his country.

ARTICLE 15 Everyone has the right to a nationality.

ARTICLE 16 Everyone has the right to marry and to found a family, which is the basis of the peace and stability of the world.

ARTICLE 17 Everyone has the right to own property alone as well as in association with others.

ARTICLE 18 Everyone has the right to freedom of thought, conscience and religion.

ARTICLE 19 Everyone has the right to freedom of opinion and expression.

ARTICLE 20 Everyone has the right to peaceful assembly and to associate with others in any form.

ARTICLE 21 Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

ARTICLE 22 Everyone has the right to social security.

ARTICLE 23 Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

ARTICLE 24 Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

ARTICLE 25 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services, and the right to education.

standard of achievement for all peoples of all nations” (emphasis added).

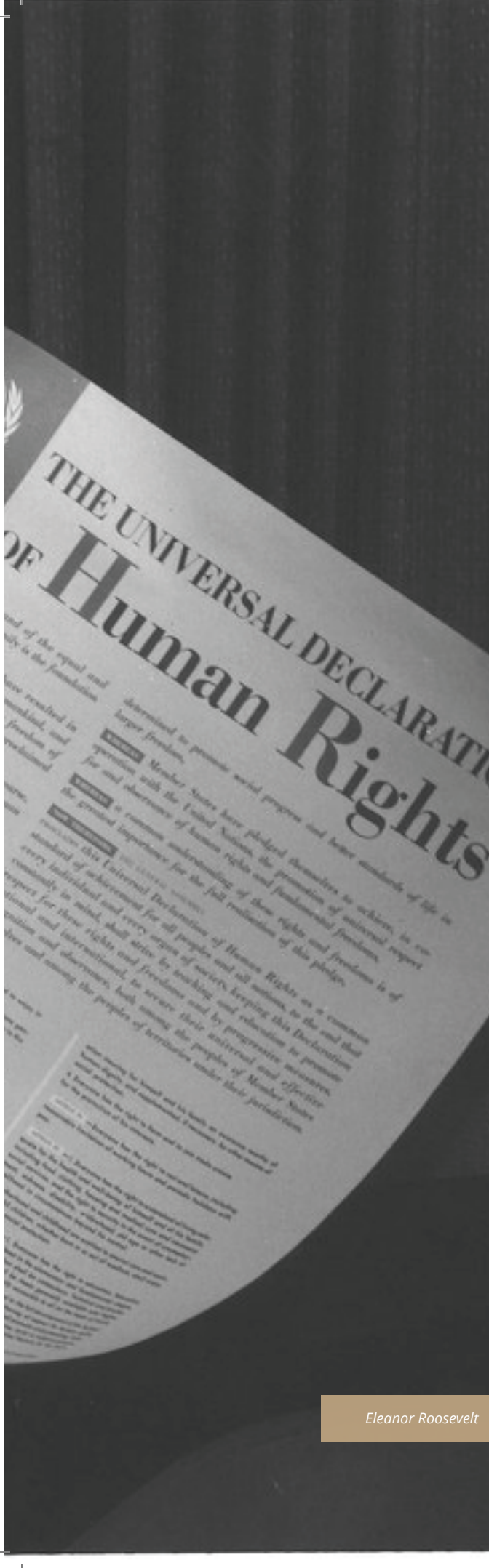
As was the case with the U.S. Declaration of Independence, the principles affirmed in the UDHR were far from reflecting the reality of the times. In 1948, no country in the world could be said to have met the standards toward which they pledged to aim. What Abraham Lincoln had said of the Declaration of Independence could well be said of the UDHR: “They meant to set up a standard maxim for free society which should be familiar to all, constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people, of all colors, everywhere.” As Mrs. Roosevelt put it when urging the General Assembly to approve the UDHR, “Let us, as Members of the United Nations, conscious of our own shortcomings and imperfections, join our effort in good faith to live up to this high standard.”

The achievement of consensus on the principles in the UDHR was a historic milestone, and a major step toward setting conditions for their gradual realization. In the case of the United States, those principles were highly compatible with, and on some points directly reflected the influence of, the principles embedded in America’s own rights tradition.

A. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE UNITED STATES

As the world began to emerge from the devastation of the Second World War, the place of human rights in the new global order was far from clear. Other pressing concerns — from economic reconstruction to the emerging Cold War and the stirrings of postcolonial independence movements — occupied the attention of the more powerful countries, including the United States. But the United States’ stated war aims (including in the Atlantic Charter which envisioned a postwar order built around ideals of peace, self-government, and economic security), the advocacy of various U.S. civic and religious groups, and the diplomatic work of exceptional individuals from many countries (including in particular from Latin America and from several smaller and less powerful nation-states) all encouraged the United States government to play a key

Eleanor Roosevelt



role in advancing the incorporation of human rights into the postwar framework of international relations and law. Without U.S. State Department support, it is unlikely that human rights would have figured prominently in the UN Charter, or that the first UN Human Rights Commission would have been tasked with drawing up an “International Bill of Rights.”

In drafting, negotiating, and revising the document that became the UDHR, the political ideals and traditions of the United States played a major role. Echoes of U.S. founding principles can be heard in the UDHR’s Preamble: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The second paragraph evokes FDR’s Four Freedoms speech, calling for a “world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.” The first 21 articles of the UDHR track well with the “unalienable rights” of the Declaration of Independence and with the classically liberal civil and political rights enshrined in the U.S. Bill of Rights and the Reconstruction amendments to the U.S. Constitution. These UDHR articles include “the right to life, liberty and security of person”; protection against slavery and torture; guarantees of equality before the law and of due process; recognition of the right to private property; and the enumeration of other rights necessary to the preservation of liberty in a constitutional democracy, such as freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; freedom to take part in elections by universal and equal suffrage; and more.

Other rights in the UDHR — the right to freedom of movement and residence; the right to marry and found a family; and the right to privacy in one’s family, home, and correspondence — may not have direct analogues in the U.S. Bill of Rights but nevertheless resonate deeply with other sources of America’s law and political culture, including U.S. Supreme Court jurisprudence. The “social and economic rights indispensable for [a person’s] dignity and the free development of his personality,” in Articles 22-28 of the Universal Declaration, are similar to those in many 20th-century constitutions and statutes. While these rights — to work, education, and a certain standard of living — generally do not have constitutionally-protected status in the United States, they are almost all familiar goals of basic social legislation dating back to the New

Deal, and were explicitly recognized as such by the U.S. delegation to the United Nations as the Universal Declaration was being drafted.

B. READING THE UNIVERSAL DECLARATION

In short, even a quick, preliminary reading of the Universal Declaration of Human Rights reveals many parallels to the fundamental constitutional and political principles of the United States. Indeed, the UDHR belongs to the same modern tradition of freedom as does the Declaration of Independence, the U.S. Constitution, and the nation’s quest to honor its founding principles. A closer reading of the UDHR brings into focus the document’s overarching principles and structural dimensions and their connection to the U.S. founding and to U.S. foreign policy.

First, at a distance of over 70 years, it is easy to take for granted what an extraordinary and unprecedented event it was for 48 nations — across divides of culture, language, history, religion, ideology, political structure, and economic system — to agree on a common set of principles governing their basic relations with their own citizens. By elevating human dignity and freedom and basic claims of justice to matters of general international concern, the Universal Declaration gave voice to the conscience of global humanity for the first time in history. In the past, notions of state sovereignty and domestic jurisdiction effectively shielded states from international condemnation and intervention even in cases of very grave abuses. The Universal Declaration changed that. Taken as a whole, it proclaims the principle that the protection of fundamental human rights in any state is of importance to the community of nations because such rights are part of a universal common good. The question of the relationship of sovereignty to human rights remains a complex and delicate one. But after the Universal Declaration, no state may reasonably claim that the treatment of its own citizens in matters of human rights is solely a question of its own domestic affairs. Instead, international criticism and accountability for serious violations of human rights have become the default expectation of the community of nations.

Second, in order to attain agreement on principles that encompassed centuries of modern thought about individual freedom and human equality, the nature of

In all these ways, the idea of human dignity at the heart of the Universal Declaration converges with the idea of “unalienable rights” in the American political tradition.

responsibility, and the limits of sovereignty, the framers of the Universal Declaration deliberately chose to draw up a spare document. The UDHR’s 30 articles articulate a fairly small number of rights. It includes only those that were capable of attaining a near-universal consensus among the diverse nations represented at the UN. Moreover, most of those rights that did get included were expressed in open-ended terms in order to achieve consensus and garner widespread support.

Third, the Universal Declaration was written and understood as an integrated set of interlocking principles. Each principle was like an instrument that made an essential contribution to the harmony of the whole ensemble. The UDHR is not a mere list of severable, free-standing provisions, each understood in isolation and on its own terms. This means that it does violence to the Universal Declaration to wrench out of context any one of its rights at the expense of others, or to ignore one part of the document by focusing exclusively on another. Article 29 of the UDHR underscores that the exercise of the rights and freedoms it contains are subject to limitations “for the purpose of securing due recognition and respect for the rights and freedoms of others.” This points to the way that each right, lived in community and in relation to the “duties to the community” (also recognized in Article 29), is part of an interrelated set that must be approached in a balanced way. The document’s power and persuasiveness — its global resonance — depend on that holistic understanding of individual rights in community.

Fourth, the Universal Declaration affirms that human dignity, freedom, equality, and community are indissolubly linked. Its opening words state that “recognition of

the inherent dignity ... of all members of the human family is the foundation of freedom, justice, and peace in the world,” and it repeatedly invokes human dignity in other key articles. The many references to dignity shared equally by all are as close as the UDHR comes to offering a foundation for human rights. The document intentionally refrains from specifying the ultimate source of that dignity, but it does make clear that human dignity is *inherent*: it pertains to human beings solely because they are human beings. It cannot be granted by any authority. It is not created by political life or positive law but is prior to positive law and provides a moral standard for evaluating positive law. And no human life can be stripped of its dignity. Finally, the Universal Declaration’s integrated set of rights begins to flesh out the meaning and implications of human dignity by emphasizing the flourishing in community that liberty makes possible. In all these ways, the idea of human dignity at the heart of the Universal Declaration converges with the idea of “unalienable rights” in the American political tradition. It is no stretch to suggest that “unalienable rights” were the form in which the American founders gave expression to the idea of an inherent human dignity.

Fifth, it should be recognized that the Universal Declaration of Human Rights was intentionally crafted as a moral and political document, but not as a legal instrument creating formal law. It provides “a common standard of achievement” and invites a competition in excellence among nations. It aims to educate individuals about their rights and nations about their responsibilities. Much has been done in the decades since the approval of the UDHR to go beyond these aspirational and pedagogical goals by translating its principles into legally

It is important to stress that the UDHR's openness to legitimate pluralism does not mean that human rights are relative, that there are no truly universal principles of human rights, or that any claim of cultural specificity ought to be accepted as an excuse for violating human rights.

binding obligations, principally through treaties. But the UDHR as the cornerstone of the postwar human rights project also implies that the responsibility to protect human rights universally is a moral and political obligation before being a legal one. While there are good reasons in many instances to seek to “legalize” human rights in international law, the success of those efforts depends on the moral and political commitments that undergird the entire enterprise; without those commitments, the legal edifice is not likely to be accepted or effective. In fact, human rights in a nation’s foreign policy often gain more force from the clarity of the nation’s moral purpose and political commitment than from the formality of its legal obligations.

