Fundamental Rights

History of a Constitutional Doctrine

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For Josef

my son, who maketh a glad father

Proverbs 10:1

Preface

The twentieth century has been witness to many significant, even radical developments in American constitutional law. There was the "court-packing bill" sent by President Franklin D. Roosevelt to Congress in February 1937, there were the New Deal decisions of the Supreme Court that brought to an end the *Lochner* era, there was the Warren Court and the decisions that outlawed racial segregation, there were the Court decisions that established the principle of "one person, one vote." There was the decision that made privacy a constitutionally protected right. There was the decision that outlawed severely restrictive abortion laws. There were the decisions that virtually brought to an end censorship of literature, the stage, and the cinema. There was the case that made separation of church and state a constitutional principle. And there were others. When, however, the constitutional scholar looks at the forest rather than at the trees, he or she sees that the most significant and enduring development has been the extension of the Bill of Rights to the States, the so-called "incorporation" of the most important guarantees of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and the doctrine that there are rights that are so "fundamental" that any restriction is subject to judicial "strict scrutiny." The process has nationalized fundamental rights and has given these rights a preferred dignity and majesty.

This book attempts to tell the story of how fundamental rights have come into the United States Constitution. The development has been a slow and difficult process. It began in the early days of American jurisprudence, long before there was a Fourteenth Amendment, long before the Supreme Court became aware that there was a Due Process Clause. It was only slowly and only step-by-step that the Supreme Court gave life to the term "'liberty" as the word is used in the constitutional phrase "life, liberty and property."

As far as I know, the detailed history of this constitutional development has not been heretofore told. I think that it is eminently worth telling. The historical record brings to the fore the names of some Supreme Court Justices who have suffered an unmerited oblivion, as well as some that are prominent and honored.

The reader will find that there are some repetitions in the book, some cases are mentioned in different chapters, and a few passages are repeated, but this is due to the fact that the same authorities figure in diverse contexts, stand for different propositions. The repetitions are, therefore, intentional and purposeful.

The first chapter is introductory and also may serve as a helpful summary intended to provide a frame within which the following chapters may be more easily read. "A man," Dr. Johnson said to Boswell, "will turn over half a library to make one book"; so, too, a man may turn over half a book to make his first chapter.

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The Idea of *Fundamental* Rights: Is There a Hierarchy of Constitutional Rights and Liberties?

In the famous second Flag Salute Case[1] the Supreme Court held that children of Jehovah's Witnesses, who believed that saluting the flag was a violation of the first of the Ten Commandments, could not constitutionally be compelled to participate in a daily flag salute ceremony at school, required by an act of the West Virginia Legislature. The decision was put on the broad ground that the compulsory flag salute was an invasion of the sphere of intellect and spirit—a sphere protected by the First and Fourteenth Amendments. National unity and patriotism may be fostered by persuasion and example, but there may be no coerced uniformity. Justice Felix Frankfurter, in an impassioned opinion, dissented. The legislation, he said, may be unwise, but the remedy for that should be in the legislature and not in the courts. Much legislation affecting freedom of thought and speech, he said, "should offend a free-spirited society" and is yet constitutional. The Court, he argued, has no constitutional power to give more weight or dignity, to place a higher value, on some rights guaranteed by the Bill of Rights than on others. There is nothing in the Constitution that gives the Court authority to be a more zealous guardian of some rights rather than of some others. "Our power," he said,

> does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation, has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.

Each specific right or liberty guaranteed by the Constitution must be, said Frankfurter, "equally respected," and the function of the Court "does not differ in passing on the constitutionality of legislation challenged under different Amendments."

The judicial history of the half-century since Justice Frankfurter wrote his dissenting opinion is that Frankfurter sadly misdirected his remarkably keen intellect and capacious eloquence. American constitutional law recognizes that, indeed, some rights and liberties enjoy more dignity than others, that some have a higher rank than others and deserve a greater degree of vigilance and protection than do others. I wish to show that this development is philosophically and jurisprudentially justified, and that its roots go further back than the New Deal or the Warren Court.

I.

In the theophany scene at Sinai, the Israelites heard the Ten Commandments.[2] The five commandments that are directed to relations between person and person are not listed in any special order of ranking in importance. One commandment simply follows another. Yet would anyone argue that the eighth commandment, "Neither shall you steal," is equal in importance to the sixth commandment, "You shall not kill"?

Although as formulated and promulgated, all five commandments appear to have equal status, the Mosaic legislation in fact does not treat them as equals, witness the fact that the punishment for murder is death, while for theft of property the penalty is restitution.[3] Obviously, there is in the Mosaic code of laws an implied hierarchy of values—life is more important than property, though this fact cannot be adduced from a mere reading of the Ten Commandments in isolation from the rest of the Pentateuch.

