THE COMMITTEE ON THE
ADMINISTRATION OF JUSTICE

"THE BLESSINGS OF LIBERTY":

AN AMERICAN PERSPECTIVE ON A BILL OF RIGHTS FOR NORTHERN IRELAND

by

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PREFACE

Martin Flaherty is a student at the law school of Columbia University in New York City. He is a graduate in history and is currently writing a doctoral thesis on Irish influences on the framing of the American Constitution.

For ten weeks in the summer of 1986 Martin was working for the C.A.J. in Belfast under the auspices of Columbia's Internationl Human Rights Programme. During this time he studied at first hand all aspects of the troubles and contributed greatly to the profile of the C.A.J. throughout the province.

This pamphlet represents Martin's thoughts on how the American experience with a Bill of Rights may be helpful to those in Northern Ireland who, like the C.A.J., are anxious to see a Bill of Rights introduced here. We should all be most grateful for the lucid and penetrating analysis which Martin has presented.

Brice Dickson
Chairman

> Two centuries ago, when the representatives of the United States assembled in general congress to make their historic declaration of independence, they proclaimed as self-evident truths that all men 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; and that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

So begins the 1977 report of the Standing Advisory Commission on Human Rights entitled, "The protection of human rights by law in Northern Ireland," which ten years later remains the most extensive study into a possible bill of rights for the province.[1] Apart from this initial reference, though, the experience of the United States in human rights protection hardly receives mention. The pattern of a brief bow with little follow-up characterizes much of the of the debate whether applied to Northern Ireland alone, the entire United Kingdom, or the whole of these islands.[2] Typical is the feeling expressed in one otherwise excellent study, "Yet the differences in almost every aspect of the legal, constitutional and social background between Britain and the United States make it really of limited value to pursue the comparison further."[3]

Surely this overstates matters. Transatlantic differences aside, the American experience deserves greater attention for several reasons. Not least of these is the depth and breadth of that experience. In 1989 the Constitution of the United States will achieve its bicentennial and two years after that so will the Bill of Rights. Nearly two centuries have seen over 470 volumes of Supreme Court cases -- many dealing with civil rights issues -- line the shelves. And the pace continues. The American Civil Liberties Union's annual Supreme Court review points to dozens of important cases decided in the last year alone.[4] Both the review and the 400-odd volumes record progress and failure. Yet on balance the course of American human rights protection since World War II must be counted as a great success for the Constitution and the courts. Moreover any failures, recent or historical, are likewise valuable in showing the pitfalls for Northern Ireland to guard against.

Not that the differences between American and both British and Irish societies do not matter. Unlike the United States, Northern Ireland endures guerilla warfare; the United Kingdom possesses an unwritten constitution; and the Irish Republic operates under a frame of government with peculiarities unique in the western world. For these reasons alone the American tendency to think that whatever worked at home will work elsewhere promises no more success in Northern Ireland than it did in Vietnam. But the differences should not obscure the similarities, including common language, common heritage, common industrialization, and the common law. The same study which dismissed U.S.comparisons in fact continually brings up American illustrations.[5]

In the end to what extent American mechanisms are relevant to Northern Ireland must be a domestic decision. But at the very least an American perspective can suggest what types of approaches have worked in not dissimilar circumstances, and how these approaches might apply to issues like entrenchment, derogation, incorporation of the European Convention on Human Rights into domestic law, judicial machinery and

power, and the nature of the rights to be safeguarded.

In this context three aspects of the American Bill of Rights seem relevant. First is the status of the Bill of Rights in law. This includes such issues as to what extent are safeguards within the system secure (very); the manner in which they may be changed or suspended (with great difficulty); who enforces them (an extensive state and federal court system); and how (activist judicial review); and who may take advantage of this machinery (theoretically, anyone). The second aspect of the American system -- surprisingly less important -- includes the text of the human rights safeguards themselves. These include various provisions in the original Constitution, the first ten amendments commonly thought of as the "Bill of Rights," and the enormously important post-Civil War amendments. The final aspect relates to the interaction of the first two. How the courts have applied the Bill of Rights and other provisions would take volumes to explain adequately. Even so, at least a mention of the U.S. record in areas like discrimination, civil liberties and the police, freedom of expression, and group rights can show the possibilities for a similar system in Ireland, and for that matter Britain too.

I THE STATUS OF THE BILL OF RIGHTS IN LAW

Setting It Up: Enactment and Entrenchment

To speak of a "bill of rights" at all means there is something more at stake than simple law reform. To advocates and opponents both the idea implies measures somehow weightier than the last parliamentary act on pet licensing. A true Bill of Rights must command respect, have a measure of permanence, and resist erosion. It should mirror in importance what it seeks to protect. In technical jargon it should be "entrenched."

Achieving this in the United Kingdom, and to a lesser extent, in Northern Ireland, remains at best problematic and at worst impossible. Most modern states of course set apart fundamental values from daily laws by means of written constitutions. In the United Kingdom, for a host of reasons, no written constitution exists due to the doctrine of parliamentary supremacy. In theory the Queen, Lords and Commons embody the will of the people. Whatever Parliament can do -- and there is scant domestic check to stop it from doing anything -- it can undo. Arguably Parliament might be less apt to tamper with a Bill of Rights even if it were simply a statute. Canada's Charter of Rights -- even previous Government of Ireland Acts -- provide examples. Yet these examples have also been changed . At most, experts agree, Parliament could enact protections that could not be deemed as repealed unless a subsequent act made such repeal explicit.[6] Ultimately no human rights safeguard would be any more secure than the whim of the latest Government.[7]

Traditionally of course Parliament has more often than not protected rights rather than attack them. With the sizable exception of Northern Ireland the United Kingdom's human rights record compares favorably with most other nations. Opponents of a Bill of Rights point to just this fact. They maintain, among other things, that entrenching any law takes power from the people and their representatives and places it in the hands of either undemocratic judges or dead majorities of the distant past.[8]

Still, problems persist. Britain's record does fall short of many countries,[9] including the United States,[10] while the record in Northern Ireland remains leagues behind.[11] The situation plays no small part in the recent interest in a bill of rights to begin with, albeit mostly in the form of incorporating the European Convention. It has prompted jurists like Lord Scarman to ask, "It is little wonder that the question is now posed, is our traditional theory of Parliamentary sovereignty man enough to do the job?"[12]

British colonists in North America long ago answered "no". They did so largely because Britain in the eighteenth century sought to consolidate parliamentary supremacy in the colonies without the corollary of truly extending representation, from which it derived its basic authority.[13] Britain's infringements on colonial rights were often more apparent than real, but they did ultimately include martial law. From this conflict ensued the American Revolution and independence.

But the creation of the United States did not mean that Americans desired to junk the supremacy of their own representative bodies. Exactly the reverse occurred although the story is complex. Suffice it to say that during the decade after 1776 the thirteen states, which were united under a weak confederation, set about giving their legislatures as much power as possible. Written state constitutions were adopted, but these generally served to make the legislatures simply more representative and to legitimate rather than to check them. Yet the experiments did not work. The state legislatures often succombed to demogoguery and factionalism and often threatened various liberties in their own right. John Adams termed the result "democratical despotism," a phrase not without relevance to Stormont in practice or Westminster in theory.[14]

The solution came in 1787 when the Articles of Confederation were challenged by a Constitution based on popular sovereignty rather than legislative supremacy. Two factors deserve mention, particularly with reference to criticisms about entrenchment of either the European Convention or a full-blown bill of rights for the United Kingdom. First, the new framework represented a shift away from simple democracy. It reduced the relative power of the national legislature, Congress, by creating a strong executive in the President and an independent federal judiciary.