Finally, one aspect of the Universal Declaration’s overall structure that has been essential to attaining its global status as the cornerstone of the entire international human rights edifice is its capacity to accommodate a broadly diverse set of political, economic, cultural, religious, and legal traditions. As noted, the document as a whole is framed in general and open-ended terms, with a minimally foundational appeal to human dignity without any specification of the source of that dignity.

The UDHR assumes that the principles it sets forth can be concretely realized in different political systems. Many of its rights are articulated in ways that allow significant latitude in their interpretation and application. For instance, the right to “a fair and public hearing before an independent and impartial tribunal” leaves undefined the details of what specifically constitutes independence, impartiality, and even a tribunal. Moreover, the UDHR says almost nothing about how the various rights ought

to be reconciled and harmonized. Where should the line be drawn, for instance, between the right to “equal protection against any discrimination” in Article 7 and the right to freedom of association in Article 20? Article 29 provides for limitations on rights for purposes of “meeting the just requirements of morality, public order, and the general welfare in a democratic society,” but what might satisfy those “just requirements” may vary dramatically across social and political contexts. Furthermore, the language of Articles 22-26 says nothing about what kind of a political or economic system ought to be considered the most effective or appropriate to advance the social and economic rights articulated there. Just as the U.S. Declaration of Independence assumes that a variety of laws and governments can secure unalienable rights, so too does the Universal Declaration contemplate a legitimate pluralism of laws, political institutions, and economic systems through which human rights can be realized. In both cases, appreciation of diversity is bounded by respect for the individual and by recognition that political power is rooted in the people.

It is important to stress that the UDHR’s openness to legitimate pluralism does not mean that human rights are relative, that there are no truly universal principles of human rights, or that any claim of cultural specificity ought to be accepted as an excuse for violating human rights. Rather, it represents a recognition that even truly universal principles must be instantiated in specific and varying contexts, and that allowing room for such pluralism is both consistent with principles of freedom and dignity and the only realistic way to attain practical agreement on rights across cultures and nations. This interplay between universal principles of human rights

and the variety of human realities in which they must be honored is at the heart of the challenge of making human rights effective.

The idea of subsidiarity is implicit in the Universal Declaration, and it has been inherent in the system of international human rights law since its beginning. Subsidiarity, which has a kinship with the principle of federalism in the American constitutional tradition, affirms that, wherever possible, decisions ought to be made at the level closest to the persons affected by them — starting with their primary communities — and that larger, more general, and distant communities should intervene only to help the primary ones, but not to replace them. Subsidiarity thus helps to hold together both the universality of human rights and the pluralism necessary to their practical realization. It accords to states significant discretion in interpreting and implementing those universal principles of human rights. Subsidiarity also advances the idea that within states, human rights entail an open and pluralistic society, with a diversity of local communities and forms of voluntary association. That does not deny the primary responsibility of the state for the protection of human rights. Rather, subsidiarity helps to allocate the relative responsibilities for the realization of human rights, from the most local forms of community through states to international associations.

C. PERSISTENT QUESTIONS REGARDING THE UDHR

The six broad characteristics of the Universal Declaration of Human Rights outlined in the previous section give rise to a number of complex questions concerning the UDHR's implications for U.S. foreign policy.

1. NATIONAL SOVEREIGNTY AND HUMAN RIGHTS

The advent of human rights as an area of international attention in the 20th century was accompanied by alterations in the idea of the sovereignty of nation-states. Some believe that these changes compromise U.S. sovereignty, so much so that the United States should be reluctant to participate in international human rights regimes. Rightly understood, however, the conception

of rights and sovereignty embodied in the UDHR is consistent with the American constitutional tradition.

National sovereignty serves as a crucial condition for securing human rights because it is typically at the level of the national political community that human rights can be protected best. The realization of human rights requires nation-states with the independence, capacity, and authority that allow them to take responsibility for defending human rights. Through their laws and political decisions, nation-states are the main guarantors of human rights. State sovereignty, however, should not be an alibi for neglecting or abusing human rights. Rather, sovereignty underlines the dependence of human rights on political order. When a nation-state asserts sovereignty as an excuse for committing or failing to address rights violations, the problem is not with the idea of sovereignty but with the flawed exercise of it. The proper response is the reform of the political order, perhaps with the help and encouragement of other sovereign states acting on the basis of their own commitments to human rights. When a nation-state proves bent on systematically crushing human rights, the community of nations should consider the full range of diplomatic tools to deter such assaults on human dignity.

From the perspective of international law, tension between sovereignty and international human rights norms should be mediated by state consent. As a sovereign act, the United States has formally consented to be bound by certain norms of international human rights law. With few exceptions, it is only legally bound when that consent emerges from the constitutionally prescribed process. Accordingly, as a sovereign state in the international legal order, the United States is not compelled to ratify human rights treaties, but when it does so in the manner required by the Constitution, those treaties constitute formal legal obligations that give expression to — rather than contradict — the nation's sovereignty.

2. RELATION OF CIVIL AND POLITICAL RIGHTS TO ECONOMIC AND SOCIAL RIGHTS

The Universal Declaration's weaving of civil and political rights together with economic, social, and cultural rights into an integrated whole poses a certain challenge for the United States. Unlike the Universal Declaration and unlike the majority of constitutions of the world that have

been adopted since the early- to mid- 20th century, the U.S. Constitution does not generally recognize, let alone entrench, economic and social rights. Throughout the Cold War, the United States emphasized its commitment to civil and political rights almost exclusively, while rejecting the notion, championed by the Soviet Union, of the preeminence of economic and social rights. Since the end of the Cold War, a consistent aspect of U.S. human rights policy, across every presidential administration regardless of political party, has been U.S. reluctance to recognize economic and social rights as an integral part of the canon of international human rights — even though the U.S. delegation pledged “wholehearted” commitment to those rights when the Universal Declaration was adopted in 1948.

The U.S. Constitution’s preamble does ascribe to government the responsibility to “promote the general welfare,” but it was broadly understood in the founding era that the general welfare was best promoted by means of a limited federal government that energetically secured individual freedom and left much up to the states. Later, as industrialization spread and wage earners outnumbered independent farmers, artisans and shopkeepers, the federal government assumed greater responsibilities. At the turn of the 20th century, the United States engaged in legislative efforts to help ensure just and favorable conditions of work, and in the decades leading up to the approval of the Universal Declaration the United States undertook massive legislative and administrative initiatives to help guarantee to many millions of Americans an

adequate standard of living and social protection of the young, the unemployed, the sick, and the elderly. In 1948, those New Deal enactments served as one model for the related provisions of the UDHR.

Today, various social policies framed as rights in the UDHR are central to the responsibilities of government in the United States at all levels. For example, although education is not recognized as a right in the U.S. Constitution, the constitutions of nearly every state of the union incorporate the right to education and place significant responsibility in public authorities to ensure the effective exercise of that right. Other major social policies at both federal and state levels that mesh with the language of the UDHR include guarantees of equal pay for equal work, the social protection of children, the prior right of parents to choose their children’s education, and the inclusion of people with disabilities in public life and in the workplace.

Looking beyond our borders, it is notable that throughout the seven decades of the international human rights project, U.S. foreign policy has prioritized economic and social well-being throughout the world with its widespread development assistance as well as by means of major initiatives ranging from the Marshall Plan to the President’s Emergency Plan for AIDS Relief. In these ways, U.S. law and policy — both domestic and international — go to great lengths to realize those economic and social goals enumerated in the Universal Declaration.

How, then, should the principles of the UDHR pertaining to economic and social rights inform U.S. foreign policy? It must be recognized that along with civil and political rights, social, economic, and cultural rights, too, are an integral part of the Universal Declaration’s fabric. At the same time, it needs to be appreciated that the UDHR presents and promotes the two groups of rights in different ways.

A crucial difference is that Article 22, which introduces the entire section on economic and social rights, provides that they are dependent on the “organization and resources of each State,” while the UDHR imposes no such limitation on the civil and political rights that it outlines (a distinction later codified in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights). More



The U.S. provides more than \$9 billion in humanitarian aid per year

If human rights were to become only or even primarily instruments for legitimating state authority and intervention, they would betray their origin and become the playthings of every authoritarian government seeking to cloak its abuses in the language of human rights obligations.

generally, the differing linguistic construction of UDHR articles suggests that some civil and political rights are not subject to limitation, especially those negative rights that require the State to refrain from directly violating them: for example, “no one” shall be subjected to slavery, torture, or arbitrary arrest. But none of the economic and social rights — which usually imply affirmative State measures rather than government restraint from action — employ this formulation.

Certainly, civil and political rights also demand action on the part of the State. For instance, the guarantees of due process and fair trial require that the State create and maintain institutions for the administration of justice; the right to be free of cruel, inhuman, and degrading treatment entails public investment in a humane system of criminal punishment. But even more than these, the economic and social rights in the UDHR can be fully realized only in polities with adequate fiscal and material resources; they are even more dependent on a wide variety of economic models and forms of organization of the state; and they almost always involve difficult trade-offs in public expenditures of finite resources for social policies — investing more in health instead education or unemployment protection, for example. In addition, economic and social rights tend to be less suitable for the

exercise of judicial control, especially in constitutional systems like that of the United States, where principles of separation of powers and democratic legitimacy confer power on the political branches, not the judiciary, to make decisions about basic social policies. Finally, it is worth underscoring that ever since the adoption of the Universal Declaration, many authoritarian states — from the Soviet Union in the past to China, Cuba, and Venezuela today — have frequently invoked economic and social rights to justify broad and illegitimate violations of their peoples’ basic civil and political rights.

In sum, the principles of the Universal Declaration do demand that economic and social rights be taken seriously in formulating U.S. foreign policy. However, for many reasons — ranging from our own constitutional traditions to the language of the Universal Declaration itself to prudential concerns about the abuse of rights — it is reasonable for the United States to treat economic and social rights differently from civil and political rights. In emphasizing the civil and political rights while realizing economic and social rights through programs of economic assistance and development, the United States operates consistently with both its constitutional principles and the UDHR’s principles.

3. HUMAN RIGHTS AND STATES' OBLIGATIONS

The most important obligation of the United States government under the Constitution is to protect its citizens' unalienable rights, which it accomplishes by giving expression to those rights in the positive law of the land. As a result of changes in society and the economy in the 20th century, the U.S. government assumed additional obligations to provide for basic elements of social and economic well-being, as described in Part II.

This is compatible with the UDHR, which contemplates a range of rights that can only be realized through effective governmental action. This is true not only of the UDHR's economic and social rights, but also of many of its political and civil rights. Consider the right to democratic political participation: it cannot be effectively exercised without government action to create and maintain adequate electoral systems, to guarantee their integrity, to protect the access and freedom of citizens to cast their votes, and to prevent fraud. Accordingly, foreign policy and foreign aid must not only focus on restraining egregious abuses, but must also assist struggling nations in addressing the conditions that foster such evils as terrorism and the modern form of slave trade, human trafficking.