Indeed, as soon as a reflective mind faces a large body of legal enactments, or religious precepts, or moral maxims, or the world of

phenomena, it feels compelled to organize them, to bring them into some order in which first things come first. Thus, e. g., we find in the Mishna (the authoritative code of rabbinic enactments from the 3rd century B. C. E. to the 3rd century C. E.) a formulation of the three beliefs that are to be considered basic in Judaism; namely, the existence of God, revelation, and a belief in retribution after death.[4] When the ancient rabbis considered the vast array of moral prohibitions, they selected three as the most important of all; namely, idolatry (which they associated with immoral pagan practices), incest (or adultery), and murder, and provided that one must not commit any one of these transgressions even under threat of death.[5] When they considered which moral laws ought to be held fundamental for all mankind (pagans or Jews, men or women), they listed seven commandments which they called the Seven Laws revealed to the descendants of Noah, the Noahide Laws.[6]

The leading philosophers and theologians of Judaism concerned themselves with this problem of fundamental laws, principles or doctrines. Philo of Alexandria (20 B. C. E.–50 C. E.) found that there are eight principles that are essential for Judaism.[7] In the Middle Ages, Maimonides (1135–1204) found thirteen articles of faith which he considered the "roots" or the "fundamentals"—the *ikkarim* or *yesodot*—of the religion.[8] Hasdai Crescas (1340–1410) had a more elaborate schema. He held that Judaism has three root principles, below which are six fundamentals of the faith. Then there are eight true beliefs, which are fundamental but not indispensable, and finally there are three true beliefs that are related to specific commandments.[9] Joseph Albo (1380–1444), in his work with the significant title *Sefer ha-Ikkarim* (*Book of Principles*), found only three root principles, from which flow derivative roots, and of an inferior order are six beliefs or *emunot*.[10]

Because Christianity needed to differentiate and separate itself from Judaism, and because it aggressively sought out proselytes, it early in its career placed heavy emphasis on creed, dogma, articles of faith, that would define orthodoxy and reduce the attractiveness of heresies. An encyclopedic survey of public confessions which have been or still were authoritative in various sections of the Christian Church in 1928 found that they exceeded 150![11] Perhaps the earliest was the Old Roman Creed (c. 100), that consisted of only twelve articles. In the third century came the Creed of Antioch. In the same century there was also the Creed of the Didascalia. In the fourth century the Nicene Council

produced the Nicene Creed. The seventh century saw the promulgation of the Athanasian Creed. Looking back over the history of the great creeds, "one is amazed at the comparative simplicity of the great truths thus singled out by the common sense of the Church, through the centuries, as of primary importance."[12]

This is precisely the point that interests us: the search for and singling out what is of prime importance—the truths or values that are indispensable, that are the foundation stones of the superstructure; that there is an order among ideas, and a ranking among them.

II.

The impulse, both speculative and practical, that drives a thinker to seek the basic, fundamental elements of any reality can be clearly seen in the development of pre-Socratic philosophy or science. As Aristotle understood their teachings as they had been transmitted to him, the question that the early Ionian philosophers asked was: What is the basic stuff of which the world is composed?[13] They endeavored to find the answer in a single principle that would account for all qualities and all changes. Thales assumed that the fundamental principle is water. Anaximenes thought that the primary substance is air. The Pythagoreans asserted that numbers are the primary causes of things. Heraclitus taught that fire is the basic principle of substance. Leucippus and Democritus taught that numberless atoms are the fundamental stuff of which the world is made.[14]

The urge or incentive that drove the ancient philosophers to seek the elements fundamental to all reality is one that contemporary scientists share with their intellectual forebears. This drive for metaphysical or scientific fundamentals is not essentially different from the compulsion felt by theologians to formulate the essentials or primary, fundamental beliefs of a religious faith. And what compels theologians, metaphysicians, philosophers and scientists to seek fundamental truths also drives moral philosophers to try to formulate the fundamental moral qualities of man.

Thus, in classical Greek moral philosophy, as Plato implies in the *Republic*, four virtues were thought to be fundamental; namely, wisdom, courage, temperance, and justice. Plato adopted these virtues as comprising the essence of morality, as the primary qualities of virtue, which is the health of the soul. The Stoics adopted the Platonic canon

of the four cardinal virtues, and made them the center of their teaching. (Cicero in *De Officiis* became for the Renaissance a prime source of the knowledge of the Platonic/Stoic virtues.) Early Greek and Latin Fathers of the Catholic Church adopted these pagan doctrines and gave them a Christian habitation and a name by attaching them to the Pauline triad of faith, hope, and charity. The result was that in time the Church taught that there are seven chief virtues: the four cardinal virtues that were known to pagans and that were now labeled as "natural," and the three preached by Paul and claimed to be "supernatural." Thomas Aquinas, however, adopted and assimilated the cardinal "natural" virtues and spoke of them, too, as supernatural, derived from the divine gifts of love.[15]

III.