Even so, this undemocratic framework purported to rest more squarely on the will of the people than anything that had gone before. The Constitutional Convention which drafted the document technically developed into an extra-legal, popular body; the document itself was ratified by likewise extra-legal, popular state conventions. The Constitution's Preamble reflects these origins, beginning, "We the People of the United States...to [among other goals] secure the Blessings of Liberty...do ordain and establish this Constitution." Not the states, nor the Continental Congress, but "the People." However theoretical or rhetorical these foundations may seem, they were to play an enormous role in according the Constitution, Bill of Rights, and the Supreme Court the power they enjoy today.[15]

At first glance extra-legal conventions and popular referenda appear more foreign to the United Kingdom than a bill of rights itself. In entrenching the first modern written constitution, though, the American "Framers", as they are termed, merely expanded originally

English materials. Conventions had been a facet of both contemporary British and Irish history. In fact the "Convention Parliament" of 1688 the current settlement in the U.K. rests on just such a device.[16] Moreover, and this is a point many commentators miss, the adoption of the Constitution came not on the heels of the Revolution, but several years later, in peacetime.

If the Framers managed to entrench their form of government, however, they did not carve it in stone. For a seven-page plan to last nearly 200 years flexibility must be built into the system. In practice the Supreme Court handles much of this task by filling in the meaning of the Constitution's often cryptic phrases. More fundamental change can also occur through the flexibility mandated in the document itself. Article V provides that the Constitution may be amended whenever a proposed change can command a two-thirds majority in both the House of Representatives and Senate and then be ratified by three-quarters of the state legislatures.

Historically amending the Constitution has proved extremely difficult. Only sixteen mostly technical changes have passed muster if the first ten amendments -- the actual Bill of Rights -- be counted as part of the original plan. Whether technical or substantive an amendment, once ratified, "shall be valid to all Intents and Purposes, as part of this Constitution."

All told the amending procedure bolsters human rights protection several ways. Not only does it entrench the Bill of Rights as deeply as the rest of the Constitution, it has made later changes which might have curtailed rights all but impossible. Crises and emergencies simply pass too quickly for Article V to confirm passing moods hostile to liberties. For this reason amendments -- with the exception of prohibition -- have only added to rights safeguards rather than derogating from it.

Keeping It Intact: Derogation

The word "derogation" brings up a facet of the Constitution especially pertinent to Northern Ireland. Virtually every participant in the bill of rights debate concedes that some provision be included for suspending certain freedoms during emergencies. Incorporation of the European Convention would guarantee this tack with a vengeance. The document allows numerous human rights violations during crises and the European Court of Human Rights follows this tack.[17] But nowhere in the U.S. Constitution does any such provision exist. The sole exception appears in Article I, section 8, which does allow for the suspension of the privilege of the writ of habeas corpus. Even here only Congress, not the President, may order this suspension and then only "in Cases of Rebellion or Invasion."

This is not to say that the American government blithely tolerates saboteurs during war. National emergencies, at least in time of war, have in fact produced some of the low points in the nation's human rights record. A particular nadir occurred during World War II when the Supreme Court upheld the Congressionally mandated internment of Japanese and Japanese-Americans on the basis of their race and ancestry.[18] The grounds for this and similarly regrettable holdings were that once Congress has declared war, infringements on liberties which are "necessary and proper"(Article I, section 8) may be deemed constitutional. On the other hand the Court has also ruled that no such infringement may take place in peacetime.[19]

In short the American approach remains far more circumspect regarding emergency-related encroachments than either the United Kingdom, the Irish Republic, or the European Convention. Unlike the U.K., neither the President nor Congress can invade guaranteed rights in peace, and in war Congress alone may do so but only if the Supreme Court agrees to it. Unlike the U.K. neither the President nor Congress can infringe guaranteed rights in peace, and in war Congress alone may do so but only if the Supreme Court agrees to it. Unlike Eire neither the Congress nor the President can declare an emergency allowing for derogation. (Ireland had technically been under such an emergency since 1939![20]) Finally, unlike the European Convention the Constitution does not provide for derogation per se.

If there is any area where an American perspective might usefully contribute to bill of rights discussions, the Constitution's rejection of emergency abuses is it. This applies even more strongly with each instance of emergency encroachments throughout these islands.

Making It Work: Judicial Review

For 183 years the ultimate authority of deciding whether Congress or the President acts constitutionally has fallen to the judiciary, above all, the Supreme Court. Oddly enough this development was by no means inevitable; nowhere does the Constitution specifically grant the Court its vast powers of judicial review. Thomas Jefferson in fact once mounted a serious campaign to vest the ultimate authority of interpreting the Constitution to the states.[21] Still, the time is long past since anyone realistically challenged the role of the Supreme Court as final arbiter. Constraints, most of them self-imposed, do exist. Yet Chief Justice Charles Evans Hughes only slightly exaggerated when he said, "The Constitution is what the judges say it is." For this reason the actual content of any bill of rights is not half so important as the power, quality, and approach of the men and women who interpret it.

The Supreme Court itself declared its power of judicial review in the case of Marbury v. Madison(1803).[22] In an opinion written by Chief Justice John Marshall the Court struck down an act of Congress which ironically gave the Court expanded authority concerning certain writs. Marshall maintained that nothing in the Constitution gave Congress the power to take this action. More importantly, he held that it was for the courts to decide "whether an act, repugnant to the constitution, can become the law of the land."[23] His reasoning went that since the Constitution was fundamental law, since it was for the judiciary to decide the law, and since allowing Congress to judge its own acts would give it unlimited power, only the courts could decide whether a law was unconstitutional or not.

Marshall's opinion echoed the thinking of one of the Constitution's architects and early advocates, Alexander Hamilton. In The Federalist, a collection of essays indispensable to anyone interested in government or rights, Hamilton argued that one of the primary points of a written constitution was to prevent legislative excess. Harkening to the Constitution's basis in popular sovereignty, he continued:

> Nor does this conclusion by any means suppose the superiority of judicial to legislative power. It only supposes that the power of the people is superior to both.[24]

In other words the ratification of the Constitution -- and its continued acceptance -- captured the will of the people more genuinely than does a Congressional election. The Constitution is therefore more fundamental than a statute and it is for the courts to decide whether statutes accord with the basic values the Constitution embodies. In this way the Court is ultimately a popular institution.

The argument is neat, but is does provide a theoretical answer to what American scholars refer to as "the antimajoritarian difficulty" of nine unelected justices invalidating laws passed by elected representatives.[25] At this level judicial review is less "undemocratic" than critics on both sides of the Atlantic would have it.

Hamilton went on to defend judicial review on practical grounds. He pointed out that the judiciary, lacking the sword of the executive or the purse of the legislature, would always be "the least dangerous branch."[26] And it remains a cliche in American constitutional law that the Supreme Court directly commands only one unarmed marshall.

Hamilton wrote in the infancy of judicial review and the Supreme Court's lack of manpower has not prevented it from amassing awesome power. But if the Court's power is absolute it has a long way to go before corrupting absolutely. Numerous checks exist. For one, the Court has developed complex rules regarding standing which essentially hold that only an injured party in an actual controversy can bring a case forward.[27] For that matter the Court can merely react; it can invalidate laws and acts but it cannot initiate them. The Court's reliance on precedent serves as another constraint.

Nor are justices unaware of the dangers of getting too far behind contemporary attitudes. Felix Frankfurter remains a classic example of a reforming crusader turned cautious jurist with his appointment to the bench. Neither are the justices entirely immune from outside political pressure. During the Depression Franklin Roosevelt threatened to increase the size of the Court with his own appointees if it continued to block New Deal legislation. Though the move backfired politically, it reputedly prompted one justice to start ruling the other way -- the famous "switch in time that saved nine."

All this said, the Supreme Court -- and American judges generally -- take an activist approach as a matter of course that is currently unthinkable in most other common law countries. This applies equally to statutory and constitutional interpretation. Whereas British and Irish judges most often seek to find the "plain meaning" of an act, American jurists generally look first to legislative intent and policy considerations. A British judge may not look to Hansard; not only will his or her American counterparts look at the Congressional Record, they will delve into any and all debates, reports, and speeches as well.