Hard limits must also be respected. The core concern about the proper reach of government, central to the U.S. constitutional tradition, must always inform policy. If human rights were to become only or even primarily instruments for legitimating state intervention, they would betray their origin and become the playthings of every authoritarian government seeking to cloak its abuses in the language of human rights obligations. We have recently seen disturbing examples of some states employing their public health responsibilities during the COVID-19 pandemic to justify excessive restrictions on freedom of the press and freedom of expression and the arbitrary detention of human rights advocates. The United States should maintain vigilance, upholding its own founding principles of limited government, and countering authoritarian models of governance whenever and however it is capable of doing so. But within those limits, U.S. foreign policy should also support the development of healthy, effective institutions of good governance in all states, for the common good of their people.

4. DEMOCRACY AND HUMAN RIGHTS

We have seen that the American tradition of unalienable rights emphasizes democratic self-government. Many fundamental rights — such as the right to vote, the right to freedom of speech, the right to freedom of assembly and association — are essential to the healthy functioning of democracy. And democratic self-government, in turn, is more likely than other regimes to foster a common political life that respects citizens' rights. By fostering a culture of human rights, it can help to transform basic rights into practical realities. The processes of democratic politics play a critical role in ordering the rights at the heart of political culture, the reasonable reconciliation of rights claims, and the best allocation of limited resources in the realization of the many rights democracies seek to respect. It is through democratic deliberation, persuasion, and decision-making that new claims of right come to be recognized and socially legitimated. This link between democracy and unalienable rights can be seen in the United States' emphasis on self-government in its declared war aims during the Second World War and its support for the “third wave” of democratization after the fall of the Soviet empire.

The same link is evident in the Universal Declaration of Human Rights. The UDHR features the classic civil and political rights necessary to the integrity and freedom of democratic processes and protects those civic associations essential to a free and self-governing society. It also explicitly places the right to political participation in the context of a general recognition that “the will of the people shall be the basis of the authority of government,” and it prescribes “periodic and genuine elections which shall be by universal and equal suffrage and ... free voting procedures.” Together with the UDHR's structural accommodation of pluralism and subsidiarity, this suggests that democratic self-government is essential to securing the UDHR's basic principles.

This convergence of the UDHR and the core of the American constitutional and political tradition has implications for U.S. foreign policy. It invites a commitment to the promotion of democratic processes and free institutions as central to the U.S. human rights agenda. This commitment can be seen in the State Department's Bureau of Democracy, Human Rights, and Labor, and in the strong U.S. support for initiatives such as the Inter-American Democratic Charter. At the

“It’s a sad commentary on our times that more than 70 years after the Universal Declaration of Human Rights, gross violations continue throughout the world, sometimes even in the name of human rights. International institutions designed and built to protect human rights have drifted from their original mission. As human rights claims have proliferated, some claims have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect. Nation-states and international institutions remain confused about their respective responsibilities concerning human rights. With that as background and with all of this in mind, the time is right for an informed review of the role of human rights in American foreign policy.”

Secretary of State Michael R. Pompeo, July 8, 2019

same time, respect for freedom and democracy obliges the United States to accord considerable deference to the decisions of democratic majorities in other countries and to acknowledge that self-governance may lead other nations to set their own distinctive priorities and basic public policies. The U.S. promotion of rights should always respect ordinary democratic politics and the legitimate exercise of national sovereignty, and should be reluctant to push rights claims that seek to bypass democratic institutions and processes. Otherwise, the United States risks the cultural imperialism involved in imposing its particular policy preferences and institutional arrangements on nations with very different traditions.

5. HIERARCHY OF HUMAN RIGHTS

Much controversy swirls around the question of whether some rights in the canon of the Universal Declaration are more important than others, and whether some should be accorded a higher priority. As discussed, the human rights in the Universal Declaration have an integrated character and are not meant to be severed from or pitted against one another, as all reflect in some degree the requirements of human dignity. For this reason, it defies the intent and structure of the UDHR to pick and choose among its rights according to preferences and ideological

presuppositions while ignoring other fundamental rights. Tensions among rights can never be an excuse for failing to abide by human rights commitments assumed under international law.

The principle of the interdependence of basic human rights, implicit in the UDHR, was made explicit in 1993 when, in the aftermath of the Cold War, the United Nations convened the Vienna Conference on Human Rights to call for renewed attention to human rights. At the close of the Conference, 171 countries including the United States affirmed the Vienna Declaration and Programme of Action, which states that “all human rights are universal, indivisible and interdependent and interrelated.”

It is no departure from that affirmation to recognize that certain distinctions among rights are inherent in the Universal Declaration itself, as well as in the positive law of human rights developed in light of the UDHR. International law accepts that some human rights are absolute or nearly so, admitting of few or no exceptions, even in times of national emergency, while others are subject to many reasonable limitations or are contingent on available resources and on regulatory arrangements. Some norms, like the prohibition on genocide, are so universal that they are recognized as norms of *jus cogens*

There is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the most disadvantaged more vulnerable. More rights do not always yield more justice.

— that is, principles of international law that no state can legitimately set aside — while other norms are open to sovereigns to accept or not. The application of certain human rights demands a high degree of uniformity of practice among nations, as in the prohibition of torture, but others allow of considerable variation in state practices, as in the protection of privacy. The work of the State Department’s Bureau of Democracy, Human Rights, and Labor reflects such considerations.

In practice, decisions about the priority of rights are not only inescapable but desirable. To begin with, in many circumstances certain rights have a necessary logical precedence. Many claims of right, moreover, are in tension even as appropriate accommodation among them must be found. For instance, the high value the United States has accorded to freedom of speech has led Washington to take exception to international norms mandating the prohibition of hate speech. Such differences of judgment about the relative weight to assign to rights are unavoidable and appropriate. Similarly, the U.S. president and Congress have constitutional obligations to make complex political judgments about the most pressing and critical human rights issues of the moment, and to establish diplomatic and political priorities accordingly. Every organization concerned with human rights — governmental, nongovernmental, and intergovernmental — necessarily does the same. Often those priorities reflect a particular history and commitment, such as the U.S. Congress’s enactment of statutory mandates for offices dedicated to the protection of particular rights, like religious freedom and freedom from slavery (human trafficking), which are legacies of the distinctive historical

experience of the United States and reflect the American people’s considered judgments and enduring interests.

In sum, while the Universal Declaration does not explicitly establish a hierarchy of rights and while it is important in principle to affirm the interdependence of all rights that pertain to human dignity, U.S. foreign policy can and should, consistent with the UDHR, determine which rights most accord with national principles, priorities, and interests at any given time. Such judgments must take into consideration both the distinctive American contributions to the human rights project and also prudential judgments about current conditions, threats, and opportunities.

6. THE EMERGENCE OF NEW RIGHTS

Like the American founders, who understood that in naming “life, liberty, and the pursuit of happiness,” the Declaration of Independence set forth “certain unalienable rights” and not an exhaustive catalog, so too the framers of the Universal Declaration of Human Rights recognized that the list identified in 1948 could not purport to be complete. They knew that the idea of human rights, pointing toward the transcendent dignity of the human person, is capable of encompassing new understandings of what freedom and equality require. And just as the American people grew over time in their understanding and acceptance of the implications of their own founding principles, so too would the people embracing the Universal Declaration grow in their understanding and acceptance of the implications of that document’s principles. It is therefore reasonable to

expect a certain expansion and refinement of the list of recognized human rights even as the essentials of freedom, equality, and human dignity remain constant.

It must be kept in mind, however, that it was largely due to the limits of its reach that the UDHR succeeded in launching the human rights project on a global scale. The UDHR was deliberately limited to a small set of rights on which there was perceived to be a near-universal consensus. The framers also knew that keeping the list more tightly circumscribed would accord higher political importance to each of the rights and would reduce the conflicts among rights claims, conflicts that could dilute the realization of any particular right and of rights in general. These concerns are highly relevant 70 years later, when the number of human rights instruments has multiplied dramatically. Taking into account the many different UN agencies, regional human rights systems, as well as specialized organizations like the International Labor Organization and UNESCO, there are now dozens of treaties, hundreds of resolutions and declarations, and thousands of provisions codifying individual human rights beyond those contained in the nine best-known UN human rights treaties. There is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the most disadvantaged more vulnerable. More rights do not always yield more justice. Transforming every worthy political preference into a claim of human rights inevitably dilutes the authority of human rights.

Accordingly, the United States should be open but cautious in its willingness to endorse new claims of human rights. This will necessarily raise difficult questions about whether some specific rights claim is legitimately within the scope of the UDHR's principles and commitments.

One way to approach this problem is by reference to the UDHR's core concept of human dignity. Indeed, many arguments for the recognition of new rights and novel interpretations, extensions, and applications of existing rights make their case by appealing to this fundamental notion. Public debate over whether a particular claim of right is an expression of the moral demands flowing from recognition of the equal and inherent dignity of all human beings is crucial and can help policymakers to discern when a new claim of right ought to be embraced and when it ought to be rejected. However, a direct appeal to human dignity by itself is inadequate to the task of distinguishing

between legitimate and unfounded claims of right. Dignity itself is a deeply contested idea, the content of which varies dramatically not only across cultures but even within our modern pluralistic societies. On some of the most deeply divisive contemporary moral issues — for instance, the legalization of voluntary euthanasia — dignity-based arguments feature prominently on both sides of the debate.

To assess whether and when a new claim of human right warrants support in U.S. foreign policy, other criteria are needed. The Commission believes that these considerations are pertinent:

- ✦ How closely rooted is the claim in the explicit language of Universal Declaration of Human Rights as it was written and understood by the framers of that document and by the United States when approving it in 1948, as well as in the language of other international human rights instruments that the United States has approved or ratified? The carefully negotiated language of these documents matters. If agreed-upon formulations and understandings are cast aside or stretched beyond recognition, the language of human rights becomes endlessly malleable and untethered from principle.
- ✦ Is the new claim consistent with the United States' constitutional principles and moral, political, and legal traditions? Is it widely recognized and accepted by the American people, through their democratically elected political representatives? This is not to say that the particular perspectives of the United States ought to dictate the direction of international human rights generally. But a U.S. foreign policy that does not take into account the support of the American people for a new rights claim risks losing domestic legitimacy.
- ✦ Have the United States and other like-minded democracies formally given their sovereign consent to the development in question through the established political mechanisms for creating international law (in particular through the adoption of clear and explicit treaty provisions)? As discussed earlier, the role of sovereign consent in international law links the idea of democratic self-government with participation in universal principles

embraced by the international community. New claims of rights that circumvent domestic constitutional processes and democratic politics — for instance, standards emanating from international commissions and committees, individual experts, and advocacy groups — may be useful sources of reflection about the appropriate scope of human rights, but they lack the formal authority of law.

- ✦ Does the new claim represent a clear consensus across a broad plurality of different traditions and cultures in the human family, as the Universal Declaration did, and not merely a narrower partisan or ideological interest? Caution is particularly warranted in two circumstances. Sometimes broad new rights have been championed by undemocratic and repressive regimes to undermine the unity and effectiveness of recognized universal rights. On other occasions, activists determined to bypass ordinary politics and domestic democratic processes employ the language and structures of international human rights to advance agendas that are not widely shared in the community of nations, and sometimes not even within activists' own nation.
- ✦ Can the new right be integrated consistently into the existing body of human rights? The consideration of new rights claims must always take into account potential conflicts and the need to reconcile rights claims, giving each claim its due. Ignoring the existing framework of human rights that has been carefully crafted through compromise and broad consensus to advance a new and previously unrecognized claim is a perilous step that threatens to unravel the entire enterprise.