From this brief review of the history of ideas in theology, philosophy, morality, and science it should be clear that a disciplined mind is forced to try to penetrate through a complex mass of ideas in order to reach concepts or propositions that point up the essential character of the mass of facts or ideas, disclosing what is relevant and what is irrelevant, what is important and what is only marginal, what is indispensable and what can be rejected. Indeed, as Socrates, Plato, and Aristotle contended, this is the very nature of conceptualization or thought, for a concept is an idea of something formed by mentally combining those characteristics that distinguish it from other things. This is the mental, intellectual process whether we try to define chair, ant, man, or, say, Christianity, virtue or goodness. As the process of conceptualization becomes more complex, as we try to reach the essential nature of, e. g., Judaism or Christianity, we feel compelled to find the root ideas without which other ideas would not follow, ideas that are basic as a foundation is basic to a house, a basic principle that serves as the groundwork on which the superstructure can be erected, or the primary idea from which other ideas can be deduced.

As used in the law, however, the term "fundamental" does not always have a precise meaning. It is at times used in an honorific sense, to underscore the importance of the idea or value in question, and it may suffice for the purpose and in the context in which it is used. It may contribute some intelligibility to a classification, it may make some decisions more predictable; it may help bring decisions or

principles into a larger order of consistency. It may be used, not to describe or explain, but to guide conduct. It may express a wish or hope.[16]

In any case, we should bear in mind the wise counsel of Aristotle, that in studying this subject, we must be content if we attain "as high degree of certainty as the matter of it admits. The same accuracy or finish is not to be looked for in all discussions any more than in all the productions of the studio and workshop."[17] Besides, as William James noted, there is something to be said in favor of the vague, the imprecise, the indefinite.

IV.

When we turn to a consideration of the Bill of Rights of the United States Constitution, we are at once faced with the identical problem that we saw as we looked at the Ten Commandments. The First Amendment guarantees freedom of speech, press, assembly, religion, and petition. The Seventh Amendment provides that in civil suits, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. Are these guarantees of equal dignity and worth? Despite the eloquent argument in Frankfurter's dissenting opinion in the second Flag Salute Case, I submit that they are no more of equal worth than are the prohibition on murder and on theft in the Ten Commandments. Yet the Bill of Rights makes no distinction between them. It became the task of the Supreme Court to classify the rights and liberties that are constitutionally guaranteed and place them in some reasonable order of dignity; and the process of sifting, weighing, and measuring them is an on-going and never-ending process. For values are always being reconsidered as new values arise and clamor for recognition, though the wording of the Bill of Rights remains *largely* unchanged.

It is not only that the rights guaranteed by the Constitution are subject to careful sifting and ordering, but, it is important to note, also that the Bill of Rights is itself the result of such a process—a process that began early in the Colonial period.

The pioneers to America's shores insisted on having written, binding charters and covenants that would guarantee them perpetual and unchangeable civil liberties. They insisted on having, in writing, guar-

antees of the writ of habeas corpus, trial by jury, right of counsel, a prohibition against excessive bail, the privilege against self-incrimination, freedom of speech and press, and a substantial measure of religious liberty. As early as 1639 the General Assembly of colonial Maryland adopted what it significantly called the "Act for the Liberties of the people," that reinforced the charter of 1632 and declared that all Christians in the colony

> Shall have and enjoy all such rights liberties immunities privileges and free customs . . . as any naturall born subject of England hath or ought to have or enjoy.[18]

In 1641 Nathaniel Ward drafted for the Massachusetts Bay Colony what was called the Body of Liberties—virtually a Bill of Rights. It provided that every person in the colony, inhabitant or foreigner, was entitled to equal protection of the law; that freemen had the right of petition; that an accused person was protected by the writ of habeas corpus; that "inhumane Barbarous or cruel" punishment was prohibited; that an accused person was permitted to have counsel; that husbands were prohibited from inflicting on their wives "bodilie correction or stripes" (unless administered in self-defense should she assault him); and it expressly recognized the right of emigration.[19] By the end of the seventeenth century there were charters of rights and liberties in at least seven of the thirteen American colonies.[20]

When the colonies had become independent sovereign states, following the Declaration of Independence in 1776, Virginia became the first state to adopt a written constitution and a Declaration of Rights—the latter drafted by George Mason—and by 1784 seven states had followed the example set by Virginia, and the remaining five states provided for the substance of personal liberty in the main body of their constitutions.[21]

