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UNIVERSAL HUMAN RIGHTS AND CONSTITUTIONAL CHANGE

David Sloss* and Wayne Sandholtz**

INTRODUCTION

Scholars have written volumes about the dramatic constitutional changes that occurred in the United States in the decades after World War II. Several leading scholarly accounts adopt an internal perspective, focusing primarily on domestic factors that drove constitutional change.¹ Other scholars adopt a more transnational perspective, linking domestic constitutional change in the United States to Cold War politics,² or to the rise of totalitarianism.³ This Article builds on the work of scholars like Mary Dudziak and Richard Primus who have emphasized the transnational factors that contributed to constitutional change in the United States. However, our account differs from both Dudziak and Primus because we emphasize that constitutional change in the United States from 1948 to 1976 should be understood in the context of the global human rights revolution that occurred during the same time frame.⁴

This Article marries international human rights and comparative constitutional scholarship with scholarship about constitutional change in the United States. It suggests that American constitutional scholars can gain a richer understanding of the dynamics of constitutional change by drawing on insights from international and comparative research. Conventional wisdom depicts the United States as insulated from transnational forces that led to the global diffusion of human rights norms. We contend

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¹ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* 26–27 (2014).

² See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 113 (2000).

³ See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 71 (1999).

⁴ In this respect, our thesis has much in common with Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *YALE L.J.* 1564 (2006).

that the conventional wisdom is wrong. Specifically, this Article suggests that three distinct phenomena are closely related: the creation of modern international human rights law (the “internationalization” of human rights); the incorporation of human rights norms into national constitutions in numerous countries (the “constitutionalization” of human rights); and the transfer of regulatory authority over human rights from the states to the federal government in the United States (the “federalization” of human rights).

The underlying theory is simple: The power of ideas is an important factor that contributes to legal change, and ideas do not respect national boundaries. The period from 1948 to 1976 witnessed a global diffusion of an identifiable set of ideas,⁵ which we call the “political morality of human rights.”⁶ The global diffusion of the political morality of human rights was an important causal factor that contributed to the internationalization of human rights, the constitutionalization of human rights, and the federalization of human rights in the United States. The leading scholarly accounts of the civil rights revolution in the United States offer many important insights about the dynamics of constitutional change. However, they are incomplete insofar as they fail to account for the global diffusion of human rights norms as an important factor contributing to constitutional change in the United States. To be clear, we do not claim that international human rights law—as law—caused constitutional changes in the United States. Instead, we contend that the diffusion of human rights norms as a global political morality was an important causal factor that contributed to the federalization of human rights in the United States. Moreover, the process of federalization significantly strengthened domestic legal protection for fundamental rights in the United States.

The political morality of human rights existed before World War II. However, revelations about Nazi concentration camps gave tremendous impetus to the diffusion of human rights as a global political morality.⁷ The internationalization of human rights

⁵ On the concept of diffusion, see KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* 34 (2013).

⁶ We borrow the term from Professor Perry. See MICHAEL J. PERRY, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* 2 (2017). Professor Perry defines “political morality” as a set of norms about how governments should act toward human beings, “a set of norms, in particular, about what government *should not do to* and what it *should do for* the human beings over whom it exercises power.” *Id.* at 26 (emphasis added). The Universal Declaration of Human Rights (UDHR)—the foundational document of international human rights law—makes clear that the core principles of the political morality of human rights include equality, universality, and inalienability. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (declaring “the equal and inalienable rights of all members of the human family”). Hence, we define the political morality of human rights as the moral proposition that governments have a duty to respect and protect, in a non-discriminatory manner, the inalienable rights of all human beings who are subject to the exercise of governmental power.

⁷ PERRY, *supra* note 6, at 5.

law between 1948 and 1976 is well known; it provides the most obvious evidence that human rights was then emerging as a global political morality.⁸ This Article documents the constitutionalization of human rights and the federalization of human rights in the United States during the same time frame.

The political morality of human rights has deep roots in American political culture. The Declaration of Independence proclaims “that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights.”⁹ Nevertheless, for most of American history, responsibility for protection of those unalienable rights was vested primarily in state governments, not the federal government. In the early 1950s, the American Bar Association was implacably hostile to international human rights law. Frank Holman, who was ABA President from 1948 to 1949, sounded the alarm about the dangers of ratifying human rights treaties.¹⁰ Treaty ratification, he warned, would “result in changing our form of government from a republic to a socialistic and centralized state—with such increase in the power of the Federal Government at the expense of the states that the doctrine of states’ rights and local self-government can become . . . nonexistent in the United States.”¹¹ Holman’s warning was partially prophetic. Between 1948 and 1976, the federal government seized power over human rights law from the states.¹² However, treaty ratification was not the mechanism that transferred power from the states to the federal government, as Holman had feared. Instead, the federal government appropriated power over human rights by silently incorporating human rights norms into federal constitutional and statutory law.