These are not exhaustive criteria, nor is any one definitive. Assessing the legitimacy of a new claim of right, especially in changing circumstances, is not susceptible to a mechanical formula but requires reason, experience, deliberation, and prudent judgment.

7. HUMAN RIGHTS AND POSITIVE LAW AFTER THE UDHR

Some authorities argue that the development of the positive international law of human rights through binding legal instruments is by itself sufficient to

answer any uncertainties about the meaning, scope, and development of human rights. Indeed, the collective effort since 1948 to translate the UDHR's principles of human rights into binding legal commitments through a network of treaties has achieved tangible results. The development of the treaty law of human rights can reflect a broadening consensus among the community of nations about human rights. Girding the aspirational and pedagogical aims of the Universal Declaration with hard legal requirements, often monitored and promoted by supervisory institutions, enhances the protection of human rights.

At the same time, both states and scholars have questioned whether the multiplication of human rights in treaties is an unalloyed good. The surfeit of new treaty obligations in human rights does not seem to have increased the effectiveness of human rights law nor stemmed the pervasive violations of very basic human rights around the world, even in many countries that have ratified all of the major treaties. Adding ever more treaty law but failing to make existing human rights obligations effective threatens to undermine respect for the international human rights system.

It is also important to recognize that the positive law of human rights, however extensive it has become, has not eliminated disputes over the nature and scope of human rights. On the contrary, as new treaty law and the work of international institutions have expanded the reach of human rights, they have also given rise to many new controversies. This is inevitable. Even as further specified in treaties, the principles of international human rights law remain, as they must, incomplete and underdetermined, and so constantly subject to critique and revision. This is all the truer since the positive international law of human rights, in contrast to the constitution of a nation-state, does not provide a comprehensive legal framework and is not itself an authoritative and final arbiter of legal disputes.

In addition, it is crucial to appreciate that the established law of human rights cannot answer the important questions that by definition spill over the boundaries of existing positive law. The very notion of a human right is that of a right inherent in human beings and not dependent for its existence on the enactment of any state or international institution. Positive law can establish and clarify a state's enforceable obligation to individuals and to other states. But positive law — whether that of a

nation-state or of the international legal order — does not *create* a human right, nor can its silence or conduct nullify a human right. The fact that positive law has recognized something as a human right, moreover, does not place that law beyond reproach, reconsideration, and revision. While human rights are the standard against which we judge the justice of positive laws, no nation-state or international institution has a monopoly or final word on what human rights require. In short, inasmuch as human rights provide core principles by which to judge the justice or injustice of positive laws, no positive law — whether national or international — can be considered the ultimate arbiter of human rights.

The positive international law of human rights also cannot determine whether the United States should make binding positive law for the country by ratifying a particular human rights treaty. The mere existence of a treaty is not a sufficient condition to require that it be accepted as a positive international legal obligation. Arguments must appeal to principles and interests beyond the existing state of the international law itself — and in the United States and other liberal democracies, they must persuade a majority of citizens, acting through their elected representatives. Similarly, any positive law must be subject to critique and revision in light of the public interest and justice, and be responsive to changing needs and circumstances. This is no less true of international human rights law. But again, this cannot be done solely from within the boundaries of the positive law. It would be a sad irony if the idea of human rights — which reflects the conviction that the positive laws of nations must be accountable to higher principles of justice — were reduced to whatever current treaties and institutions happen to say about it.

The development of a positive law of human rights is welcome. But the positive law must be informed by thoughtfulness and due deliberation. Diplomats and lawyers must eschew the naïve notion that positive law is infallibly capable of settling all serious questions of the international human rights project and resolving the endlessly daunting challenges of foreign affairs.

This balanced approach has roots in America’s founding principles. It is consistent with the principles undergirding the Universal Declaration of Human Rights, which is itself not a statement of positive law but a nonbinding instrument oriented toward setting a standard for nations

to achieve through politics and education, as well as law. And it reflects the consistent orientation of the U.S. State Department to international human rights law and institutions for at least the past half century, under both Democratic and Republican administrations.

8. HUMAN RIGHTS BEYOND POSITIVE LAW

Since 1948, human rights treaties have constituted the most important and most formal of means for developing the norms of international human rights. Yet much of day-to-day human rights discourse in international politics and diplomacy does not consist of appeals to formally binding legal norms in ratified treaties, but to a variety of non-binding resolutions, declarations, standards, commitments, guiding principles, etc. These are sometimes misleadingly named “soft law,” but properly speaking, they are not law at all. Guided by the principles of the Universal Declaration of Human Rights, we should nevertheless appreciate the functional value of such instruments, for the Universal Declaration itself is a non-binding instrument that has had a transformative effect on international policy and practice. In fact, some of the most significant human rights landmarks and achievements have had a primarily extra-legal and diplomatic-political character, such as the Helsinki Accords and the Inter-American Democratic Charter.

At the same time, the widespread proliferation of non-legal standards — drawn up by commissions and committees, bodies of independent experts, NGOs, special rapporteurs, etc., with scant democratic oversight — gives rise to serious concerns. These sorts of claims frequently privilege the participation of self-appointed elites, lack widespread democratic support, and fail to benefit from the give-and-take of negotiated provisions among the nation-states that would be subject to them. The U.S. State Department has historically taken a firm stance that binding norms can only be made through the formal and recognized processes of public international law that pass through state representation and consent, and that so-called soft-law therefore does not and cannot result in obligatory international norms. That stance is prudent and fully consistent with the American constitutional tradition, including the principles of the Universal Declaration that the nation embraced in 1948.



IV. HUMAN RIGHTS IN U.S. FOREIGN POLICY

A. FOREIGN POLICY AND FREEDOM

Born on the western shores of the Atlantic, an ocean apart from the powers of Europe, the United States was a marginal actor in world politics for longer than its first century of existence. With the Allies' victory in World War II, however, the United States emerged as a superpower. In the postwar era, the United States took the lead in forging a new international order. That international order — under which we live today — was bound up

with the idea, affirmed in the American Declaration of Independence and elaborated in the Universal Declaration of Human Rights, that the governments of nation-states are obliged to respect certain rights inherent in all human beings. Although a concern with freedom was a central feature of America's thinking about itself and the world from the beginning, it was only in the post-World War II era that promotion of human rights came to occupy a prominent place in American foreign policy, and, under U.S. leadership, in world affairs.

A new chapter in the history of freedom was unfolding in those years, both at home and abroad. The two world wars, with their vast destruction of much that was familiar, had intensified awareness that the way things had been



"Mr. Gorbachev, tear down this wall!" President Ronald Reagan, 1987

is not the way they always have to be. In a world where more than 750 million people were still living under colonial rule and millions more belonged to disadvantaged minorities in the United States, Latin America, and the Soviet Union, men and women were longing not only for peace but for better and freer lives. What American poet Phyllis Wheatley, a former slave, had written in the midst of America's war for independence, seemed evident: "In every human breast, God has implanted a Principle, which we call Love of Freedom; it is impatient of Oppression, and pants for Deliverance."

The path for a foreign policy that emphasized freedom and dignity had been laid by Woodrow Wilson's "Fourteen Points" statement on war aims and peace principles at the

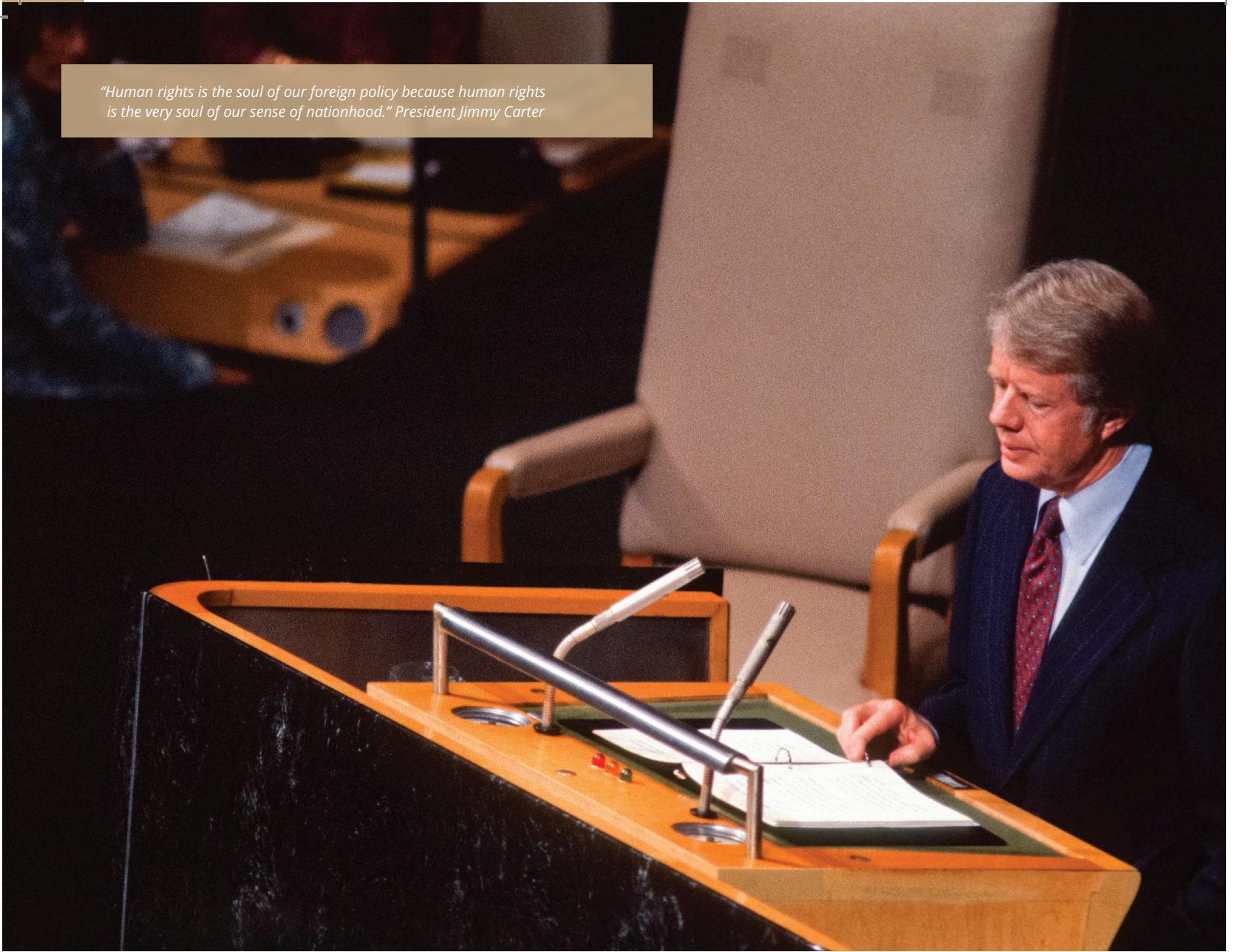
close of World War I, Franklin Delano Roosevelt's World War II rhetoric, and the Atlantic Charter. Subsequent presidents, while maintaining a healthy appreciation of the role of power in international affairs, repeatedly referred to the principles of freedom in the elaboration of American foreign policy. Among the most memorable examples are the Truman Doctrine; John F. Kennedy's 1963 speech in West Berlin; Jimmy Carter's 1978 Speech on the 30th anniversary of the UDHR; Ronald Reagan's 1982 Westminster address and his 1987 speech at the Berlin Wall.