History suggests that this greater adventurousness naturally follows from both written constitutions or bills of rights. In America it took 27 years from the first state constitutions to Marbury. The Irish Republic, with a bench much more closely tied to British traditions, waited for nearly 40 years for an activist approach to judical review to emerge.[28] Canada's Charter of Rights experience reflects the pattern.[29] Northern Ireland does not in part, perhaps, because none of the Government of Ireland Acts represented a true constitution or contained an extensive list of rights. The following axiom thus seems to follow: the more power given the judiciary, the

more active it becomes.

Certainly this has held true with the Supreme Court. As Marshall indicated in another major decision, McCulloch v Maryland, (1819)[30], judges must read presumptions into the Constitution if only because the document is short, terse, and meant to "stand for the ages." The Court as a result has stretched various clauses almost beyond the breaking point, at times inferring provisions that simply do not exist.

An extreme example of this approach occurred with the 1965 case of Griswold v. Connecticut[31], which struck down a state law restricting contraceptives. Several justices wrote several opinions, none of them resting squarely on Constitutional text. All agreed that the Constitutions protected a married couple's right to privacy, and that Connecticut had invaded this right. One tack located the right in the "Due Process Clause" of the Fourteenth Amendment, which reads, "nor shall any State deprive any person of life, liberty or property without due process of law." Several other justices pointed to the Ninth Amendment, which states that the enumeration of certain rights in the Constitution "shall not be construed to deny or disparage other retained by the people" like, arguably, the right to privacy. Finally, one justice turned nothing into everything, contending that the right to use contraceptives in private was protected by "penumbras or emanations" from the First, Third, Fourth, Fifth, and Ninth Amendments.[32] This type of judicial creativity underscores, although usually to a lesser extent, any number of Supreme Court decisions.

And it also cuts both ways. Many of the Court's worst and most controversial decisions have also been its most creative. In Scott v. Sandford(1857)[33], a pre-Civil War case since overruled by the Fourteenth Amendment, the Court held that the term "citizen" as used in the Constitution did not extend to free blacks despite ample historical evidence to the contrary. Similarly disastrous, and of special interest to labour, was Lochner v. New York(1893)[34]. There a laissez-faire Court threw out a state law which limited the work week of bakery employees to 60 hours on the grounds that the regulation deprived workers (and employers) of their liberty to contract without due process. It was on this basis that the Court blocked much pro-labour legislation through to the Depression.

Subsequent Courts have overruled Lochner and erected all sorts of intellectual barriers to prevent its return.[35] But the point in the end stands. Without doubt in recent decades the Supreme Court has led both the Congress and President in reform and civil liberties protection. But at the end of the day nothing really exists to stop it from serving a diametrically opposed function save indirect methods like the appointment of new justices as old ones retire or die, criticism from the legal profession, and public opinion. On balance the American experience shows that the judiciary, equipped with power and entrenched human rights safeguards, devotes its activism in more progressive ways than the conservative traditions of the legal profession might lead one to expect. Ultimately no court can stray too far from politics, or the text it uses, in either direction.

Making It Work: Judicial Machinery

Article III of the Constitution sets forth the guidelines for the national, or "federal", judiciary. It states, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

establish." Congress has responded to this mandate by creating an extensive system of federal courts on various levels. To these courts Article III also guarantees several devices for judicial independence. The result is a vast judicial network which, while highly political in the abstract, seldom indulges in naked party politics.

The network functions as a three-tiered pyramid. On the bottom are currently 64 U.S. District Courts covering geographical areas on average smaller than the states. These courts serve a vital purpose in that they not only may review legislation, but they act as courts of origin (nisi prius) of suits between citizens of different states; suits involving more than $10,000; and actions arising out of federal law. (See Article III, section 2.) As such they determine both the laws and the facts of a case, while higher courts may only rule upon legal questions. Of the higher courts, currently twelve U.S. Circuit Courts of Appeal, covering correspondingly larger regions, preside on the intermediate level. At the top of course sits the Supreme Court.

To a great extent this set-up, even the Supreme Court, does not deal with constitutional questions at all. Suits under federal law or between citizens of different states account for the size of the system far more than do human rights cases. Even so, if human rights is not the cause it is the beneficiary. Any one of these courts, within its jurisdiction, may invalidate state or federal laws. In this the United States differs, and probably fortunately so, from the Republic of Ireland where constitutional review is limited to the High Court and Supreme Court.[35] The United Kingdom could have the best of both worlds in the sense of avoiding setting up a vast new system yet providing ample opportunities for rights litigation simply by throwing judicial review open to all courts.

In this way the U.K., or for that matter Ireland, could also benefit from another feature of the American set-up by having the courts themselves adjudicate cases while filtering out less important ones. In the U.S., the Circuit Courts and the Supreme Court grant writs of certiorari only in those cases deemed interesting, weighty, or both. Judicial discretion, in other words, furnishes the courts' own check against excessive or frivolous litigation. On the other hand the system does make for the anomalies of differing decisions in different jurisdictions on similar issues. Until the Supreme court steps in different Districts or Circuits may have opposing ideas on, for example, whether lie detector tests are an unconstitutional search and seizure under the Fourth Amendment. Then again, it is just this type of jurisdictional disagreement which usually prompts the Supreme Court to "grant cert."

The size of the federal judiciary costs a great deal and fuels America's infamous passion for litigation. Yet it is only the proverbial tip of the iceberg. The 50 states and the territories also boast multi-tiered court systems. Through Article VI all of these must treat the Constitution, with all its provisions of rights, as the "supreme Law of the Land." In short, a litigant, again in contrast to Ireland, may invoke the Fourth Amendment even in a municipal court if local police conducted an unreasonable search. A passion for litigation is not necessarily a bad thing in defence of civil liberties.

Still, in the realm of civil liberties it is the top which dominates. With this in mind, the Framers included several safeguards of judicial independence already in practice in Britain. Article III

provides that federal judges shall hold their office during good behaviour, and receive a salary which may not be diminished. Such independence is an obvious prerequisite for any form of judicial review. As Hamilton put it, "This independence of the judges is equally requisite to guard the constitution and the rights of individuals from...the effects of designing men...the people themselves...and serious oppressions of the minority in the community."[36]

All this judges in the U.K. and Eire enjoy, albeit the former at Parliament's pleasure. In the United States a further phenomenon heightens "the independence of the judges." The power, make-up, and record of the Supreme Court in particular work to place it at the pinnacle of the legal profession, and likewise invest it with a stature and authority among the populace in general.

These factors all make the Supreme Court a highly visible and powerful political body -- but not in the sense of bill of rights critics who warn of the politicization of the judiciary. Insofar as the justices may strike down (or uphold) press censorship, discriminatory programmes, and laws against abortion, politics must intrude into the courtroom. Moreover, another provision in the Constitution at first glance appears to undercut its guarantees of judicial insulation. Article II empowers the President, on the advice and consent of the Senate, to appoint justices to the Court. The Supreme Court thus comprises nine political appointees.

Nonetheless, the justices' life tenure, the Court's stature, indeed the simple fact that judges rule on specific cases, have historically allowed even the most blatently political appointee to fool the politicians. Instances may not be the rule but they do abound. Oliver Wendell Holmes, Jr., the scion of a New England brahmin family, turned out to be a champion of free speech, workplace safety, and equal treament of minorities. Likewise, Hugo Black, who had been a member of the Ku Klux Klan. Most celebrated of all, Dwight Eisenhower appointed Earl Warren Chief Justice thinking he was getting a conservative rather than one of the greatest human rights activists the bench has seen. Indeed, William Brennan, another Ike appointee, still carries that particular torch.[37]

The same unpredictability often applies to the Court as a unit. The current Burger Court, almost entirely the creature of Republican presidents, has slowed the progressivism of the Warren Court but not reversed it.[38] The Chief Justice himself, during Watergate, led a unanimous Court against the man who appointed him in United States v. Nixon(1974).[39] This is not to say the court does not reflect shifts in the political mood. As the current hearings on the new Chief Justice indicate, the "Reagan Court" will expand liberties at a far slower pace than did the "Roosevelt Court," and may even regress. Still, the justices remain justices, not party ciphers. Party leaders realize this, too. While the President's appointment of an individual with a similar outlook is considered appropriate, the Senate would never allow a string of appointments of members of one party or residents of one region.