Because of this panoply of guarantees of civil liberty by the states themselves, there was no groundswell of sentiment for a bill of rights at the Constitutional Convention. There was no felt need for it. In addition, there was the argument that since the Federal Government would have only specific, enumerated rights or powers, and all other rights or powers would be retained by the states or the people, there was no need to provide that the new government should not have certain powers, e. g., should have no power to curtail religious liberty

or freedom of the press. Still, there were important leaders—Thomas Jefferson, George Mason, Eldridge Gerry, James Madison—who contended that a bill of rights was advisable, if not indispensable; and state conventions called to ratify the Constitution clamored for amendments that would constitute a bill of rights, and some of the state conventions even made specific proposals.[22] In all, 124 amendments were submitted by the states.[23] In the first Congress, Madison introduced eight resolutions, only five of which were relevant to a bill of rights. The House of Representatives adopted seventeen proposals; the senate rejected two and consolidated the remainder to twelve, and these were accepted by the House and were submitted to the states, which ratified only ten, which have come to be known as the Bill of Rights.[24]

A point to be noted is that the process of deciding what rights and liberties are fundamental, indispensable, and which ones may be important but are not imperative, was not begun by the Supreme Court. The process has a long history that can be traced back to the early years of the American colonies, and even back to the Mayflower Compact of 1620, by which the Pilgrims covenanted to enact only "just and equal laws, Ordinances, Acts, Constitutions, and Offices."[25] Madison, who was mainly responsible for the framing and enactment of the Bill of Rights, spoke of "the great rights, the trial by jury, freedom of the press, . . . liberty of conscience." He did not speak in such superlative terms of other guarantees, although willing to provide for them in the amendments.[26]

V.

The first attempt by a Justice of the Supreme Court to formulate explicitly the idea of fundamental rights was made in 1823, thirty-four years after the United States Constitution was ratified. Justice Bushrod Washington, sitting on circuit, had before him the case of *Corfield* v. *Coryell*,[27] that involved the question whether the State of New Jersey was constitutionally required to allow citizens of other states to gather shellfish in its waters. Article IV, Section 2, of the Constitution has a Privileges and Immunities Clause that provides that "[the] citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." "The inquiry is," wrote Justice Washington,

> what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, . . . "

Justice Washington then specified the following rights as "fundamental" within the above description:

> protection by the government;
> "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety";
> the right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise;
> the benefits of the writ of habeas corpus;
> to institute or maintain actions in the courts of the State;
> to take, hold and dispose of property;
> exemption from higher taxes than those paid by other citizens of the State.

At the time Justice Washington wrote his opinion, the Natural Law-Natural Rights theory was widely held, by some Justices of the Supreme Court, some members of Congress, and leading abolitionists.[28] And it has been responsibly said:

> If it had been accepted by the Court, this theory [as formulated by Justice Washington] might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the due process and equal protection clauses of the Fourteenth Amendment, but it was firmly rejected by the Court.[29]

The list of rights designated as "fundamental" by Justice Washington fails to mention rights which today come readily to mind, such as religious liberty, freedom of speech and press. One reason for the omission is that he was deciding a case in 1823, more than a century before the Court had begun to make applicable to the states the rights guaranteed by the Bill of Rights. Secondly, Justice Washington concentrated his thoughts on the rights that he considered to be inherent in the concept of citizenship in a democratic country, "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." In any case, it is noteworthy that, in addition to citing some examples of what he con-

sidered to be fundamental—specific rights,—he resorted to the Declaration of Independence to say that citizens have the fundamental right to "the enjoyment of life and liberty, . . . and to pursue and obtain happiness and safety." He thus used the broadest possible terms, words into which one may be free to read specific rights essential to life, liberty, and happiness, like those enumerated in the Bill of Rights and even more. Justice Bushrod Washington thus deserves honor for being the first Supreme Court Justice to open up the inquiry into the subject of fundamental rights—rights which are, "in their nature, fundamental; which belong, of right, to the citizens [only we would today say "people"] of all free governments." This is no small honor.

VI.

Although Justice Bushrod Washington was the first Justice of the Supreme Court to single out certain rights and liberties—or certain privileges and immunities—as fundamental, it was James Madison who first singled out certain rights as being preeminently important, while certain others, though essential, were not to be thought of as "natural rights."

On June 8, 1789, Madison moved in the first Congress of the United States that a select committee be appointed to consider and report on amendments to the Constitution. Then he proceeded to speak about eight amendments that he would sponsor. Of these, five proposals contained what were to become the Bill of Rights. In the course of his presentation he had occasion to mention "the three great rights, the trial by jury, freedom of the press, or liberty of conscience. . . . " These, to Madison, were the most important, the most basic, the most highly prized rights or liberties. Then he said that the "freedom of the press and rights of conscience, those choicest privileges of the people," though unguarded in the British Constitution, must be safeguarded by the U. S. Constitution. Madison then divided bills of rights into five categories, of which only the following two are relevant for our purpose:

3. Those specifying the rights retained by the people when particular powers are given up to be exercised by the Legislature.
4. Those that seem to result from the nature of the social compact, such as trial by jury, which cannot be considered as a natural right yet is no less essential to securing the liberty of the people.