

200 Years of American Constitutionalism— A Foreign Perspective*

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I feel a certain sense of presumption in undertaking to address you upon this subject. I was very flattered by your invitation to do so and to some extent my presence here represents the triumph of vanity over prudence. However, I address you as a member of the judiciary of a very small country—one which is the most westerly country of Europe. The historical, cultural, and political ties which bind our two countries are close. Being on the western edge of Europe and because of our close associations with the United States of America, we enjoy to some extent a front seat view of what goes on in your great country. In Ireland we are affected only after an interval of time by the great movements which emanate from the United States on our west, or from mainland Europe on our east. The waves of these great movements are somewhat diminished in intensity before they reach our shores. This has two results. First, reaction is delayed by the unavoidable time lag. Second, the time lag gives us the benefit of being able to study the immediate effects as well as the modifications which can be discerned in the areas from which these tides have come. Such an appreciation of these effects is based on our own values. Thus, any views I offer to you must be taken as being subjective both from a national and personal point of view, but particularly from the latter.

It is, however, with some degree of confidence that I venture to offer you some reflections and observations upon American constitutionalism because for very many years I have been drawing upon it as an aid and instrument in my own decision making in constitutional decisions. When I speak of American constitutionalism I include within that phrase all the sentiments contained in the Declaration of Independence as well as the Constitution and the case law and jurisprudence which have developed the interpretation of that great Constitution. I am aware that important constitutional decisions can create considerable excitement in your country, but they also create a considerable excitement in my own and other countries and, indeed, in European countries in which English is not the spoken language. The following quotation illustrates the excitement of the author as well as of the public. This passage appeared in the well-known British periodical *The Economist* during the period of the late President Truman's efforts to take over the steel industry in 1952.

At the first sound of a New Argument over the United States Constitution and its interpretation, the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Hâfleur, they stand like greyhounds in the slips, straining upon the start. Last week the old bugle note rang out clear and thrilling, to call the Americans to a fresh debate on the Constitution.¹

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1. *American Survey—Steel Puts The Question*, THE ECONOMIST, May 10, 1952.

In my own case I find myself enjoying the happy coincidence of addressing you on the eve of the bicentennial of your Constitution and on the eve of the 50th anniversary of our own. The Constitution of Ireland owes a great deal, not merely in its text, but also to a very great extent in its interpretation to American constitutionalism. So we have the interesting comparison of the United States, a relatively young country in the history of the world but with a Constitution approaching its 200th anniversary, with Ireland, a very old country in world terms though not very old as an independent state, with a 50-year-old Constitution.

I approach the examination of all law cases with a certain philosophical approach to the law itself. Perhaps it will surprise you that my first philosophical reaction to American constitutionalism is that I regard it as imbued with natural law concepts. I am partly conditioned to this point of view by the fact that only about ten years separated your Declaration of Independence and your Constitution. It is scarcely necessary for me to recall to you the part of the Declaration which states as a self-evident truth, that "all men are created equal."² More importantly, however, is the vital phrase which speaks of men being "endowed by their creator" with certain inalienable rights. That statement was an assertion of something which indicated that the founding fathers had in mind matters which were beyond the reach of positive law namely, "certain inalienable rights." Many years later Abraham Lincoln said that the American Declaration of Independence was intended to include all men, and was not intended to say that all men are equal in all respects. He went on to say of the authors of the Declaration: "They defined with tolerable distinction in what respects they did consider all men created equal—equal with 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant."³

He went on to point out that they had meant to declare the right so that the enforcement might follow as fast as circumstances would permit. These provisions of the Declaration of Independence, and the sentiments expressed by Abraham Lincoln, indicate to me that his approach was a philosophical one. In other words, he was speaking of the function of your constitutionalism and of your laws to guarantee what are fundamental human rights and not rights created by any positive law. Those human rights are expressed to be above all positive law. That is why in looking at the subject from my own standpoint I see that these sentiments and provisions, coupled with the provisions of the ninth amendment of the United States Constitution, acknowledge the existence of these human rights as rights which man enjoys because he is man and that American constitutionalism guarantees his continued enjoyment of these rights. This is why I see that fundamentally your constitutionalism is based on the acceptance of natural law concepts.

In the Constitution of Ireland one also finds that natural law rights are guaranteed. The Irish Constitution does not claim to confer them, but undertakes to guarantee and protect them, whether they be the few which are specified in the

2. The Declaration of Independence para. 2 (U.S. 1776).

3. Speech by Abraham Lincoln on the *Dred Scott* decision (June 26, 1857 Springfield, Illinois), printed in R. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 352 (1946) [hereinafter cited as Lincoln speech].