To be sure, the United States stepped into the role of a defender of human rights burdened with a history of grave departures from the principles of freedom and equality both at home and abroad. For as long as nations have been interacting with other nations, foreign affairs have been characterized by calculations of interest and power, relations of convenience, tragic compromises, reckless adventures, and spectacular errors of judgment. And America is no exception. In the 19th century, under the flag of Manifest Destiny, the United States cruelly expelled Native Americans from their ancestral lands with tremendous cost in human life and compelled them to enter into treaties that it failed to honor. The United States has sided at times with dictators and undermined expressions of democratic will. And the United States has undertaken military actions that, many have concluded, were ill-conceived and damaging to the cause of freedom.

Nevertheless, the world's oldest democracy became the world's foremost champion of freedom in the 20th century, providing hope and encouragement to countless men and women living under brutal dictatorships. America played a pivotal role in defeating the era's two greatest enemies of the rights inherent in all human beings, National Socialism and Soviet communism.

Following World War II, the United States took the lead in constructing an international order that reflected the commitments to freedom at the core of American constitutional government. With Europe's infrastructure in ruins, Congress adopted the Marshall Plan in 1948, a massive program of economic aid aimed at restoring "conditions abroad in which free institutions can survive." Explaining the need for such a program in his 1947 commencement speech at Harvard University, Secretary of State George Marshall said it was only "logical that the

"Human rights is the soul of our foreign policy because human rights is the very soul of our sense of nationhood." President Jimmy Carter



United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace." To this day, the United States maintains a strong role in economic development and, through public and private aid, is the world's largest donor of humanitarian assistance for the relief of poverty, hunger and disease.

In the 1970s, Congress made human rights a priority in U.S. foreign policy with the wholehearted support of President Jimmy Carter. In his speech commemorating the UDHR's 30th anniversary, Carter said,

[H]uman rights are not peripheral to the foreign policy of the United States. Our human rights policy is not a decoration. It is not something we have adopted to polish up our image abroad or to put a fresh coat of moral paint on the discredited policies of the past.... Human rights is the soul of our

foreign policy because human rights is the very soul of our sense of nationhood.

The 1974 Jackson-Vanik amendment, conditioning trade with Soviet bloc countries on their respect for their citizens' right to emigrate, was hailed as a major advance not only by Soviet dissidents but also by the burgeoning grassroots human rights organizations of that era. It paved the way for later uses of trade sanctions to promote human rights.

Increased emphasis on human rights continued in the Reagan administration. Natan Sharansky wrote movingly of how the Russian translation of Ronald Reagan's 1983 "evil empire" speech came to him and other jailed Soviet dissidents as a ray of hope in the darkness of their six-foot cells. "[T]he clear moral position of the West," he said, meant that there could "be no more illusions about the nature of the Soviet Union...." The prisoners, using the secret means they had to communicate, "knocked from one cell to another by Morse [code]"; they "talk[ed]

through toilets to say to one another the great day” had arrived.

In today’s world, tens of millions of persecuted men and women still count on the United States for encouragement and hope. That is why, in this moment of crisis for the human rights idea, America must pursue that cause with renewed vigor, with pride in what has been accomplished, with humility born of the awareness of her own “shortcomings and imperfections” and of the complexities of world politics, and with the heavy knowledge that the future of freedom is bound up in no small way with the vitality of her commitment to her own constitutional tradition, rooted in unalienable rights.

B. CONSTITUTIONAL STRUCTURE, STATUTORY CONTEXT, AND TREATY OBLIGATIONS

The structure of American government, the treaties that the United States has signed (and declined to sign), and legislative enactments all shape U.S. foreign policy on human rights.

Article Two of the Constitution vests the president with authority to conduct foreign policy through the power to make treaties subject to ratification by the Senate, to appoint and receive ambassadors, and to lead the nation’s armed forces. The Secretary of State serves as the president’s primary diplomat and advisor on foreign policy. Within the State Department, the Bureau of Democracy, Human Rights, and Labor (DRL) has responsibility for developing and implementing human rights policy. DRL undertakes numerous initiatives and programs that support human rights around the world including producing detailed reports on how well nations protect human rights. In addition, the Department’s offices of International Religious Freedom and Trafficking in Persons concentrate on human rights as does a separate and independent entity, the United States Commission on International Religious Freedom. At the same time, all bureaus and offices in the Department have a responsibility to ensure that American diplomacy is conducted in accordance with the nation’s human rights obligations.

The State Department is not alone in the executive branch in carrying out foreign policy. The Department of Defense exercises significant influence on our relations with other states, for example, through decisions on deployment of forces around the world and through critical choices about partners in theaters of combat. In addition, the Department of the Treasury, the Department of Commerce, the United States Trade Representative, the Department of Justice, the U.S. Agency for International Development and the White House’s National Security Council all engage in activities essential to U.S. diplomacy.

Beyond the executive branch, Congress has played an increasingly large role in the determination of foreign policy, including in the area of rights. In the early 1970s, as part of the national soul-searching that followed from U.S. policies in Indochina and elsewhere, Congress launched an unprecedented study of the relationship between human rights and American foreign policy.

Congressman Donald Fraser, chair of the Subcommittee on International Organizations and Movements, convened landmark hearings which culminated in March 1974 with the release of a seminal report entitled “Human Rights in the World Community — A Call for U.S. Leadership.” The report criticized the existing approach in American foreign policy and made the case for elevating human rights:

The human rights policy is not accorded the high priority it deserves in our country’s foreign policy. Too often it becomes invisible on the vast foreign policy horizon of political, economic and military affairs...We have disregarded human rights for the sake of our assumed interests...Human rights should not be the only or even always the major factor in foreign policy decision-making. But a higher priority is urgently needed, if future American leadership in the world is to mean what it has traditionally meant — encouragement to men and women everywhere who cherish individual freedom.

By combining a recognition that advocacy of human rights abroad is one among many goals of a responsible U.S. foreign policy with a determination to give greater weight to human rights, the report set the tone for the vital debate about the balance the nation must strike between the harsh realities of world affairs and the demands of justice.

A cautious approach to international human rights instruments has been consistently maintained by the elected representatives of the American people as well as by the State Department's experienced diplomatic and legal professionals.

In following years, Congress enacted a series of bills culminating in 1976 in Section 502B of the Foreign Assistance Act, which established that it would be “a principal goal of the foreign policy of the United States to promote the increased observance of internationally recognized human rights by all countries.” This had the effect of making human rights considerations, as a matter of law, part of the foreign policy decision-making process. Presidential encouragement from Democrat Jimmy Carter and Republican Ronald Reagan fostered bipartisan legislative cooperation.

In subsequent decades and with further bipartisan cooperation, Congress passed and presidents signed over 100 human-rights-related laws. Specific legislative enactments — such as the Jackson-Vanik Amendment; its successor, the Global Magnitsky Act, authorizing the U.S. government to freeze the assets of certain human rights offenders and ban them from entering the United States; the Comprehensive Anti-Apartheid Act of 1986, imposing sanctions against South Africa; the International Religious Freedom Act; the Trafficking Victims Protection Act; and others — have provided the Department of State and other departments with additional tools and have had a measurable impact in combatting human rights outrages in various parts of the world. The House and Senate continue to play a prominent role in promoting human rights, most recently with the adoption of the Hong Kong Human Rights and Democracy Act in late 2019 and the Uighur Human Rights Policy Act of 2020.

Notwithstanding positive trends and genuine accomplishments, American human rights policies

have been subject to criticisms from across the political spectrum. Some say human rights considerations are too readily sidelined when they appear to conflict with security or commerce. Others believe that the United States advocates for human rights at the expense of security and commerce. Some allege that the United States excuses the misdeeds of friends and allies. Others claim that the United States is harsher toward the shortcomings of fellow democracies than toward the brutalities of undemocratic friends, rivals, and adversaries. Some doubt the United States' commitment to human rights because of our reluctance to participate fully in the international legal framework for human rights, including our failure to ratify certain instruments (such as the International Covenant on Economic, Social and Cultural Rights), our refusal to participate in the Treaty of Rome/International Criminal Court, and our withdrawal from the United Nations Human Rights Council. Others assert that because international human rights organizations are dominated by a cadre of professional bureaucrats with a political agenda, the United States should undertake an extensive decoupling. Some, pointing to the controversy over immigration and U.S. management of its southern border, say the United States should get its own house in order before lecturing others and imposing sanctions. Others observe that the persistent flow of people seeking a better life in the United States testifies to the success of the American experiment in freedom. Some want the United States to do more, particularly by addressing the problems that afflict many developing countries—lack of potable water, malaria and other diseases, inadequate sanitation, and unequal opportunities for women and girls. Others want the United States to reduce the importance of

The question of whether to consent to binding international legal obligations is separate from the question of whether in general a moral imperative or political principle is within the scope of the law of human rights. Not every moral imperative and political priority need be translated into juridical form to demonstrate U.S. seriousness of purpose regarding human rights.

human rights in foreign policy to save the nation's limited material resources and diplomatic capital.

These many, varied, and conflicting criticisms underscore how extraordinarily difficult it is to get a human rights policy "right." At the same time, the vitality of our debates about human rights reflects the centrality of rights to the American constitutional tradition. These debates, often intense and high-stakes, are also reminders of the complexities faced by policymakers who, even under the best of circumstances, must often choose between imperfect courses of action on the basis of imperfect knowledge. These difficulties must inform the nation's powerful legal and moral commitment to the promotion of human rights as a principal goal of its foreign policy.

A few remarks are in order concerning the cautious approach the United States has taken with regard to the ratification of some human rights instruments and its participation in certain international institutions.

In contrast to many other countries, including close allies, the United States has always been highly selective in its acceptance of international obligations and supervision over human rights. It has signed and ratified only a few of the major human rights treaties (most notably, the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture). A few others, such as the International Covenant on Economic, Social and Cultural Rights, have been signed by the president but not ratified by the Senate. There has been little political interest, in either major party, to ratify additional human rights treaties. For those few

human rights treaties it has ratified, the United States has consistently incorporated a number of reservations, declarations, and understandings that are carefully designed to ensure compatibility between the treaty obligations the nation assumes and the requirements of the U.S. Constitution. The United States has been unwilling to accept any optional provisions within those treaties (such as the Optional Protocol to the ICCPR) that grant authority to the treaty bodies to receive and consider individual complaints alleging that the United States has violated its treaty obligations. The United States is not a party to any treaty that gives an international human rights tribunal the authority to render binding legal judgments against it.

Originally, the United States' reluctance to bind itself to new international obligations was also connected to considerations of expediency, but its deepest roots are matters of principle. In the post-World War II years, some of the U.S. resistance to the applicability of international human rights law came from the long legacy of racial injustice in the United States. The U.S. engagement with the early United Nations and its active role in promoting the UDHR met with strong resistance from those who feared, with reason, that international human rights law would add to pressures against the legal segregation and unequal access to political participation that persisted in the United States.