For the United Kingdom, as with Ireland, many of the factors which would keep politics out of judicial review already exist simply by virtue of the courts being courts. Conversely, enough factors are absent -- such as stature and tradition -- to make it very difficult to establish a bench that would make bold, controversial rulings in

defence of individual rights. Again the Irish experience suggests a delay before judges feel they can employ judicial review vigorously.[40] In the U.K. perhaps only the House of Lords, had it a bill of rights to work with, could commence the task with sufficient weight to take early initiatives.

Whatever the best course the American experience does indicate one conclusion beyond much doubt. The more powerful, more extensive, and more independent the machinery to enforce a bill of rights is, the less danger of the document itself becoming a mere list of aspirations.

Making It Work: Judicial Opportunities

Given entrenched protections, judicial review, and dozens of courts a further question arises: who initiates human rights cases? The short answer is anyone. Here political philosophy again yields practical results. By the theory of popular sovereignty the Constitution represents a limited grant of powers from the populace to the government -- as James Madison put, a charter of power granted by liberty.[41] If government invades the rights the people retain, the corollary goes, it is for the aggrieved parties to present their grievances before the courts. In consequence parties who believe they have grievances bring thousands of actions every year. But if the system causes delay and expense it also produces vigilance which no government commission could produce on its own. On the other hand, American constitutional theory is less productive when it comes to remedies. Compensation for rights violations can be available, but only by virtue of Congressional statute rather than from the Bill of Rights itself.

The celebrated case of Gideon v. Wainwright(1963)[42] illustrates just how open the system can be. The case came about when the Florida Supreme Court upheld the burglary conviction of Clarence Earl Gideon, a semi-literate drifter with several felonies to his credit. Gideon himself felt victimized since he could not afford a lawyer, nor was it Florida practice to furnish one. After some jailhouse study Gideon discovered a device known as a ipsa pauperus writ which enables indigent parties to petition directly to the Supreme Court. This he did in a badly spelled, handwritten letter. The Court granted certiorari, and appointed a future Supreme Court justice as Gideon's counsel. Ultimately the Court ruled in Gideon's favour on the grounds that Florida law had deprived him of liberty without due process under the Fifth and Fourteenth Amendments. As a result felony defendants in state courts throughout the country now had a right to appointed representation.[43]

Gideon notwithstanding, many, if not most, major human rights cases arise through the offices of private civil liberties groups. Among the most active are the American Civil Liberties Union (ACLU); the National Organization for Women (NOW); and the Legal Defence Fund of the National Association for the Advancement of Colored People (NAACP). These groups often expand rights protection just as much as they defend it. The NAACP Legal Defence Fund affords perhaps the most notable example of how private groups successfully conduct long-term strategies. A major chapter in the group's fight for black equality occurred after World War II. During this time the NAACP brought cases before the Court designed to chip away at the 1896 ruling that "separate" facilities for blacks were constitutional if "equal."[44] The successes included Sipuel v. Board of Regents(1948)[45], and Sweatt

v. Painter(1950)[46], which struck down racial prohibitions on law school admissions. These cases provided the prologue for Brown v. Board of Education(1954)[46], which overruled "separate but equal" doctrine and remains probably the most famous civil rights case in American history.

This is not to imply that the government plays no role. The Civil Division of the Justice Department serves as a watchdog in its own right and played a leading role during the Kennedy and Johnson administrations. Today, however, it has grown comparatively moribund -- a striking testament to the need for private redress of constitutional violations as well.

The private approach also furthers human rights in other ways. Even when groups -- or the Justice Department -- do not initiate cases they often augment the plaintiff's case by submitting amicus curiae (friend of the court) briefs. Important cases will attract dozens of such briefs. Moreover, the human rights "industry" keeps the pressure on through law review and newspaper articles, fund-raising, and membership drives. The net effect tends to be an especially heightened awareness of Constitutional rights.

Nor does this awareness stop with civil rights lawyers. The private nature of American rights litigation as much as anything, and this is a point that cannot be stressed too greatly, makes individual awareness of them a part of the culture. Children learn the Constitution in school, and few escape without learning at least snippets of the Preamble, the First Amendment, the Fifth Amendment. And what school does not reach TV does; police shows have ingrained one's rights upon arrest into the national psyche. Politicians, commentators, popular leaders consistently invoke. To be sure not everyone goes as far as the Mormon Church, which holds the Constitution to be divinely inspired. But the document does enjoy a sanctity akin to Magna Carta and a currency which surpasses it.

Still, the Constitution does not do everything, and nowhere is this more apparent than in the types of remedies it allows individuals to demand. The short answer here is none except the prospective protection that comes through invalidating a law or program. A Gideon may gain release from prison but he cannot obtain compensation through the Constitution. Congress has filled the void with statutes which authorize compensation for some human rights violations, and allow for injunctions against future infringements.[47]

Likewise, the Constitution has always been inadequate when individuals violate the rights of other individuals. Again the situation stems from the original notion of the document as a grant of limited power to government. Therefore most Constitutional prohibitions against rights violations work only against the government. (One exception is the Thirteenth Amendment which prohibits slavery.) Safeguards against private discrimination thus fall to Congress and the state legislatures. The sixties witnessed a response to this problem with various statutes, above all the Civil Rights Act of 1964. But as with an Act of Parliament the possibility that a simple Congressional majority can overturn such legislation provides not a few civil rights advocates cause for concern.

The options the American system offers, then, furnish Northern Ireland with both examples of what has worked well and what has not gone far enough. Private redress, whatever its costs, clearly bolsters

civil rights vigilance in a way no other method can. Such vigilance would be even more potent given entrenched remedies and prohibitions against private as well as government violations. This is one example where it is America's difficulty which serves as Ireland's opportunity.

II THE TEXT OF THE BILL OF RIGHTS

Much of the debate on human rights safeguards for Northern Ireland centres on their text. If written from scratch, the question arises, what should go in it? And if just incorporating the European Convention is considered, how might that document be improved?[48] If nothing else, the American Bill of Rights should show that the text of any protections are a secondary consideration to entrenchment and methods of enforcement. One is tempted to say the more powerful the watchdogs, the less detailed specific provisions need be.

That said, the text of a Bill of Rights should not be underestimated, especially in jurisdictions where judicial review remains novel. Even in the U.S., when the Supreme court stretches clauses beyond recognition, it is still stretching something. Concerning rights, those somethings are scattered throughout the Constitution and not just in the first ten amendments referred to as the "Bill of Rights." They require a brief survey in their own right before any understanding of how the courts have applied them can be reached.

The Original Constitution

The Constitution adopted in 1789 contained no Bill of Rights. Nor was this some shocking oversight. The Constitutional Convention had considered a bill of rights, and in the end decided that such a safeguard was unnecessary. The orthodox thinking rested on theoretical and practical considerations.

The theory recalled, yet again, popular sovereignty. In a grant of limited powers by the people to the government, it followed that any powers not specifically authorized -- for example the power of quartering troops in private homes -- were not for the government to exercise. Indeed, some argued that an enumeration of rights would be dangerous since it would give the government carte blanche to trammel any rights not protected. As Hamilton put it:

> For why declare that things shall not be done where there is no power to do? Why should it be said, for instance, that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[49]

Whatever the merits of such arguments, as a practical matter the Constitution did list certain prohibitions designed to protect certain rights. Most of these appear in Article II, section 9. Clause 2 blocks suspending the privilege of the writ of habeas corpus save during rebellion or invasion. Clause 3 provides that no bill of attainder or ex post facto law shall be passed. Clause 4 prohibits direct taxation unless there has been a census. Clause 8 prevents the granting of titles of nobility. Other protections appear elsewhere. Of particular relevance to Northern Ireland, the third clause of Article III, section 3 directs that "The Trial of all Crimes, except in

cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes shall have been committed." (The Seventh Amendment elaborates this point.)