Constitution or the great number which are unenumerated.⁴ I see both constitutions as documents which recognize that human rights are the prerogative of the human person. It is of interest to note that the Constitution of Ireland, having provided that "all citizens shall, as human persons, be held equal before the law," goes on in effect to reflect what Lincoln said,⁵ by the provision that "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."⁶

In 1989, we shall celebrate the bicentennial of the French Declaration of the Rights of Man and of Citizen. This Declaration claimed that the rights were not a gift from society but were antecedent to society. It has been claimed that an essential difference between the French and American approaches was that in France freedom was regarded as freedom through the law; whereas, in the United States, it was regarded as freedom from the law. Be that as it may, the essential ingredient of both documents was the acknowledgment of the inherent nature of human rights.

What is very interesting is that American constitutionalism springs from a period when society was not very complex. Perhaps that is why its contribution to human thought has been all the more valuable. By springing from a relatively simple form of society, the very simplicity of life aided a clearer understanding of the truth. This philosophy of the founding fathers appears to reflect their own intuition. It matters not whether they were conscious that they were following a line of thought traceable back to ancient Greek thought and philosophy.⁷ This philosophical outlook appears to me to have informed all that came afterwards in the development of American constitutionalism. Thus it was the very antithesis of that legal philosophy which became so popular in England after the beginning of the 19th century, namely, the doctrine of legal positivism. In its most extreme form it was, as indeed Jeremy Bentham, himself a utilitarian, put it: "Rights are, then, the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law."⁸ The law to which he was referring was man-made or positive law. This thesis had already been rejected by your forefathers and never seems to have gained any foothold in United States jurisprudence, perhaps because the common law was established in America in the early 17th century when it had not yet rejected natural law. Perhaps it might be said that my perspective in this subject is coloured somewhat by the fact that the Constitution of Ireland, which I am called upon as a Justice of the Supreme Court frequently to interpret, is one which in its most important articles—namely those dealing with fundamental rights—is clearly based upon natural law concepts. Perhaps that predisposes me to see the same in American constitutionalism. However, for the reasons I have given, I believe there is some validity in my perception of your constitutional philosophy. I think the same could be said of the perspective of persons trained in the civil law tradition.

4. *Ryan v. Attorney General*, 1965 I.R. 294.

5. Lincoln speech, *supra* note 3.

6. IRELAND CONST. art. 40, § 1.

7. They did know the writings of John Locke who was influenced by scholastic philosophy.

8. 3 THE WORKS OF JEREMY BENTHAM 221 (J. Bowring ed. 1943).

It is of interest to me to compare the preambles of our respective constitutions. Yours is a relatively short preamble and to the point, while ours is somewhat longer. In neither case is the preamble part of the constitution yet, in each case, it can be said that the preamble "walks before it." In each case there is the solemn proclamation of the fact that the sovereign power is the people. The United States Constitution proclaims that "we, the people . . . do ordain and establish this Constitution for the United States of America,"⁹ while the Irish Constitution proclaims, "we the people . . . [d]o hereby adopt, enact, and give to ourselves this Constitution."¹⁰ For the United States the preamble includes the promotion "of the general welfare" as one of the purposes of the Constitution, and the Irish preamble uses an almost identical phrase in speaking of the promotion of the "common good."

I am quite accustomed to the classical exposition of the separation of powers. It is expressly spelled out in the Constitution of Ireland, which at its inauguration had had the benefit and experience of the 150 years of your constitutionalism. It has been said that the doctrine of the separation of powers is the great structural principle of American constitutional law. When your forefathers set out to develop this great structural principle, they were for the first time giving it the force of law and were thus opening up a new constitutionalism. A brief fifty years ago we reflected this in our own constitution.¹¹ We were influenced not merely in the statement of this, but in its development and interpretation by the experience of the United States Constitution. Nowhere has the American influence been greater than in the area of the judicial branch of government. The power of judicial review was written into the Constitution of Ireland. Chief Justice Marshall's assertion that the judicial power is a coordinate of government was taken to heart. One may emphasize the importance of this by pointing out that in your own constitutional jurisprudence, were it not for the famous decision in *Marbury v. Madison*¹² your constitution would have been fifty years old before the first assertion of judicial review was made, which was in the *Dred Scott v. Sanford*¹³ case. Indeed, there was an interval of thirty years between the decision in *Marbury v. Madison* and the *Dred Scott* decision.