It would be a mistake, however, to overlook the ways in which the United States properly calibrates its obligations under international human rights law today. The primary source of American reservations about international human rights law is the country's

constitutional tradition and its emphasis on limited government and the consent of the governed. By binding itself to international agreements and submitting to the authority of international institutions, the United States can put at risk the sovereignty of its people and the nation's responsibility to determine what courses of action best secure rights at home and ensure a free and open international order. A cautious approach to international human rights instruments has been consistently maintained by the elected representatives of the American people as well as by the State Department's experienced diplomatic and legal professionals.

The question of whether to consent to binding international legal obligations is separate from the question of whether in general a moral imperative or political principle is within the scope of the law of human rights. Not every moral imperative and political priority need be translated into juridical form to demonstrate U.S. seriousness of purpose regarding human rights. In fact, the United States' selective ratification and strict construction of treaties signifies the firmness of the U.S. commitment to the rule of law: the United States only accepts formally those principles to which it is prepared to adhere in practice and to be held accountable for by other nations in international law. The converse — indiscriminate treaty ratification with little care or intention to harmonize those international obligations with domestic law and practice (as is the case with some countries) — would be far more damaging to the strength and legitimacy of international human rights law. Similarly, the U.S. insistence on strict construction of human rights treaty provisions, rooted in the actual negotiated language of the treaties it has ratified, safeguards the integrity of sovereign consent. The U.S. reservations likewise ensure respect for the democratic legitimacy of law in the United States by preventing international norms and institutions from bypassing ordinary, constitutionally authorized, democratic politics and the established lawmaking process.

The United States' restrictive posture concerning the supervisory role of international human rights institutions also warrants reflection. As with treaty ratification, considerations such as the protection of U.S. sovereignty, the rule of law, and democratic accountability give good reason to be cautious in subjecting national political decisions to an international body. International human rights institutions can certainly play constructive roles in monitoring, supervising, and promoting human

rights obligations. They can be key actors in fostering compliance with international norms. It is for these reasons that the United States has often supported such institutions, both diplomatically and financially.

At the same time, these institutions are rife with serious flaws: they are frequently subject to interest-group capture; they are not broadly representative of the societies that are putatively governed by the norms they apply; and they lack democratic legitimacy inasmuch as they vest enormous discretion in the professional elites who staff their permanent bureaucracies. Moreover, the quality of their work is hugely variable, and even the more serious institutions are often ineffective in accomplishing their basic purposes.

Under these circumstances, maintaining a position of selective constructive engagement with international human rights institutions is reasonable. Out of respect for human rights, the United States cooperates with and supports such institutions when they serve the larger purposes of advancing human rights, while holding them to their authorized boundaries and powers. International human rights institutions (with a few exceptions, none of which apply to the United States) do not have formal interpretive authority over the treaties that create them. Moreover, not every interpretation or extension of rights or application of the treaty language that may have been declared by a human rights body is necessarily authoritative or correct. Indeed, examples abound of treaty bodies making extravagant interpretations of the rights in their charters that go far beyond the treaties' negotiated language. It is important — not least to uphold the good name of human rights — for the United States to continue to rigorously demand that international human rights institutions remain within the scope of responsibility accorded to them by the treaties under which they have been created.

These general observations regarding the proper reach of human rights law and institutions, and some principles to guide U.S. policy in this area, are limited by the remit of this Commission. Specific recommendations regarding whether the United States should ratify any additional human rights treaties or accept the mandates of other international human rights institutions are properly accorded to the elected representatives of our country and the departments, bureaus, agencies, and offices to which they have delegated that responsibility.

C. NEW CHALLENGES

As long as nations have been formulating foreign policy, managing alliances, and confronting adversaries, they have been seeking to reconcile the necessities of security and commerce with the claims of what is right and just. Few nations have devoted as much energy and as many resources as has the United States to thinking through and implementing policies that promote human rights abroad. Today, those efforts are complicated by a host of new challenges.

The Decline of Human Rights Culture. In the wake of the horrors of the Second World War, the UDHR gave expression to a widespread recognition of the importance of respecting human dignity by promoting universal human rights. The project gained increasing support due to its role in the fall of apartheid in South Africa and the dramatic collapse of communism in Eastern Europe. In recent years, however, enthusiasm for promoting human rights has waned. Even prominent members of the human rights community expressed disheartenment on the 70th anniversary of the UDHR in 2018.

Multiple factors are at work, as we have discussed. We rank the waning of concern for basic human rights as first among the challenges listed here because while enthusiasm for promoting human freedom and dignity may decline, the human suffering caused by their denial does not.

The Failings of International Organizations. In 2018, after extensive efforts to work from within to reform the United Nations Human Rights Council, the United States withdrew from it. The UNHRC shows many of the same flaws that had come to mark its predecessor, the United Nations Human Rights Commission. Charged with addressing human rights violations globally, the Council gave greatly disproportionate attention to Israel while ignoring egregious human rights abuses in many other parts of the world. These outcomes are in part a function of programmatic bias in the UNHRC, and in the United Nations more broadly. The U.S. withdrawal from the UNHRC does not reflect a rejection of human rights and fundamental freedoms, but rather a determination to find better means of effectively securing them.

The defects of the HRC are an inescapable consequence of its structural composition, which reflects a broader problem with the UN. Given the mandate to include

members from all regions of the world, it is inevitable that nations that are themselves flagrant human rights abusers — such as China, Cuba, Libya, Russia, Saudi Arabia, and Venezuela — participate in, and even dominate, the Council. An organization with responsibility to monitor human rights abuses that is led by regimes that routinely commit such abuses cannot succeed and, indeed, is bound to discredit the cause of human rights.

One of the major dilemmas facing friends of human rights involves decisions about when to persist in reforming, or at least mitigating the damage done by flawed institutions, and when to pursue alternatives.

The Autocracy Challenge. The United Nations is home to many egregious human rights abusers, and, as we have noted, a large portion of the globe now lives in countries with scant human rights protection. Among these countries, the most influential are Russia and China.

The hope in some quarters after the collapse of the Soviet Union was that Russia would develop into a liberal and democratic country with respect for human rights. But those who clung to that hope have been sorely disappointed. Regime critics are subject to repression and assassination, press freedom is severely limited, and the independent judiciary necessary to protect rights does not exist. Similarly, the prospect that China, if welcomed as a responsible stakeholder in the international order, would develop a respect for rights and democracy has proven to be an illusion. The Chinese Communist Party maintains dictatorial rule over the country, subjecting the population to extensive and intrusive surveillance that prevents a true, organized opposition from developing. Meanwhile, the CCP has undertaken programs aimed at destruction of culture in Xinjiang and in Tibet, is curtailing freedom in Hong Kong, and is threatening Taiwan. China figures consistently at or near the top of the list of countries repressing religious freedom.

China tries to diminish the traditional political and civil dimension of human rights by emphasizing what it calls the “right to development” or “economic development.” Despite much empirical evidence to the contrary, Beijing assumes that an optimal pursuit of development requires restrictions on individual rights and political liberty that far exceed the scope of limits imposed in Article 29 of the UDHR. From the point of view of the

“United States human rights policy will not pursue a policy of selective indignation. Every act of torture or murder is equally repugnant to the American people, no matter who commits it. Of course, the means available to us to halt such human rights violations always vary with the specific case. Our specific response to the human rights violations appropriately differs from country to country, but the intensity of our concern should not.”

U.S. State Department, Preface to 1981 Human Rights Report

UDHR, development cannot justify infringement of fundamental rights.

Not only are Russia and China engaging in repressive policies domestically, they are also actively attempting to promote their despotic political models internationally. For the first time since the 1970s, when the Soviet Union still had some veneer of plausibility as an international model, liberal democracy faces significant challenge as the most desirable political option. Authoritarian leaders, especially in the developing world, may look to China for a model of governance that allows for mass surveillance and suppression of dissent, with no expectation to honor human rights. Some of our closest traditional allies, especially in Europe, sometimes show greater eagerness to accommodate China and Russia for commercial reasons, than determination to oppose them by holding up the banner of human rights.

New Technologies and Rights. The emergence of new technologies and their rapid dissemination around the world represent marvelous opportunities to promote economic development, improve health, facilitate communication and the transmission of information, develop new forms of energy and transportation, and much more. These new technologies run the gamut from artificial intelligence (AI) and cyber/internet technologies to emerging biotechnologies. They also pose vexing challenges for the protection of rights. The most important new development in AI technologies, for example, is the field of machine learning — in broad terms, complex software algorithms able to process enormous amounts of data to find otherwise hidden correlations and discern otherwise invisible patterns of social behavior.

The potential benefits to society of these advances are great, but so too are the risks to individual liberties and rights. Algorithms are often not as accurate as their



*Unknown protester faces Chinese tanks,
Tiananmen Square, 1989*

designers hoped, and biased or discriminatory algorithms can be readily abused in decisions concerning, say, bank loans or court sentencing. When the algorithms are used on a large scale, moreover, such biases may show up only after the harm is done. Of particular concern are the threats to human rights posed by surveillance and behavioral-prediction applications. AI and related cyber-technologies — such as facial recognition conducted over the internet, including social media and other platforms — are already being employed as surveillance tools in the United States and other democratic nations, which are developing political and legal mechanisms to meet the challenge of balancing the advantages against the risks. The dangers are especially great in authoritarian states where there is little or no disposition to regulate these new technologies.

Nowhere has the ambition to establish a “wholly-surveilled” society progressed as far as in China. The

Communist Party of China has built an aggressive internet censorship system known as the Great Firewall of China. A high-tech version of its discredited forbears, the Iron Curtain and the Berlin Wall, the CCP’s Great Firewall seeks to lock its citizens in a digital-information prison.

Beijing’s “social credit system,” moreover, is based in large part on emerging AI and cyber software that permit the aggregation and integration of many different data streams about an individual. These include surveillance equipment and facial recognition programs that record everywhere one goes; smartphone credit card apps that track purchases in real time; performance monitoring on the job and in school; ratings on social media — by one’s friends, neighbors, and associates — of a person’s conformity and loyalty; and so on. An authoritarian regime can not only use these tools to track and punish individuals but also exploit them to monitor and control

entire groups, such as disfavored religions or ethnicities. Meanwhile, predictive-behavior algorithms might — over time and with enough data accumulated from the large-scale surveillance of society — improve state security agencies’ ability to persecute members of disfavored groups by determining with great accuracy when, where, and how they will meet.

AI and cyber are not the only emerging technologies likely to threaten human rights. Biotechnology (including manipulation of the human genome), nanotechnology, quantum computing, and robotics, among others, will also pose daunting challenges to human rights.

Migration of Peoples. Recent years have witnessed large-scale movements of populations, and not only for the traditional reasons of armed conflict or political, religious, and racial persecution. In some cases, migrations take place against the backdrop of efforts to flee poverty and reach the stronger economies of the United States and Europe. In some cases, they are in response to prolonged droughts and other climate disruptions. Improved communication capacities, including social media, encourage attempts to resettle by highlighting the dramatically higher living standards in the developed world. Meanwhile, criminal operations have seized the opportunity to profit from the plight of migrants up to and including human trafficking. Most of these migrants are not refugees in the sense of the 1951 Refugee Convention and the 1967 Protocol, to which the United States is a party. Yet the extent of these population movements is putting pressure on the traditional distinctions between refugees from persecution and immigrants, resulting in hard questions concerning the scope and applicability of human rights.