Neither the theoretical nor political arguments against the need for a further enumeration succeeded. That said, the original Constitution's protections illustrate that there is more to the list of entrenched liberties in the U.S. than just the Bill of Rights.

The Bill Of Rights

Popular sovereignty may have made explicit protections irrelevant, but the desire for such protections proved too compelling. In retrospect this desire was sage; judges turned out to be more positivist than Hamilton thought, and in practice often acted as though the test of the Constitution conferred rights rather than simply recognizing them. Without a list of preferred rights the courts would have had a much tougher time pulling in the reins on the states, the Congress, and the President. Moreover, at the time the Constitution may not have been ratified without the eventual pledge from its supporters to enact a bill.

As one of its initial acts, therefore, the first Congress after ratification approved a package of ten amendments. By the mechanism of Article V this went to the states, which approved them by 1791. In this way the Bill of Rights became part of the Constitution. Much of the credit for promoting the scheme goes to James Madison, also the guiding light behind the original Constitution itself. Madison in turn modelled a great deal of the package on earlier state bills of rights, especially that written for Virginia by Madison's friend and mentor, Thomas Jefferson. For several provisions the ancestry can also be traced back to the English Bill of Rights of 1688.[50]

Any survey of the Bill of Rights, short of outright quotation, involves some degree of interpretation. For this reason the appendix includes the actual text as the best way of understanding the document the Supreme Court works with. The following run through merely aims at supplying the gist of the scheme.

Amendment I - Prohibits Congress from making any law establishing religion or prohibiting its free exercise. Also provides for freedom of speech, of the press, of assembly, and of petition.

Amendment II - Guarantees "the right of the people to keep and bear arms," (though this may possibly be directed only for the benefit of members of the militia).

Amendment III - Prohibits the quartering of soldiers in homes in time of peace without the owner's consent, "nor in war, but in a manner to be presented by law."

Amendment IV - Provides safeguards against unreasonable searches and seizures. Directs that warrants shall issue only upon probable cause, supported by oath, and describing specifics about what is to be searched. Generally protects "the right of the people to be secure in their persons, houses, papers, and effects."

Amendment V - Secures protections against double jeopardy, self-incrimination, the taking of private property without just

compensation, and against deprivation of "life, liberty or property without due process of law."

Amendment VI - Guarantees the right of a jury trial in criminal proceedings that is "speedy and public." Also provides for trial in the district of the alleged crime, for the right to counsel, for the right to be informed of charges, and to have compulsory process for obtaining witnesses.

Amendment VII - Preserves trial by jury in common law suits where the amount in controversy exceeds twenty dollars.

Amendment VIII - Prohibits excessive bail, excessive fines, and the infliction of "cruel and unusual punishments."

Amendment IX - Answers Hamilton's objections by declaring, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Amendment X - Sets forth the principle of limited powers, stating that "powers not delegated to the United States by the Constitution, nor prohibited it by the States, are reserved to the States respectively, or to the people."

Taken together the first ten amendments go a long way. Thanks especially to their broad language and absence of any list of exceptions, they compare favourably to such modern instruments as the European Convention. Yet the gaps soon enough become glaring. The case of Barron v. Mayor of Baltimore(1833)[51] confirmed that these protections worked only against the federal government; the states in theory could infringe any of these enumerated rights. Likewise, the Bill of Rights says nothing about equal treatment under law, nor about citizenship rights, nor about the right to vote. Most glaring of all, it remained mute concerning slavery.

The Civil War Amendments

It took the Union's victory in the Civil War to redress some of these omissions. The War Between The States, as it is known in the South, was fought over many things, but certainly two issues at stake were the authority of the national government and the status of blacks. In many ways the amendments ratified just after the war represent peace terms imposed by the North on the Confederacy. These amendments have also proven themselves as the basis for an enormous amount of recent civil rights litigation.

Amendment XIII, Section 1 - Ratified in 1865, ended slavery and is short enough to quote in full: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party has been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction."

Unlike other amendments, this one prohibits not just governmental actions, but outlaws a condition and so reaches the activities of private individuals as well.

Amendment XIX, Section 1 - Enacted in 1867, seeks to do three things. First, it defines national citizenship, thereby overruling Scott v. Sandford, the case which denied that blacks could be citizens. Next, it enjoins the states from dealing with any person without "due

process of law." Finally, it prohibits the states from depriving their residents of equal protection of law.

An early decision, The Slaughter-House Cases(1873)[52] shamefully denuded the first clause. In contrast the second two have played an enormous role in rights protection this century and also deserve quotation, "...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Amendment XV, Section 1 - Ratified in 1870, prohibited racial discrimination regarding voting rights and again worth quoting in full: "The right of citizens of the United States to vote shall not be denied by the United States or by any state on account of race, color, or previous condition of servitude."

All three amendments conclude with sections empowering Congress to enforce them "by appropriate legislation." The Supreme Court has defined the limits of Congressional power broadly or narrowly more or less reflecting the mood of the nation.[53] The most recent line of cases goes the broader route, thus allowing Congress to reach private as well as government discrimination. On the other hand the sections just surveyed, like the Bill of Rights, are self-executing, meaning the courts can enforce them even with no legislative back-up. Unfortunately, the self-executing clauses, with the execption of the Thirteenth Amendment, aim only at government actions. Not that this did not have tremendous significance. The Warren Court achieved much of its success by repeated rulings that the "Due Process" clause "incorporated" various provisions of the first ten amendments until nearly the entire Bill of Rights now applies to actions of the states as well. For its part the Thirteenth Amendment received so narrow a reading initially that it played no significant role against racial discrimination, though a recent ruling does appear to have broadened its scope.[54]

All of which points to one further facet of the Civil War Amendments. Textually and conceptually they are untidy and highly susceptible to judicial manipulation. Recent manipulation has expanded rights at a near revolutionary pace; nineteenth century fiddling went the opposite way. On the other hand, this should not imply that the type of elaboration found in the European Convention provides the remedy for such untidiness. One of the strengths of the Constitution lies in its very broad language, which in turn promotes judicial review aggressive enough to enable 100 and 200 year old provisions, for instance,to protect the right to join a union. Indeed many of the elaborations in the European Convention work to restrict it. An in-depth study of the fortunes of the Civil War amendments would serve whoever might draft similar enumerations for Northern Ireland immeasurably.

III APPLICATIONS OF THE BILL OF RIGHTS

The foregoing survey, especially the example of the Fourteenth Amendment, should indicate the impossibility of separating the text of the Constitution from "what the judges say it is." Taking the system and the Constitution's provisions together should place the point beyond all doubt. To begin with, regardless of their content the Bill of Rights and its relations enjoy a status that is deeply entrenched, overseen by an extensive bench and bar, and invigorated by wide powers of judicial review. To this framework are brought a set of specific

enumerations which, while by no means exhaustive, are strong on basic civil liberties and suggestively general. When the framework and the enumerations meet, America's actual human rights protections result, adapt, and grow.

Paradoxically, how the Supreme Court interprets and applies the Bill of Rights offers a Northern Ireland audience what is both most relevant and irrelevant from the American experience. The irrelevancy stems from the individuality of judges and the differences in America's traditions and conditions. Posit the identical Bill of Rights and U.S. methods of enforcement in Northern Ireland and the only safe prediction would be that, concerning the actions of the new Supreme Court, the decisions of the U.S. Supreme Court would provide few predictions.

But American applications do retain a certain value. Not only do they show the actual state of rights in America, they illustrate how a vigorously mooted Bill of Rights handles thorny issues all too familiar in the Six Counties, and for that matter in the rest of Ireland and the U.K. as well.