To all foreigners, the most striking thing about your constitutional history is the assertion of the judicial power or the power of judicial review. In my own country we started with the benefit of the United States experience. We had this power expressly written into the Constitution of Ireland. It also now appears in some more recent European constitutions. While we now take this for granted, we also appreciate that it was not always taken for granted in the United States, whose example we have followed. It is, however, correct that prior to the decision in *Marbury v. Madison* there was a widespread assumption that the constitutionality of legislation was a judicial question. But there always remained some doubt about it until the decision in *Marbury v. Madison*. Perhaps even to this day there may be some who question

9. U.S. CONST. preamble.

10. IRELAND CONST. preamble.

11. Though we did not reflect this in every detail. In Ireland the members of the executive branch of government must also be members of the legislative branch.

12. 5 U.S. (1 Cranch) 137 (1803).

13. 60 U.S. (19 How.) 393 (1857).

the legitimacy of such a doctrine, although one would have thought it was a self-evident truth. It is because of this that some countries have gone out of their way to expressly exclude judicial review from their courts. In Israel, for example, there is no written constitution because of the unwillingness to deal with this question of judicial review. Those of you who have read the correspondence between the late Mr. David Ben-Gurion and the late Professor Cahn will appreciate the point of view which was asserted by Mr. Ben-Gurion to the effect that it would be undemocratic for anybody to have the power to review the acts of a popularly elected parliament. Perhaps your founding fathers recalled the words spoken by a bishop preaching in 1717 before George I of England who said: "Whoever hath an absolute authority to interpret any written or spoken law; it is he who is truly the law giver to all intents and purposes, and not the person who first wrote and spoke them."¹⁴ These were words which probably brought little joy to politicians and, perhaps, even less joy to some timorous judges. Prior to that, the famous Lord Coke had unsuccessfully sought in England to establish the authority of the common law to cure the aberrations of Parliament. He said:

It appears in our books that in many cases the common law will control Acts of Parliament and sometimes it judges them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and will judge such Act to be void.¹⁵

However, this bold assertion was never translated into practice. This assertion was later described by Professor Pollock, when English law was well in the grip of legal positivism, as "a typical example of the sweeping nature and the inaccuracy of Coke's statements."¹⁶ Nevertheless, all of these stirring ideas were most probably well-known to your founding fathers. Thus when the great case of *Marbury v. Madison* arose, the basic idea was neither unfamiliar nor repugnant to American legal philosophy.

This decision was probably one of the greatest, if not the most important decision ever handed down by a court. Yet, to a foreign observer, this landmark case had many unusual and even curious aspects. If the case were to be heard today it is most probable that Chief Justice Marshall might be expected to disqualify himself. Relatively speaking, the controversy itself was not of any great importance. First, it concerned only some minor positions as justices of the peace in the District of Columbia, who were appointed for a limited period of five years. Second, it was an original proceeding and not an appeal from another tribunal. The Supreme Court tried the case pursuant to its original jurisdiction, listening to witnesses and reading affidavits. Third, and most remarkably, the one person who knew all about the facts was the Chief Justice himself. He had been the last Secretary of State in the closing days of President Adams' term of office, and had served both as Secretary of State and as Chief Justice. Experience in this dual role must have aided him very much in

14. Bishop Hoadley, Sermon preached before the King (1717).

15. Dr. Bonham's Case, 77 Eng. Rep. 646, 8 Coke 114a (C.P. 1610).

16. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 250 (1896).

appreciating the political interests which were at stake. Nevertheless, the stark simplicity of the view of Chief Justice Marshall was that the Constitution existed to control some things and to guarantee certain rights. Because it was the fundamental law of the state, if it could be bypassed or ignored, the system would make no sense. This is the simple truth which passed into history. The unusual aspects of Marshall's personal position have faded from memory. Yet simple though it was (although it appears that the full impact of this judgment may not have been fully grasped by everybody), its influence became immense. The fact that my own country has in the brief span of fifty years advanced very rapidly along the road of judicial review, is undoubtedly due to the development of American constitutional jurisprudence and to the immediate availability of the case law of the United States Supreme Court. Canada, which has only very recently adopted a bill of rights, is already at an even greater speed, so I am told, reaping the benefits of American constitutionalism in this field of law. In this manner the jurists of many countries, including my own, can reap immediately the benefits of the extensive harvest of American jurisprudence.