Global Health, Pandemic, and Human Rights. The ongoing COVID-19 pandemic has raised complex human rights issues of its own, as governments have been forced to grapple with protecting public health without infringing basic human rights and sacrificing individuals’ economic security in a globalized world. The pandemic has provoked temporary restrictions on the freedom to practice one’s religion “in community with others and in public” (UDHR Article 18), to assemble (UDHR Article 20), and to travel (UDHR Article 13). The attempts by technology companies to monitor the spread of the disease through data mining and surveillance have raised serious questions about the right to privacy (UDHR Article 12). Meanwhile, legitimate criticism of both scientific

evaluations and government responses allegedly has been suppressed, triggering worries about free expression (UDHR Article 19). And struggling families, workers, and students have seen the right to work (UDHR Article 23) and right to education (UDHR Article 26) curtailed through social distancing policies. Throughout the crisis, as the greater human family has attempted to strike the proper balance between competing interests, it has faced a medical situation that is imperfectly understood, and for which there is not yet a vaccine. During this time, the specific contours of an individual’s “duties to the community” (UDHR Article 29) have been fiercely debated through the push and pull of domestic politics and international relations.

Rise of Human Rights Violations by Non-State Organizations. Non-state actors have long posed a challenge for human rights, which paradigmatically apply only between nation-states and the individuals under their jurisdiction. Recent years, however, have seen an alarming multiplication of the number and diversity of non-state groups responsible for large-scale human rights violations including, for example, terrorist groups, transnational organized-crime networks, purveyors of child pornography, and organizations engaged in human trafficking. These non-state organizations are often based in fragile states that lack the capacity or political will to address the abuses originating within their territories. In such weak states, the relative power and autonomy of multinational corporations and other business enterprises can present complex challenges for the promotion and protection of human rights as well.

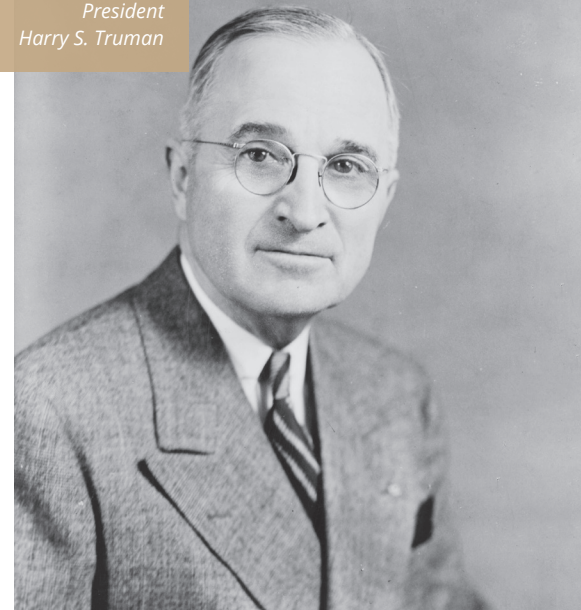
D. HUMAN RIGHTS IN A MULTIDIMENSIONAL FOREIGN POLICY

In accordance with this Commission’s duties as outlined in its Charter, this Report has reviewed the specific American legacy that undergirds the U.S. commitment to human rights (Part II) as well the international principles which the United States has embraced (Part III). Our survey of American rights principles reveals a tradition that, even as it is grounded in universal principles, is both distinctive and dynamic. Its distinctiveness is the product of a unique blend of intellectual influences and historical experiences, and its dynamism is powered by a persistent argument among Americans about what kind of society

“One of the primary objectives of the foreign policy of the United States is the creation of conditions in which we and other nations will be able to work out a way of life free from coercion. This was a fundamental issue in the war with Germany and Japan. Our victory was won over countries which sought to impose their will, and their way of life, upon other nations.”

Harry S. Truman, Special Message to the Congress on Greece and Turkey: The Truman Doctrine, March 12, 1947

President
Harry S. Truman



we are and what kind of society we wish to be. Integral to that tradition is a commitment to “certain unalienable rights” that belong to all human beings, and to a form of constitutional government that grew out of the particular American experience and which is designed to secure rights by keeping competing principles in balance while fostering compromise and toleration of opposing views.

This Report’s survey of international human rights principles stemming from the Universal Declaration of Human Rights, by contrast, reveals a tradition that was designed to affirm universal principles without relying upon any one particular national tradition. The list of principles in the UDHR was deliberately kept small and general so that those principles could be brought to life within many different cultures, traditions, and political systems. The dynamism of the international human rights project comes from experiences gathered over time as nations move toward meeting the “common standard” established in the UDHR.

Although there is a close correspondence between the American rights tradition and the international principles to which the United States is committed, the implications of America’s dedication to unalienable rights for foreign policy are more diffuse and indirect than they are for domestic affairs, due to the multiple factors that must

be considered in the formation of foreign policy. Policymakers must fulfill all treaty obligations that the nation has assumed, even as they make prudential judgments about the role of national principles and interests, taking into consideration limited resources together with current conditions, threats, and opportunities in the world around us. They must make difficult choices, often on the basis of limited information, as to which rights violations and abuses warrant first attention, and how to expend limited diplomatic capital and financial resources. The means available will vary with each specific case.

The complexity of diplomatic decisions in the real world, however, should never be an excuse for paralysis or indifference. There are many ways for the United States to promote fundamental rights abroad consistent with its distinctive national tradition, the sovereignty of other nation-states, and the imperatives of sober

diplomacy. Policymakers have a wide range of available tools, all requiring judgment calls and estimations of likely effectiveness. Diplomats can work through back channels, communicating concerns and recommending changes. They can support local rights activists or organizations. They can make concerns public and rate the performance of other countries through the State Department's annual Country Reports on Human Rights, the Report to Congress on International Religious Freedom, or the Trafficking in Persons Report. They can engage with the treaty bodies that govern particular international agreements. When warranted, they can pursue forms of sanctions, or limit cooperation in trade or security. And, not least, they can regularly and robustly espouse the principles of American constitutional government, which make the protection of the rights inherent in all persons the ultimate measure of political legitimacy.

While judgments about particular policies are beyond the scope of this Commission's mandate, our survey of the animating principles of the American rights tradition and of U.S. commitments to international human rights principles leads us to offer the following observations to those who bear the heavy responsibility of framing a moral foreign policy that advances American interests while remaining true to American ideals.

V. CONCLUDING OBSERVATIONS

1. It is urgent to vigorously champion human rights in foreign policy. In today's world, the ambitious international human rights project that arose in the wake of World War II is facing grave new challenges. The hard-won social and political consensus that sustained it is more fragile than ever, even as hundreds of millions of men and women suffer under authoritarian regimes where freedom and equality are but distant dreams, where hope is crushed, and where help is withheld. Some powerful nations are challenging the very idea of human freedom and dignity by promoting a vision of the future that drastically downplays civil and political liberties, while rapid technological advances pose a host of novel threats. To meet today's complex challenges will require friends

of human rights to respond with courage, tenacity, and wisdom.

In this hour of need, the United States, by virtue of the principles deeply inscribed in its constitutional system and its international commitments, must champion vigorously the vision that it and nearly every other nation pledged to support when they approved the Universal Declaration of Human Rights. It is by fidelity to what is best in the nation that the United States can respond most effectively to the manifold demands of the moment. Each of the major traditions that merged in America's founding — Biblical faith, civic republicanism, and the modern tradition of freedom — nourished the nation's core convictions that government is properly rooted in the consent of the governed and that its first purpose is to secure the rights that all human beings share. These core convictions, and the traditions that nourish them, are a source of inspiration and strength. It is no exaggeration to say that, with people around the world counting on America to champion fundamental rights, this country's energetic dedication to that task will have no small influence on the future of freedom.

If the United States is to remain a beacon of hope, it must prudently pursue all diplomatic options, addressing abuses by allies as well as unfriendly nations, while never promoting a false moral equivalence between rights-respecting countries that at times fall short and countries that systematically trample on their citizens' human rights. In the war of ideas between liberal democracy and autocracy, the uneven progress of liberal democracies does not invalidate the lofty goals to which they are dedicated.

The Commission also notes the likelihood that U.S. measures to promote human rights abroad will be more effective when carried out in cooperation with other nations. No nation alone can achieve all that is necessary to bring human rights to life, and one nation acting by itself will always be suspected, fairly or unfairly, of ulterior motives.

2. The power of example is enormous. A crucial way in which the United States promotes human rights abroad is by serving as an example of a rights-respecting society where citizens live together under law amid the nation's great religious, ethnic, and cultural heterogeneity. Notwithstanding many failures to live up to the nation's own ideals, Americans rightly take pride in

their constitutional tradition. The American experiment in freedom, equality, and democratic self-government has had a significant influence on how human rights are understood around the world — not necessarily as a model to be copied, but as evidence that a rights-respecting society is achievable. The country's experience in addressing conflicts among diverse groups in society and in dealing with tensions among rights and rights claims has provided encouragement to others engaged in similar struggles. At the same time, it must be recognized that the American model will serve as an inspiration to others only so long as we ourselves recognize the gap between our principles and the imperfections of our politics and can demonstrate, as we ask of others, tangible efforts at improvements. The more the United States succeeds in modeling the principles it champions, the more powerful will be its message and the more inspiring its example for people longing for freedom. The maintenance of the American rights tradition is a continuing challenge that builds on what has come before and requires hard work by each succeeding generation.

3. Human rights are universal and indivisible. A major threat to the noble post-World War II human rights project stems from the rise of powerful nation-states that reject the propositions that all human beings are created free and equal and that “all human rights are universal, indivisible and interdependent and interrelated.” Whether attacks on that proposition are openly expressed or take the form of disregarding it in practice, they strike at the heart of the social and political consensus upon which the Universal Declaration of Human Rights rests. The core principles on which nearly all nations once agreed are now threatened by a competing vision in which the political and civil rights enshrined in the UDHR are radically subordinated in the name of development or other social and economic objectives.

4. The universality and indivisibility of human rights do not mean uniformity in bringing them to life. The United States and every other state that has taken on international commitments are obligated to fulfill all of those commitments, with no cultural exceptions. The UDHR does contemplate, however, some variation in emphasis, interpretation, and mode of implementation. The Vienna Declaration makes that explicit, stating that while “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms,” the

“significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind.” The universality of human rights and the pluralism necessary to their practical realization are held together by the principle of subsidiarity inherent in the system of international human rights law. Subsidiarity in the international arena has affinities with the principles of freedom, democratic accountability, and federalism inscribed in America's constitutional tradition. It requires that wherever possible decisions ought to be made at the level closest to the persons affected by them — starting with their primary communities — and that larger, more general and distant communities should intervene only to help the primary ones, not to replace them.

5. A degree of pluralism in respecting human rights does not imply cultural relativism. The recognition of a legitimate pluralism does not permit ignoring any of the rights in the UDHR. The scope for diversity in bringing human rights to life is circumscribed by the duty to “promote and protect all human rights and fundamental freedoms,” and by the provisions of the UDHR specifying that all rights must be exercised with due respect for the rights of others and that its rights may be subject to “such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” As Secretary of State Warren Christopher observed at the opening session of the 1993 Vienna Conference, “We respect the religious, social and cultural characteristics that make each country unique, but we cannot let cultural relativism become the last refuge of repression.”