Of course any adequate account of Bill of Rights applications would require at least as many pages as there are volumes of Supreme Court cases. Only a few areas and doctrines can be mentioned, and then only briefly. It is a testament to the situation in Northern Ireland that the fields where liberties are most precarious -- civil liberties vs. police power -- in the U.S. are among the most securely grounded in protections dating to the 1700s. Freedom of expression offers another area where American protections are vigorous. Somewhat less so, though of no less interest to Northern Ireland, has been the realm of anti-discrimination. Other areas bear less directly on the province's distinctive problems, yet are valuable to consider in themselves and as illustrations of less well-grounded applications. Worthy of mention here are privacy rights, which include the rights of women and gays. Finally, one field both relevant to the troubles and leaving something to be desired in the U.S. comprises group rights.

Civil Liberties And Police Powers

The Bill of Rights gives the Supreme Court ample materials to check police excesses. The Fourth, Fifth, and Eighth Amendments between them cover the range of criminal process, from searches and seizures to guarantees against self-incrimination to jury trials to humane punishment. However important are the applications of these controls against the federal government, a clearer picture of American protections in this field comes through viewing how the Supreme Court has used the Due Process Clause of the Fourteenth Amendment against the states. For one thing this line of decisions is more recent. For another, they tend to show the true frontiers in this area since state and local police departments usually abuse their powers more openly than do federal authorities.

Concerning searches and seizures of persons, their homes, papers, and effects, the Supreme Court has followed the Constitution's clear language that these be not "unreasonable." Justice Frankfurter, writing for a six-three majority, at least in theory applied this standard to the states Amendment in Wolf v. Colorado(1949)[55]. One passage has special immediacy to Northern Ireland:

> The knock at the door, whether by day or night as

> a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples.[56]

Unfortunately the Court, citing among other cases the English precedent of Elias v. Pasmore(1934)[57], undercut its rhetoric by allowing illegally seized evidence to be admitted in criminal prosecutions. Not long afterwards, though, the Court overruled this aspect of its holding in Mapp v. Ohio(1960).[58] Here a woman had been convicted of possessing obscene material after the police burst into her apartment, without a warrant, looking for someone they claimed to be hiding there. This time the Court, also by a six-three majority, threw out the conviction. Citing the federal exclusionary standard in Weeks v. United States(1914)[59], Justice Clark argued that any rule against unreasonable searches and seizures would be "valueless" if the police could use the evidence obtained anyhow. Since Mapp the Court has shown no signs of turning back.

Just what the Court deems "reasonable" depends on circumstances and the judge's own sense of justice. In Beck v. Ohio(1964)[60] the Court ruled that pedestrians have a reasonable expectation of privacy as they walk down the street whereas in Terry v. Ohio(1967)[61], someone "casing" a store in order to rob it may be stopped and frisked. Not surprisingly perhaps, the Court recently held unconstitutional a state statute which gave a policeman discretion to shoot dead a fleeing teenager who did not pose a threat to the community as an unreasonable "seizure."[62] Common to all these cases, the burden of proving the reasonableness of a search in effect rested with the authorities, who in any event must resort to a warrant whenever practicable.

Once the police (reasonably) pick someone up, Bill of Rights protections follow the detained into custody. Two of the Court's most famous decisions come into play here. The Gideon case, as has been seen, guarantees felony defendants the rights to appointed counsel. In addition, follow-up cases have extended this right to certain types of arraignments and preliminary hearings. On the technical level Gideon represented a Due Process incorperation of another Bill of Rights amendment, this time the Fifth.

Molloy v. Hogan(1964)[63] played the same role concerning the well-known Fifth Amendment, though here Miranda v. Arizona(1966)[64] -- familiar to television police show buffs as the source of "Miranda rights" -- justly deserves its fame. Thanks to Miranda, police must inform the accused that they have the right to remain silent, that if he or she waives this right anything said may be used in court, and that anyone accused has a right to counsel which, if unaffordable, will be furnished by the state. More important, like Mapp, Miranda directs that any evidence given either under compulsion or in lieu of the reading of these rights will be tossed out of court.

If anything the rights of the accused once inside a courtroom are more firmly guarded. First among these is the right to a criminal trial by jury, which the Constitution upholds in both Article III and in the Sixth Amendment. In the context of federal cases the Court in the nineteenth century held that these provisions mean the traditional twelve man jury, Thompson v. Utah(1898)[65], and as requiring a unanimous verdict, Maxwell v. Doe(1900)[66]. Via Due Process it applied

these standards to the states in Duncan v. Louisiana(1968)[67]. (Louisiana, thanks to its French origins, is the only state in the Union based on civil law, and so had no tradition of jury trial except for capital crimes.)

Similarly, the Fourteenth Amendment incorporated the Sixth Amendment with regard to the right to a speedy [68], and public [69] trial as well. The same also goes for the right to compulsory process for obtaining favorable witnesses[70] and freedom from double jeopardy[71].

If despite all these safeguards the accused is duly convicted, his or her rights do not entirely get left outside the prison gates, though here, frankly, the Supreme Court does not go all that far in extending Eighth Amendment protections against "cruel and unusual punishments." No case of the lustre of Miranda or Mapp exists. Robinson v. California(1962)[72] did apply the Eighth Amendment to the states, but for the unusual reason of invalidating a statute which punished drug addiction rather than use. Penalizing someone for a disease, the reasoning went, would have been "cruel and unusual." Furman v. Georgia(1972)[73] did prohibit inconsistent application of the death penalty, but since then more regular procedures now enable many states to conduct executions. Hutto v. Finney(19760[74] serves as the most pertinent case to the H-blocks. In it the Court upheld a District Court order forbidding putative isolation for more than 30 days. For the most part, however, the justices leave an often horrendous penal system to the oversight of the lower courts.

Freedom Of Expression

In few countries has freedom of expression been extended as far as in the United States. Within the U.S. the First Amendment -- in particular its protections of speech, press, assembly, and petition -- have been termed "the Constitution's most majestic guarantee."[75] Of course not a few times reality strayed from the ideal, as often as not due to the federal government. In consequence the Fourteenth Amendment plays less of a role here compared to the First Amendment itself. As to the nature of that role, Justice Brandeis best captured the tone of many First Amendment rulings when he said the best remedy for questionable free speech was more free speech.[76]

Lawrence Tribe, Professor of Law at Harvard, attempts to conquer the mountain of free expression cases by positing two types of violations: those aimed at content and those aimed at effect. Of these the first proves the more common and more pernicious. During this century the Court generally meets the challenge through invoking the "clear and present danger" test, which directs that expression must be protected unless imminent harm threatens to follow.[77] Despite some regrettable lapses the passing decades have witnessed an ever more narrow definition of what constitutes a clear and present danger. The test has thus protected IWW literature during the twenties[78], Communists during the fifties[79], and Klansmen during the sixties[80]. In similar fashion the Court threw out a government attempt at prior restraint when it upheld the right of the New York Times and Washington Post to print the sensitive Pentagon Papers during the Vietnam War.[81] Even wearing slogans like "Fuck the Draft" in a courthouse[82] or printing false libel about public officials in good faith today receive judicial protection[83].

Conversely, the Court must also account for several denials of First Amendment protections, particularly under a broad definition of "clear and present danger." These include allowing bans on valid radical statements during World War I and the twenties, not to mention those of Communists during the first shadows of what became the McCarthy era.[84] This last case, Dennis v. United States(1951)[85] temporarily threw out the "clear and present danger" test altogether due to the supposed enormity of domestic communism. Under this extreme and since repudiated approach a party like Sinn Fein in the Northern Ireland context might also have suffered, though the "clear and present danger" doctrine ordinarily in use would most likely protect it. Insofar as associational rights are concerned, the First Amendment would probably have the same effect for paramilitary groups. Proscribed organization laws, in other words, would in all likelihood not pass constitutional muster.