Unlike the position in countries in which it is asserted that judicial review is contrary to democracy or to democratic rule by a popularly elected parliament, the great strength of the United States Constitution is that the fundamental law or the rules which govern the country cannot be changed every time the elected representatives might wish to do so. Experience has shown that legislation hastily enacted as a reaction to the last outrage or the last heartbreak proves to be unwise. Your Constitution prevents that kind of instant reaction. That is one reason why it is so highly esteemed throughout the world and why so many countries seek to imitate it. Those of us who, as part of our judicial function, engage in judicial review could not, in all honesty, say that our experience could lead us to subscribe to Justice Oliver Wendell Holmes' assertion that "legislatures are the ultimate guardians of the liberties and the welfare of the people in quite as great a degree as the Courts."¹⁷ Legislators are the guardians of the liberties and the welfare of the people, but they are so not by choice but by the injunction of the Constitution.

What is most striking to a foreign observer is to note with what great success your system has coped with the size of your country and the diversity of your society. Not only is your country geographically very large, but also it is a country which in its formative years had a polyglot society—a nation created from peoples of very different cultural backgrounds, different experiences, and even different languages—all gathered together in little more than a century and a half to form one nation. It would be difficult to conceive of any greater success which could be attributed to a constitution than the success which your Constitution has had by binding together all these peoples and guaranteeing to all of them freedom from injustice. Human experience does not support the view that one should have complete faith in popular majorities, especially if the majority is a hastily gathered one. On the contrary, experience has shown that in the short run popular majorities have often been indifferent or even hostile to other democratic values. I believe that the late Chief

17. *Missouri, Ka. & Tex. Ry. v. May*, 194 U.S. 267, 270 (1904).

Justice Earl Warren is on record as having said that if the Bill of Rights were to be now submitted to the electorate it probably would not be passed.

Your Constitution has proved that judicial supervision is in the interests of democracy, even without every fine detail being spelled out. It is the broad sweep of the principles enunciated which guarantee the liberties of the people.

Some interesting aspects of the technical operation of judicial review arise from time to time. Unlike the United States, we in Ireland do not require that some other justiciable controversy exist before raising the question of the constitutionality of some law. In our legal system the declaratory action is the most popular form of challenging the constitutional validity of legislation. One requires a certain *locus standi*, but once there is any appreciable interest, that is sufficient. While we have not yet reached the point of adopting *actio popularis*, we have come very close to it. A question of interest to both of our countries is what happens to statutes which are declared to be invalid. This I believe to have been an interesting question in the United States. In 1923, the Supreme Court ruled that the District of Columbia minimum wage law was unconstitutional.¹⁸ In 1937, in a case sustaining a similar law, the Court formally overruled the 1923 decision.¹⁹ The Attorney General had advised that the 1923 ruling had simply suspended the enforcement. But the question was whether the act was valid and enforceable after the 1937 decision. The argument was that while the statute still remained in the statute book, it could be revived. In 1940, in another case, the U.S. Supreme Court held that an unappealed decision applying federal statutes had become *res judicata* despite a subsequent Supreme Court ruling that the law itself was unconstitutional.²⁰ Chief Justice Hughes stated that "a principle of absolute retroactive invalidity cannot be justified."²¹ This is a particularly interesting viewpoint because, unlike your Constitution, the Irish Constitution does not adopt the American doctrine of prospective overruling. This is because of the wording of our respective constitutions. Your Constitution does not speak of "invalidity" of a statute, whereas the Constitution of Ireland does so. Therefore, in Ireland, when the Supreme Court states, in the words of the formula provided by the Constitution itself, that some statute is invalid "having regard to the provisions of this Constitution,"²² it means that it was never valid. Therefore, it would be quite impossible for a doctrine of prospective overruling to evolve. The American doctrine is a very useful one and one which would be equally useful in my own country. But for the reasons stated, the wording of the Irish Constitution would not permit its adoption. Consequently, the Supreme Court of Ireland has occasionally confined the benefits of its decisions to persons who have already instituted legal proceedings. One example is the Court's decisions in striking down income tax laws. In such cases, those who have already paid their income tax pursuant to an unconstitutional tax law are prevented from recovering, on the grounds that they

18. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

19. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

20. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

21. *Id.* at 374.

22. IRELAND CONST. art. 34 § 4 cl.4.

should have brought their own proceedings. The effect of this strategem is, of course, to foreclose vast claims for repayment of tax already paid. However, it also gives an advantage to the tax defaulter, at the expense of the citizen who promptly paid his taxes before the unconstitutionality was established.