6. Nation-states have some leeway to base their human rights policy on their own distinctive national traditions. As the world's oldest democracy, the United States, for example, devotes particular attention to the promotion of individual freedom and democratic processes and institutions. Within the State Department, it maintains special offices for International Religious Freedom as well as Trafficking in Persons, the latter reflecting the country's historical experience with slavery and the former its signal achievement in guaranteeing religious liberty for all members of a large and diverse polity. But it would be a violation of a country's international obligations to ignore other fundamental principles or to disparage them. Though it is sometimes difficult to define the bounds of

legitimate pluralism, or a “margin of appreciation,” the process must begin with the understanding that the basic principles in the UDHR were meant to work together rather than to be pitted against each other. Conflicts or tensions between fundamental rights therefore must be occasions to discern how to give each right as much protection as possible consistent with the overarching conviction affirmed in Article I of the UDHR that “All human beings are born free and equal in dignity and rights.”

7. Although human rights are interdependent and indivisible, certain distinctions among them are inherent in the Universal Declaration itself, as well as in the positive law of human rights that follows from the UDHR.

While it is important to affirm the interdependence of all rights that pertain to human dignity, U.S. foreign policy can and should consider which rights most accord with national principles and interests at any given time. Such judgments must take into consideration both the distinctive American contributions to the human rights project and also prudential judgments about current conditions, threats, and opportunities.

A nation’s discretion is limited, however, by international law, which makes some human rights absolute or nearly so, admitting of few or no exceptions, while others are subject to many reasonable limitations and are contingent on available resources and on regulatory arrangements. Some international norms, like the prohibition on genocide, are so universal that they are recognized as norms of *jus cogens* — that is, principles of international law that no state can legitimately set aside. The application of certain human rights demands a high degree of uniformity of practice among nations, as in the prohibition of torture, while others allow for considerable variation in emphases and modes of implementation, as in the protection of privacy or the realization of social and economic rights in the UDHR.

8. Freedom, democracy, and human rights are indissolubly linked. The processes of free and open deliberation, persuasion, and decision-making enable liberal democracies — democracies grounded in fundamental rights — to reasonably reconcile the various claims of rights and determine the best allocation of limited resources in the realization of the many rights that they seek to respect. This is because the core notion of individual freedom, that no person is born subordinate to or ruler over another,

and the central idea of democracy, that political power ultimately resides in the people, are themselves reflections of the rights inherent in all persons. Individual freedom, democracy, and unalienable rights have deep roots in the American tradition and received powerful expression through the nation’s emphasis on self-government in its declared war aims during the Second World War; its support for the “third wave” of democratization after the fall of the Soviet empire; and its continuing commitment, consistent across administrations, to an international order that favors liberal democracy because it is grounded in respect for human rights and national sovereignty. The same principles are evident in the UDHR, which features the classic civil and political rights that give expression to the dignity of the individual and are necessary to the integrity of democratic processes; places the right to political participation in the context of a general recognition that “the will of the people shall be the basis of the authority of government”; and prescribes “periodic and genuine elections which shall be by universal and equal suffrage and ... free voting procedures.”

This convergence of the UDHR and the core of the American constitutional and political tradition has implications for U.S. foreign policy. In the first place, it invites a commitment to the promotion of individual freedom and democratic processes and institutions as central to the U.S. human rights agenda. By the same token, it counsels considerable deference to the decisions of democratic majorities in other countries, recognizing that self-governance may lead them to set their own distinctive priorities. The U.S. promotion of fundamental rights should always be sensitive to the outcomes of ordinary democratic politics and the legitimate exercise of national sovereignty, and wary of rights claims that seek to bypass democratic institutions and processes.

9. Social and economic rights are essential to a comprehensive foreign policy.

Although social and economic rights are an integral part of the fabric of the Universal Declaration, the principle of the indivisibility of human rights was obscured during the Cold War when, for opposite reasons, the Soviet Union and the United States tended to treat the civil and political rights in the UDHR as separate and distinct from its social and economic provisions. As a result, it is crucial to recognize four considerations: (1) The United States was a major supporter of the indivisibility principle as well as the aspiration for “better standards of life in larger freedom” that appears in the UN

Charter and the Preamble to the UDHR. In presenting the UDHR to the UN General Assembly, Eleanor Roosevelt affirmed that the U.S. government gave its “wholehearted support for the basic principles of economic, social and cultural rights set forth in those articles.” (2) It was the U.S. position on how those rights were to be implemented — leaving it up to each nation to bring them to life in accordance with its resources and political organization — that prevailed over the Soviet view that the state should be their exclusive guarantor. (3) The indivisibility principle requires the economic and social rights to be taken seriously in formulating U.S. foreign policy. (4) Because a certain minimum standard of living is essential to the effective exercise of civil and political rights, America’s commitments under the UDHR accord with the nation’s constitutional tradition.

Time and much empirical evidence have amply proved the wisdom of the U.S. position that a prudent mixture of public and private means is better suited to provide “better standards of life in larger freedom” than a state-managed economy. Where foreign policy is concerned, the United States, consistent with its dedication to individual freedom and human equality, has sought to promote the UDHR’s economic and social principles primarily through generous programs of economic assistance directed toward the world’s poorest, most vulnerable and most persecuted communities.

10. New claims of rights must be carefully considered. With the passage of time, it is reasonable to expect a certain expansion and refinement of the list of recognized international human rights even as the essentials of freedom and human dignity remain constant. The application of existing rights to persons from whom they have been wrongfully withheld is particularly to be welcomed. It must be kept in mind, however, that it was largely owing to the relative modesty of its reach that the UDHR succeeded in launching the universal human rights project on a global scale. The UDHR was deliberately limited to a small set of rights on which there was perceived to be a near-universal consensus. The fact is that the power of the universal human rights idea is strongest when grounded in principles so widely accepted as to be beyond legitimate debate; it is weakest when it is employed in disputes among competing groups in society over political priorities. Such political disputes are usually best left up to resolution through ordinary democratic processes of bargaining, education, persuasion,

compromise, and voting. The tendency to fight political battles with the vocabulary of human rights risks stifling the kind of robust discussion on which a vibrant democracy depends. The effort to shut down legitimate debate by recasting contestable policy preferences as fixed and unquestionable human rights imperatives promotes intolerance, impedes reconciliation, devalues core rights, and denies rights in the name of rights. In sum, the United States should be open to, but cautious in, endorsing new claims of human rights.

11. National sovereignty is vital to securing human rights. As does the U.S. Declaration of Independence, so too does the Universal Declaration of Human Rights assume that nation-states, through their laws and political decisions, are the main guarantors of human rights. Essential to the defense of human rights, therefore, is the defense of the sovereignty of nations, large and small. Like other international legal obligations, the international human rights obligations of the United States must be grounded in those norms to which the United States has formally and explicitly consented. To cede authority to determine those obligations to international bodies without the constitutionally legitimated consent of the United States would erode American sovereignty and dilute democratic accountability. It follows that U.S. policymakers should resist attempts at creating new rights through means that bypass democratic institutions and procedures, or that are inconsistent with the understandings on the basis of which the United States entered into international agreements. It also follows that the United States should respect the independence and sovereignty of nation-states to make their own moral and political decisions that affirm universal human rights within the limits set forth in the UDHR. At the same time, it must be recognized that freedom-loving nations rightly employ the full range of diplomatic tools to deter nation-states that abuse their sovereignty by destroying the very possibility of the exercise of human rights by their people.

12. The seedbeds of human rights must be cultivated. Over the years, the human rights idea has shown great power, to the point where “human rights” has become the phrase most commonly used today by millions of men and women from all nations and cultures to express their yearnings for justice and relief from oppression. But friends of human rights must keep in mind two important considerations: respect for human rights must be cultivated, and the promotion of basic rights is

only one element in building the kind of societies that promote human flourishing in all its dimensions. Rights are helpful tools for addressing injustices and improving living conditions, but they do not magically generate the respect for individual freedom, democracy, human dignity, and rule of law or the qualities of responsibility, solidarity, and tolerance that are required for the maintenance of humane and just societies.

The collective effort since 1948 to translate the UDHR's broad principles of human rights into binding legal commitments through a network of treaties has achieved laudable results. But the enduring success of such efforts depends on the moral and political commitments that undergird them. It would be a sad irony if the idea of human rights — which reflects the conviction that the positive laws of nations must be accountable to higher principles of justice — was reduced to whatever current treaties and institutions happen to say that it is. The fact is that human rights in a nation's foreign policy often gain more force from the clarity of the nation's moral purpose and political commitment than from the formality of its legal obligations. Declarations, constitutions, and treaties on human rights are but what Madison called “parchment barriers” without constant effort and determination — not least in the provision of an education that presupposes and transmits the essential ideas about freedom and human dignity — to make those rights a reality.

As Eleanor Roosevelt put it on the tenth anniversary of the UDHR:

Where, after all, do universal human rights begin? In small places, close to home — so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

The experience of the United States teaches that protection of human rights is a never-ending struggle, one that involves a nation's sense of its own principles and purpose as it grapples with questions about the security and the well-being of the political community for which all have a common responsibility. Promoting fundamental human rights is an essential step, but only a step, in shifting probabilities toward better and freer societies. The surest protection of human freedom and dignity comes from the constitutions of free and democratic states undergirded by a tolerant, rights-respecting culture. As in the case of the United States' distinctive rights tradition, the maintenance of the international human rights project will require attention to the “small places” where the spirit of liberty is rooted, nurtured, and cultivated. ▲

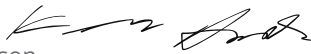
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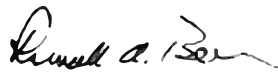
Mary Ann Glendon, *Chair*



Peter Berkowitz, *Executive Secretary*



Kenneth Anderson



Russell Berman



Paolo Carozza



Hamza Yusuf Hanson



David Tse-Chien Pan



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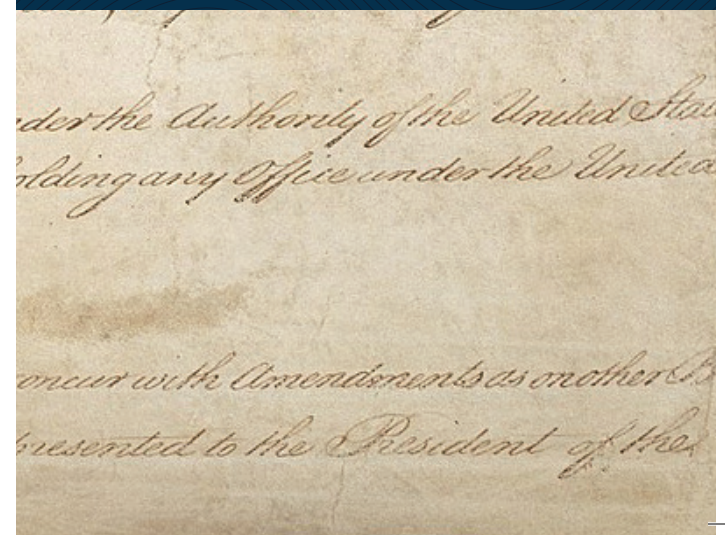


Christopher Tollefsen

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Report *of the* Commission on Unalienable Rights



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