That other common form of activity in Northern Ireland, marching, falls largely into Tribe's other category -- infringements aimed at the effects of free expression. Clearly parading, outdoor speeches, and other forms of expression often incur some degree of public inconvenience and usually require some form of regulation. The Supreme Court commonly deals with this problem by erecting broad protections for "public forums" like streets and parks[86], allows more regulation of activities in "semi-public" forums like schools[87], and gives most latitude of all to regulation of private forums like shopping malls and the broadcast media (though not the editorial content of the latter)[88]. On the other hand, what the First Amendment would seem to give activities like Orange marches, the privacy rights of the Fourteenth Amendment might give to communities not keen on such processions .

Discrimination

Above the entrance of the Supreme Court building in Washington, D.C. are carved the words, "Equal Justice Under Law." The choice of motto was a curious one, in some ways curiously inappropriate. More than a few critics have echoed one legal scholar's observation that "the constitutional commitment to equality is less than complete."[89] The very word "equality" appeared in neither the original Constitution nor the Bill of Rights. It did appear in the aftermath of the Civil War, but only in the Fourteenth Amendment prohibition against states denying "to any person...the equal protection of laws." Nothing as comprehensive as Article 14 of the European Convention has been attempted or even proposed.

The Constitution in short furnishes the Supreme Court with some material to promote equality of legal protections and of opportunity but precious little to combat private discrimination (or, an amazing lapse, discrimination by the federal government!) or unequal distribution of wealth. The latter goals rest on the shakier foundations of Congressional and Executive action.[90]

America's limited approach toward equality should give contemporary rights advocates ample instances of gaps to fill in. That said, it should also illustrate how far judicial review can and cannot push for equality within the constraints of fighting state discrimination, a fight which enjoyed great success in the decades after World War II. Nor is this insignificant, especially insofar as government discrimination against blacks in Mississippi, Georgia, or Massachusetts

might parallel similar policies against Catholics in a devolved Northern Ireland (or, indeed, against Protestants in a united Ireland).

The Supreme Court currently guards against state discrimination first by deciding what "level of scrutiny" it will apply to any government act brought before it which treats different groups or "classes" in different ways. Much of the time the Court, ever conscious of its antimajoritarian potential, defers to the legislature by winking at less fundamental laws under a minimal scrutiny standard. In Williams v. Lee Optical(1955)[91], for example, the justices considered an Oklahoma law which regulated opticians, but not makers of ready-to-wear glasses. Though the law clearly discriminated, the Court allowed it to stand since the issues at stake did not seem to justify overturning the considered wisdom of Oklahoma's representatives. In this type of case the Court often indicates that if a statute makes distinctions that are at least "minimally rational"[92] or have a "conceivable basis"[93] to a legitimate government end, they will stand.

Of special interest to Northern Ireland must be the other end of the spectrum known as "strict scrutiny," those instances in which the Court will place a discriminatory act under the microscope. Acts which "trigger" strict scrutiny must somehow involve, as Tribe puts it, the distribution of "benefits or burdens in a manner inconsistent with fundamental rights."[94] The Court at once justified and heralded equal protection strict scrutiny in the celebrated footnote of Justice Harlan Fiske Stone's opinion in United States v. Carolene Products Co.(1938).[95] There he argued that under the Fourteenth Amendment the Court had to be doubly vigilant in guarding against any law which "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation."[96] The stricture applies to laws affecting voting rights, speech, assembly, as well as those -- and this is the key -- which discriminate against "discrete and insular minorities."[97] In other words the judiciary will protect minority communities from the legislative domination of the majority, especially the type of majority which holds all the political cards.

Both before but especially after Carolene Products, the Court struck down many, though not all, of the ingenious forms of discrimination the states could concoct. Early on the Court tossed out such fairly bald instances of "facially invidious discrimination" as a West Virginia law which denied blacks the right of sitting on juries.[98] Not long after that, in 1886, the Court went beneath the surface and invalidated a municipal ordinance which purported to regulate laundries equally, but which in effect outlawed practices which were mostly used by Chinese.[99] Tragically, the trend did not continue. In the infamous case of Plessy v. Ferguson a majority of the justices bowed to the argument that "separate but equal" facilities for blacks and whites were constitutional.

It took almost sixty years, and with them the emergence of the Carolene rationale, to overrule Plessy with Brown v. Board of Education. There a unanimous Court, upon close examination of the effects of state-mandated school segregation, held that separate educational facilities were inherently unequal and proceeded to apply this view to other facilities as well.[100] Various provisions unequally restricting the right to vote,[101] amd access to the courts[102] met similar fates.

Still, even strict scrutiny has its limits. Chinese laundries notwithstanding, these limits are particularly evident in situations in which government discrimination appears less direct, above all with regard to the interplay of poverty and race. On access to the courts,

for example, essentially the same bench which quashed fees for divorce upheld fees for filing bankruptcy![103] Likewise the Court also deferred to a municipal authority with effectively racist zoning law since there was no apparent intent to discriminate, a decision which cast a pall over civil rights advocacy.[104] In fact the federal judiciary has found school desegregation so difficult to monitor that some local decisions have deferred to the foot-dragging of local authorities in this area as well.[105]

Finally, the Court approaches certain types of discrimination under an "intermediate" level of scrutiny. On the one hand the intermediate standard of review marginally renders gender discrimination somewhat less suspect than that based on race.[106] On the other hand, the recent decision in the emotive case of Bakke v. Regents of the University of California(1977)[107] illustrated that intermediate scrutiny would allow affirmative action programs as rationally related to legitimate government ends. They would be considered closely, but not so closely as to prevent redressing a national legacy of depriving certain race equal rights and opportunities.

Unwritten Rights

The United States Constitution enjoys a special relevance to Northern Ireland, among other reasons, because the situation in the province is in one sense so old-fashioned. The Framers knew all about attacks on free speech and assembly, the dangers from an occupying army, unwarranted searches and seizures, and the denial of a fair day in court. By the same token they were also well aware of the dangers of mobs and internal rebellions. Small wonder, then, that so many provisions in the Bill of Rights in particular appear applicable. Then again, the Framers did not know it all. Some rights, like the freedom to pursue one's vocation, they perhaps took for granted; others, like the freedom of sexual preference, their time culture hardly allowed them to consider. Local headlines notwithstanding, no attempt at human rights protection can be complete without considering these and other challenges which would exist without any troubles. Thanks to the overlap, examining how the U.S. deals with unwritten rights shows not only how a Bill of Rights may and may not adapt to changing times. It will also show how the Court currently attacks dilemmas which, pending some resolution of the province's larger problems, will be at the cutting edge of human rights debate in Ireland as in America.

Unwritten -- the Framers would have said, "unenumerated" -- rights inevitably rest on the most uncertain of foundations. To an extent Hamilton's unsuccessful arguments against a Bill of Rights did prove prophetic. Madison's Ninth Amendment, echoed in Article 17 of the European Convention, purported to underline the point that the Bill of Rights did not constitute an exhaustive or exclusive list of freedoms. Rarely, however, has the Ninth Amendment been cited. Rather, as could be seen in Griswold contraception case, justices locate unenumerated rights in a "here, there, everywhere" sort of hodgepodge. More often than not, though, the Court has relied, again, on the Fourteenth Amendment.