One aspect of American constitutional law which has attracted a great deal of attention abroad is the political effect of the exercise of judicial power. There are, obviously, considerable political effects resulting from some decisions. In such cases the exercise of the supreme judicial power must necessarily result in some political friction. Mr. Justice Brandeis obviously was of the same opinion when he said that the separation of powers adopted in 1787 was not to promote efficiency, but to preclude the exercise of arbitrary power. "The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."²³

You in the United States, and we abroad, have had many occasions to observe the political friction and even social friction which has developed from your Supreme Court decisions. In my own country, in our own small way, we have had the same experience.

Nevertheless, as I read your Constitution (and indeed my own) both the Executive and the Legislature have a clear duty not to act consciously in violation of the Constitution. To that extent they must interpret it as best they can. Nevertheless, in the last analysis it is the judiciary which remains the protector of all of the rights guaranteed by the Constitution. It is not a question of whether the other organs of government acted in bad faith or in good faith; the only question is whether they were right or wrong in their understanding of what they could do within the constitution. This is not a view universally shared, particularly among many European countries. For example, in Sweden, the power of judicial review does not exist. Recently, the Constitutional Committee of the Swedish Parliament, at a meeting in Strasbourg with members of the European Court of Human Rights, made clear that they looked with great disfavour upon judicial review and stated quite boldly that in their view, parliaments should be able to enact laws so perfect that no court interpretation would be needed.

It seems to me that your Constitution has in many respects, and in particular in the protection of fundamental rights, articles which are self-executing. That is to say, articles which do not require the assistance of legislative provisions to give them force. We in Ireland have taken the same view, essentially based upon the maxim *ubi jus ibi remedium*. We can also enforce constitutional rights in suits between private parties, that is to say suits in which the government is not a party. It appears to be quite clear from your jurisprudence that rights are meaningless unless they can be enforced. This points up an essential difference between the approach of American constitutionalism and that of certain western countries on the one hand, and the

23. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

approach of totalitarian states on the other hand. A number of these latter states guarantee their citizens many constitutional rights,²⁴ but, in practice, these rights are never enforced. To that extent agreements touching on human rights, for example, like the Helsinki Accords,²⁵ lie fallow. Unlike the position in the United States, the judicial function in such countries remains ineffective to control the other organs of government without the express authority of those other organs. Indeed, even in some Western European democracies the power of judicial review is excluded.

While your Constitution, like ours, does not take the form of a listing of specific rights, it does specify some particular rights. However, in our own constitutional jurisprudence, we have by judicial decision stated in much the same terms as appears in your ninth amendment, that there are unspecified rights which the Irish Constitution will protect if called upon, even though some of these rights may not have been contemplated when the Constitution was adopted. It appears that your ninth amendment leaves the courts in the United States free to discover "new rights"; that is to say, rights which are not in a strict sense "new," but rights which have remained dormant because they have never been asserted. Modern conditions of life create new problems and new situations which were not envisaged many years ago. These can manifestly give rise to infringements of human rights in one form or another. Your ninth amendment, in addition to the expressed rights in the other articles of your Constitution, appears to give your courts an open-ended power to discern what rights are involved and to protect them. Without this judicial ability there would be no ultimate protection against what one might call "administrative depravity." Therefore, there must necessarily arise from time to time questions of a social, economic, and ethical complexity formerly unknown. Thus, the field of potential conflict can be quite large.

In other countries great interest has been taken in your constitutional conflicts concerning economic matters, particularly during the New Deal period of American history. In Europe, the main tendency has been, as it has been in your own country, to think primarily in terms of personal liberty and the more immediate effects upon it of various administrative and legislative acts. But in recent years Ireland and other countries have experienced the action of constitutional guarantees upon economic or fiscal policies. Several years ago the Canadian Supreme Court struck down certain measures taken by the Canadian Government to combat inflation, on the grounds that the measures went beyond what was necessary.²⁶ It is clear that in any country all such justiciable controversies are very sensitive matters. The courts have to avoid being placed in the position of "second guessing" the executive in highly specialized matters. Nevertheless, on some occasions judicial action is called for even if it does leave the courts open to the accusation that they are meddling in the affairs of the executive.

One aspect of American constitutionalism which puzzles many foreigners is the breadth and scope of the powers of your Congressional committees. In our own system

24. See, e.g., Konst. SSSR art. 118-28 (USSR).

25. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.R.M. 1292 (1975).

26. In re Anti-Inflation Act, 68 D. L. R.3d 452 (1976).

we have held that such parliamentary committees, which inquire into various things, must not infringe the constitutionally protected rights of the persons called to appear before them. Therefore, it comes as a surprise that the ordinary "due process" protection does not appear to be available to persons called before your Congressional hearings and inquiries. I may be wrong in this interpretation, but that is the impression which is often given, at least by the newspaper accounts of such proceedings.

Of special occupational interest to me as a judge is your impeachment procedure. The Irish Constitution provides that a judge can be removed only for "stated misbehaviour or incapacity"²⁷ by a vote of both Houses of Parliament, that is to say, the House of Representatives and the Senate. In fact, we have never had such a case. Speaking for myself, it appears that that would not leave open to our Parliament the power to act arbitrarily, and the activities of Parliament in such an affair could be reviewed by the courts if what was stated to be misbehaviour or incapacity could not reasonably be held to such. Yet it appears to me that under the American system the power of Congress to impeach a judge is not subject to judicial review.²⁸ Are not judges entitled to equal protection against possible injustice?

In your jurisprudence we have also noted with interest the various cases which have arisen in the field of what you call "apportionment" of electoral areas.²⁹ You have had cases where the allegation was made that rural areas or urban areas, as the case may be, were unfairly weighted or underweighted. Such cases go to the heart of the "equal value of one man one vote" issue. Obviously, such cases are of great political importance. In our own case, the Constitution requires that the apportionment of electoral areas must be as mathematically even as possible. Thus, statutory provisions which appeared to give undue weight to rural constituencies or thinly populated areas were struck down by our courts. I do not claim for a moment that our position is necessarily the wisest one. There may be many cogent arguments based on reason and fairness in favour of providing that sparsely populated areas, where people are widely scattered, might in all justice require more representatives than compact urban populations, where in a comparatively small area a very large population may be found. In your system of federal representation, with two senators elected from each state and a House of Representatives elected on a *per capita* basis, it is quite obvious that the exercise of the judicial power in apportionment cases can have very far reaching political effects. Considering the size of your country and the structure and dispersal of your population it is a wonder that the system has produced so little litigation in this area.

To us in Ireland the one area of your constitutionalism which causes considerable wonder, and not a little bewilderment, is the way in which the doctrine of sovereign immunity became so firmly entrenched in your legal system. One would think that such a doctrine is the complete opposite of what you would desire. This remains for me one of the great mysteries of your legal history. How could this doctrine, which was so exclusively attached to the British Crown and the person of

27. IRELAND CONST. art. 35 § 4, cl. 1.

28. U.S. CONST. art. I, § 3, cl. 6.

29. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962).

the royal sovereign, have become so entrenched in the United States system that it was accepted to a far greater extent than in England? In England, sovereign immunity never protected the Crown's servants individually, but only protected the sovereign and those acts done in the sovereign's name. Why did the great American Republic, which had so firmly rejected the sovereignty of the English Crown, so wholeheartedly embrace this attribute of the rejected monarchy? One suspects that perhaps this doctrine remained unnoticed until it became so entrenched³⁰ that it could not be removed except by an act of Congress. I appreciate that Mr. Justice Oliver Wendell Holmes sought to rationalize it on the basis that "there can be no legal right as against the authority that makes the law on which the right depends."³¹ I must confess this is a view which would not commend itself to either the Irish constitutional lawyers or indeed, to most Europeans. In my own country, this claim of sovereign immunity was firmly rejected by the Supreme Court in a decision many years ago.³² Our decision was based upon the recognition of the fact that people are the supreme authority and that the state was merely the creation of the people through their Constitution. Therefore, the state could not on any basis claim to be immune from the effects of or the liability for its wrongful acts whether directly or through its servants or agents. Thus, the state must be vicariously liable for the wrongful acts of its servants and agents. I know that you have sought to modify the immunity by your Federal Tort Claims Act of 1946,³³ and in England it has been partly modified by the Crown Proceedings Act of 1947.³⁴ In my own country the legislature's failure to do anything about it eventually led to the Supreme Court striking the doctrine down to its very roots.

An area of American constitutionalism which has attracted great admiration in Europe is the area of fair procedures in criminal trials and fair procedures on arrest. We do not have any single case, such as the *Miranda v. Arizona*³⁵ case, which could alter our whole system. In our own situation, a whole series of decisions, inspired by your jurisprudence, has created the proposition that everybody is free from arrest for any reason except for the purpose of charging him with a criminal offense, if not immediately, then within a matter of hours and that must be done by bringing him before a court. The effect of not doing so is to render all evidence, by way of admission or confession, whether true or false, obtained during the excessive delay in bringing him before a court, inadmissible. It is unconstitutional because the detention is illegal and is therefore *ipso facto* unconstitutional. The basis of this approach is the example of the American constitutionalism which appears to us to place the protection of the Constitution higher than the detection of the crime. By a series of decisions of our Supreme Court we have also reached the point where an accused person who is under arrest must be informed of his right to have a lawyer.