Specifically they rely on a doctrine termed, "Substantive Due Process." Some deprivations of life, liberty and property, the theory goes, violate the guarantee of due process of law in and of themselves, that is, in substance. This can be true even if all established legal procedures have been observed. In Griswold, for example, the statute against contraceptives had been duly passed and those convicted under

it, duly prosecuted. Even those sceptical about unenumerated rights. like future Chief Justice William Rehnquist, accept that Fourteenth Amendment protection of liberty in particular "embraces more than the rights found in the Bill of Rights."[108]

No case better illustrates substantive due process not an issue in the vanguard of rights protection -- some would argue too far -- than Roe v. Wade(1973)[109]. Here the Supreme Court, citing the Fourteenth Amendment, held that the Constitution protects a woman's right to privacy, including "a woman's decision whether or not to terminate her pregnancy."[110] So fundamental is this right, the decision continued, that absent a compelling state interest no state may invade it during the first trimester of pregnancy. Justice Blackmunn adopted the first trimester standard because abortion was shown to be safer than birth to that point and because the foetus could not survive outside the womb. This decision capped a long line of substantive due process cases, more or less starting with Griswold, that extended the right of privacy first to married couples who used contraceptives, then to their use by any individual.[111]

But quirky is the course of judicial review. To the extent that gay rights are less emotive than abortion the Court seemingly should have thrown out state anti-sodomy laws as well. This past term, however, in the case of Bowers v. Hardwick, (1986)[112], the majority refused to extend due process privacy to the practices of consenting adults, and for that matter, refused to invoke strict scrutiny under the Equal Protection Clause.

Of course not all unenumerated rights are so controversial. Strictly speaking the Constitution does not protect the right to freedom or travel, the right to marry, or the right to dress as one wishes. Yet whether on Fourteenth Amendment grounds or citations to other Constitutional provisions, all have received protection to a greater or lesser extent.[113]

In the end no charter of liberty can fully anticipate the future or fill in omissions left by its drafters. A Ninth Amendment style provision would help, and probably many Supreme Court decisions would seem less strained had the justices relied on it from the start. One point, though, should be made. Decisions on unwritten rights have enraged and pleased both left and right. Given the flexibility such holdings breathe into a 200-year old document, these most powerful episodes of judicial review not only seem a reasonable price to pay, in any vigorous system they are probably inevitable.

Group Rights

Northern Ireland numbers one of several situations in which a distinct cultural, religious, or linguistic group lives as a minority community. Historically and currently most charters of liberty on both the national and international level seek to deal with the problems of such groups by insuring common rights for the majority and minorities alike. Another method, however, remains possible -- guaranteeing the rights of a minority as a distinct group.[114] Probably the furthest extension of this tack appears in Article 27 of the United Nations Covenant on Civil and Political Rights. It states:

> In those states in which ethnic, religious, or linguistic minorities exist, persons belonging

> to such minorities shall not be denied the right, in communion with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[115]

Except for the phrase "in communion with other members of their group," the U.N. guarantee still protects a minority group's rights as individuals. Rightly or wrongly the U.S. does not even go this far, procedural devices like class actions notwithstanding.

In this area the Constitution and Bill of Rights continue to be very much the products of the eighteenth century. As such they reflect a philosophy, still potent, which often posited rights in universal terms but did so with reference to individuals. The Declaration of Independence, to be sure, speaks of the necessity of one people dissolving the political bands which unite them with another, the basis for the break is the denial of the liberties of individuals. Likewise, the Constitution makes no distinction among cultural groups. Its protections, needless to say, did not initially apply to groups like women or blacks. But subsequent amendments and Supreme Court rulings alike have sought, however haltingly, to include them by preventing the denial of their rights as individuals on account of their membership in a group. Much still needs doing, but the process continues.

The United States, in other words, acknowledges the rights of members in a group rather than group rights as such. Justice Stone's holding in Carolene Products best illustrates the extent of the American conception. "Prejudice against discrete and insular minorities," he argued, may tend "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which call for a correspondingly more searching judicial inquiry."[116] To the extent that a majority victimizes any group, the Court will impose strict scrutiny. Still, the rights that strict scrutiny usually uphold remain the liberties of individual members of the group, not the group as such.

One interesting exception to all this involves the rights of Indian tribes. Early in its history the Supreme Court confirmed popular and natural law assumptions that tribes enjoyed a quasi-sovereign status and so possessed a certain autonomy from both state and federal legislation.[117] Conversely, the unique history of governmental/tribal relations which produced this judicial stance also makes the tack a non-starter for Northern Ireland.

One final, and in some ways the strongest, American approach to group rights is not substantive but procedural -- the class action. Traceable to equity, the device now enjoys statutory sanction in Rule 23 of the Federal Rule of Civil Procedure. Section (b) of the rule provides how any one of three successively broader classes of litigants might bring a case, or be brought into, court. In practice the rule generally allows plaintiffs who have suffered a common injury to unite in a single suit, the outcome of which would bind all. In this way individuals who might not have either the time or money to see a case through on their own can throw in their lot with a larger group. For those who would rather go it on their own the rule also enables anyone part of a class to "opt-out." A cut from a larger bulk settlement furnishes attorneys the incentive to pursue class actions in cases where small individual suits might not be worth their while.

Among the more famous instances a successful class action came about when a number of lawyers helped form a class comprising thousands of Vietnam veterans. The class sued the manufacturers of Agent Orange, a product which allegedly caused birth defects, cancer, and other diseases in both the soldiers and their families.

As the Agent Orange case implies, an advantage of class actions lies in their providing attorneys with the motivation to litigate for groups the members of which would seldom go to court as individuals. Even so, the device does not add up to a safeguard of group rights along the lines of Article 17. Plaintiff classes most often come about not as cultural entities but literally by accident insofar as many class actions are in tort. Moreover, the nature of judicial review makes the practice less important for cases under a bill of rights. Gideon may have appealed as an individual, but he won his case not only for himself but for all indigent accused. This was so because lower courts are bound to apply the Supreme Court standard and because authorities, knowing this, generally comply on their own.

However much of a new frontier group rights proves to be, the relevance of the American experience is here as limited as it is extensive nearly everyhere else.

CONCLUSION

Relevance of course does not always mean applicability. In the realm of government alone Northern Ireland, the United Kingdom, and the Irish Republic possess traditions and attitudes at points profoundly different from those of the United States. Beyond government the truism that America's isolation aned prosperity -- to say nothing of its exploitation of blacks and immigrants -- make a commitment to rights for the rest of the population possible retains more than a little validity. None of these differences should be underestimated. Nor will they be if opponents of the bill of rights approach have anything to say.

For the supporters of a bill of rights these differences, real and perceived, make for an immediate Catch-22 (to borrow from America once more). On the one hand to champion the features which characterize American human rights protection, thanks to their extreme nature, would inevitably break down any consensus for a bill of rights on this side of the Atlantic. For such pragmatic reasons the Standing Advisory Commission thought it best to aim for the lower mark of incorporating the European Convention, rather than push for a full-fledged charter. But as the Commission also noted, any safeguards which lack teeth would render any bill of rights at best hollow; at worst, provocative.[118]

If an account of the American Bill of Rights has any value at all, it is precisely to identify the features that have made it successful as well as those that make it fall short. Individually or together these features should provide those concerned about rights in Northern Ireland goals which experience has shown to be worth fighting for or worth fighting to extend. The more important factors this paper has dealt with include:

1) As extreme an entrenchment of safeguards as possible; ideally based on some form of popular sovereignty and confirmed through a constitutional convention, referendum, or both.

2) An amending process which makes changes possible only with a considered national consensus.

3) The absence of any possibility of derogation. At most whether to curtail liberties during crises should ultimately be decided by the courts on a case by case basis.

4) The courts themselves should be encouraged to exercise broad powers of judicial review actively.

5) Enforcement of any bill of rights should be the function of as wide a portion of the judiciary as possible.

6) Private groups and individuals rather than government commissions should play the primary role in bringing cases before the courts.

7) The text of any bill of rights should be general enough to adapt to changing circumstances and to be readily quoted and invoked by lawyers and non-lawyers alike.

8) Traditional civil liberties like freedom of expression, the right to a fair trial, security in one's own person and home could find protection in current American-style safeguards.

9) Rights such as equal treatment, an adequate standard of living, sexual preference, and privacy, unlike in the United States, should be accorded explicit protection.

10) Any enumeration of rights should include a declaration that it is not exhaustive.

If even some of these features can survive the thickets of political controversy, the protection of human rights by law in Northern Ireland would render Jefferson's "self-evident truths" far more self-evident than they seem in Northern Ireland today.