30. Though not without some questioning. See *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (per Jay, C.J.).

31. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). See also *U.S. v. Lee*, 106 U.S. 196 (1882).

32. *Byrne v. Ireland*, 1972 I.R. 241.

33. Federal Tort Claims Act, ch. 753, 60 stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346 (b)(c), 1402 (b), 1504, 3110, 2401 (b), 2402, 2411 (b), 2412 (c), 2671-80).

34. The Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44.

35. 384 U.S. 436 (1966).

We have not yet had to consider the precise *Miranda* situation, namely, that the accused should be entitled to have a lawyer present during his questioning by the police. However, we have said that the constitutional requirements of fair procedures must apply even during a police interrogation; so it may well be that in a particular case, depending on the actual circumstances, the fact that there was no lawyer present may be held to render the whole questioning process unconstitutional. If such a case comes, it would be but a short step to follow the full *Miranda* decision.

Now you may wonder why I have mentioned these particular instances of comparison with American jurisprudence. It is to illustrate the importance of the existence of American constitutionalism in the development of our own law. To some extent it also reflects an element of judicial strategy. It is not that Irish judges cannot themselves think up the same ideas. But as a matter of "presentation" it is appreciated that in the eyes of the political branches of government and in the eyes of the public generally, it adds far greater credibility to our own views if we can back them up by American decisions. If one of our judges hands down a decision which says exactly the same thing as some American decision on some novel point, but if he does not refer to the relevant American authority, he may be subject to criticism that his view is unreasonable. One is met, even from lawyers, with the retort that no authority has been cited for the view advanced. But such is the respect in which American constitutional jurisprudence is held, that if in giving his decision the Irish judge at the same time produces American decisions which express the same point of view then his decision will carry far greater weight in the minds of many people. While our judges are quite capable of formulating the same ideas and do not have to depend upon American decisions, nevertheless, as a matter of presentation (or public relations) when the decision can be reinforced by reference to similar American decisions they will do so and thus the weight attached to our decisions is far greater in the minds of our fellow citizens.

There are many interesting parallel cases in American and Irish jurisprudence. Many provisions of our respective constitutions are similar and many of the situations with which they are called upon to deal are also similar. One particularly striking and recent example is that of the question of the composition of juries. In 1975, a case came before our Supreme Court on the constitutionality of the composition of juries.³⁶ Our jury system had been based on certain property qualifications; they were minimal, but nevertheless existed. Jury service was equally open to men and women who had the same property qualifications, but the law allowed the women a right to opt out of jury service. This was challenged in a criminal trial which eventually reached the Supreme Court for decision on the constitutional point involved. On the very day in which we heard the case, we were honoured by a visit from Chief Justice Warren Burger. He sat with my colleagues on the Supreme Court bench. After about three or four minutes of the opening presentation to the Court, he turned to me and said that he had virtually the identical case awaiting him on the docket of the U.S. Supreme Court upon his return. In the case which we were then hearing, and in the

36. *De Burca & Anderson v. Attorney General*, 1976 I.R. 38.

case which was coming before the U.S. Supreme Court, the decision in *Hoyt v. Florida*³⁷ was up for consideration and review. It was being urged upon us that we should follow the *Hoyt* decision, which in effect permitted this type of jury discrimination. We declined to follow that and held that this kind of property qualification and sex qualification was unconstitutional. Within a short time after our hearing, the United States Supreme Court heard their case³⁸ in which they overruled *Hoyt v. Florida*. Each of our respective courts arrived at their decisions independently and virtually simultaneously, but arrived at the same decision.

The question of executive privilege against the production in court of certain evidentiary materials is another area of constitutional law which provides some interesting parallels in our respective systems. Prior to your case involving President Nixon, when the whole question of executive privilege arose,³⁹ our Supreme Court had already held that no executive privilege could be claimed simply because a document was an executive document.⁴⁰ Up to then, a member of the government could withhold a document simply by certifying that in his opinion, it would be contrary to the interest of the state or to the public interest to produce it. We expressed our view in a way which I think was not out of accord with the American view. We said that all matters of evidence are matters within the judicial power and only the judicial power could decide what would be allowed to be privileged and what would not. Therefore, if a case is made that certain documents ought not to be disclosed, our system now permits the judge to look at the documents and make his own decision as to whether or not the production would in some way impair a paramount interest of the state. Unless I am mistaken, I think that was one of the essential points in President Nixon's case. I quote these and the other examples as instances where the exercise of judicial power of review, which really came into being for the first time in American constitutionalism, is one which we in Ireland (and other countries) have been very happy to adopt and to follow.

Unlike most constitutions of the world yours is strikingly simple in its statements and avoids great detail. Perhaps this reflects the age from which it sprang and reflects in a sense the view that it was sufficient to state things simply. Your Constitution has endured so well for 200 years with comparatively few amendments that it remains a great monument not only to its framers, but also to the generations of judges who have interpreted it. It has coped with the revolutionary changes which have occurred in society and in human activity, and even changes in the very nature of man himself, although such changes cannot have been envisaged 200 years ago. Our own Constitution is more detailed in some areas. But modern European constitutions are far more detailed and tend more to provide for particular situations and circumstances than does yours or ours.

We in Ireland and the rest of Europe note that your Constitution is written in and construed in the present tense, as indeed is ours. One is often faced in and out of court

37. 368 U.S. 57 (1961).

38. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

39. *United States v. Nixon*, 418 U.S. 683 (1974).

40. *Murphy v. Corporation of Dublin*, 1972 I.R. 215.

with the type of argument which says that something is not what the founding fathers thought 200 years ago or some arguments to the like effect even in respect of our own 50 year old Constitution. We see your Constitution not as a document speaking from 1787, but as a law speaking from the present day. This is precisely the view which we have taken and followed in interpreting our own Constitution.

I have observed earlier that one perception of American constitutionalism is that it guarantees freedom from the law. In effect, we have followed this by emphasizing that in the wording of our own Constitution, the word “justice”⁴¹ appears before the word “law,”⁴² and therefore must be regarded as the more important of the two. Your due process clauses are really incorporated into our jurisprudence by applying as we do the test of “justice” or “injustice” to many different situations which arise. There is an express provision in our Constitution to the effect that the state undertakes to defend the life, the person, the property, and the good name of its citizens, and in case of injustice done, to vindicate these rights.⁴³ This has such a wide sweep that it effectively means that, like your due process provisions, we can judge situations by criteria which are current concepts of justice or injustice. In this, we believe we are following the example discernible in your constitutionalism of current interpretation in the light of current circumstances and current concepts. This is not to say that the earlier generations were short-sighted or in error in their perceptions. It simply recognizes that the world moves on. As we see it, the great merit of your constitutionalism is its tremendous elasticity, which in its 200 years has succeeded effectively in dealing with all the complex changes in society which have occurred in that period, and has taken into account changes in the concepts of justice and injustice. A striking illustration of your constitutional continuity is to be found in one fact that really fascinates and amazes most Europeans, myself included. It is that in the whole of this period of 200 years, your present distinguished Chief Justice is only the sixteenth Chief Justice of the United States. This really illustrates the strength of the thread of continuity running through your constitutionalism. In most European countries chief justices change every few years.

Lastly, the outstanding quality of American constitutionalism is the protection it offers to those who have been called the victims or “consumers” of injustice. Of course, injustices tend to occur from time to time, but your constitutionalism, as we see it, does not allow the perpetuation of any such position indefinitely. This emphasis on the concept of the predominance of justice is one which has always greatly influenced us and, indeed, many other countries. It brings home to judges and to others the vital importance of living in a country where the citizens can be assured that there is a higher law to which recourse is available, and that its interpretation is in the hands of people who are willing and able to take the courage to implement it. That is the ultimate protection. Although the world has turned upside down in the 200 years of your constitutionalism, your Constitution, as the courts have witnessed, has coped. There is a certain historical irony in the fact that, in 1781, at the surrender of

41. IRELAND CONST. preamble.

42. *Id.* art. 3.

43. *Id.* art. 40, § 3.

the British armies at Yorktown, the British army band played a tune called “The World Turned Upside Down” as the defeated troops marched away from the scene of battle.

In the legal circles throughout the world, your constitutionalism stands like the Statue of Liberty. Even in non-English speaking countries there is an active consciousness of its existence and of its influence. But most of all one is conscious of the power of the judiciary in the United States. It is a judiciary which has remained undaunted and is not reluctant to enter into the exciting frays to which I referred in my opening quotation. I think that is your great contribution to the world.

Even after 200 years, American constitutionalism is still celebrated and appreciated in every country of the world as the greatest monument to the defense of human liberty and justice which the world has seen in its whole history. For the peoples of the world, it is seen not only as a bastion of freedom, but also as a source of inspiration and of strength for those throughout the world who seek the blessings of liberty for themselves and for their posterity. We who have profited from its inspiration have been privileged by our office to assist actively in this quest.