This Article identifies 68 discrete rights that are included in both the Universal Declaration of Human Rights (UDHR)¹³ and the Comparative Constitutions Project database.¹⁴ As of 1948, state governments exercised primary or exclusive regulatory authority for 71% of those rights (48 of 68), whereas the federal government exercised primary or exclusive regulatory authority for only 29% (20 of 68).¹⁵ By 1976, the allocation of authority between state and federal governments had flipped. As of 1976, the federal government exercised primary or exclusive regulatory authority for 74% of those rights (50 of 68), and state governments exercised primary or exclusive regulatory

⁸ Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 405 (1979).

⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰ Frank E. Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A. J. 707, 789 (1950).

¹¹ *Id.* at 788.

¹² Makau Wa Mutua, *Looking Past the Human Rights Committee: An Argument for Demarginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 215–16 (1998).

¹³ UDHR, *supra* note 6.

¹⁴ Zachary Elkins et al., *Characteristics of National Constitutions, Version 2.0*, COMPARATIVE CONSTITUTIONS PROJECT (2014), <http://comparativeconstitutionsproject.org/download-data> [https://perma.cc/FPX3-HHJE]. All sixty-eight rights are listed in the Appendix. Part I explains how we derived that set of sixty-eight rights.

¹⁵ *See infra* Part III.

authority for only 26% (18 of 68).¹⁶ Four decades later, in 2018, the division of power over human rights between state and federal governments is virtually the same as it was in 1976.¹⁷ Thus, the constitutional revolution in the United States in the decades after World War II was not merely a rights revolution—it also entailed a radical change in the division of regulatory authority between the states and the federal government. Scholarly accounts that attempt to explain the radical change in constitutional federalism as the natural development of the inner logic of American constitutionalism are unpersuasive.¹⁸ The transfer of authority over human rights from the states to the federal government represented a sharp break from one of the core premises that guided American constitutional development from the Founding until the 1930s: the assumption that governmental responsibility for protection of fundamental rights was vested primarily in the states, not the federal government.¹⁹

This Article demonstrates that the United States federalized human rights through a process of *silent incorporation*.²⁰ Silent incorporation occurred primarily through three different mechanisms. First, the Supreme Court decided that rights specifically enumerated in the Bill of Rights—which had previously constrained only the federal government—would henceforth be binding on state governments also.²¹ Second, the Supreme Court granted federal constitutional protection for “unenumerated rights”: that is, rights not explicitly mentioned in the Constitution’s text.²² Third, Congress enacted federal statutes that, for much of U.S. history, would have been deemed unconstitutional encroachments on areas reserved to state law.²³ Nevertheless, courts upheld those statutes as valid exercises of federal legislative power.

The federalization of human rights in the United States proceeded in parallel with the internationalization of human rights law. Between 1948 and 1976, the United

¹⁶ See *infra* Part III.

¹⁷ See *infra* Section III.E.

¹⁸ Professor Akhil Amar argues, in effect, that the United States federalized human rights law when it adopted the Fourteenth Amendment in 1868. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 6–7 (1998). We agree that ratification of the Fourteenth Amendment was an important milestone. However, Part III demonstrates that the period from 1948 to 1976 was the key time period for federalization of human rights in the United States.

¹⁹ See *Barron v. Baltimore*, 32 U.S. 243, 243 (1833); *The Slaughter-House Cases*, 83 U.S. 36, 67–68 (1872). New Deal programs adopted in the 1930s initiated the process of federalization of human rights in the United States. However, as documented in Part III, the most significant federalization occurred after 1948.

²⁰ See David L. Sloss & Michael P. Van Alstine, *International Law in Domestic Courts*, in *RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW* 79, 104–05 (Wayne Sandholtz & Christopher A. Whytock eds., 2017) (discussing silent incorporation).

²¹ See AMAR, *supra* note 18, at 7.

²² See *infra* Section III.C.2.

²³ See *infra* Section III.C.3.

Nations adopted the UDHR, the Genocide Convention,²⁴ the Convention on Racial Discrimination (CERD),²⁵ the Covenant on Civil and Political Rights (ICCPR),²⁶ and the Covenant on Economic, Social and Cultural Rights (ICESCR).²⁷ During the same period, Europe and Latin America developed regional human rights systems. Although the international human rights regime has expanded dramatically since 1976, the core principles of modern international human rights law were codified in human rights treaties by 1976.

The internationalization and federalization of human rights are closely related to a third phenomenon: the constitutionalization of human rights. Almost all modern constitutions provide for individual rights and enumerate specific rights.²⁸ In the decades after World War II, more than ninety percent of new constitutions included some form of rights guarantees.²⁹ Since 1976, virtually all new constitutions have done so.³⁰ The “new constitutionalism” that emerged in Western Europe after World War II included “a charter of fundamental rights” and “a mode of constitutional review to protect those rights.”³¹ That model had “diffused globally” by the 1990s.³² According to one analysis, “[o]f 106 national constitutions written since 1985, every one contained a charter of rights.”³³ In a comprehensive empirical analysis, Professors Law and Versteeg found that, over the past sixty years, constitutions show a trend toward “‘generic rights constitutionalism,’ wherein an increasing proportion of the world’s constitutions possess an increasing number of rights in common.”³⁴ As noted above, this Article identifies 68 discrete rights that are included in both the UDHR and the Comparative Constitutions Project database. As of 1947, the average national constitution contained just 11.6 of those 68 rights; by 2005, the average national constitution contained 30.7 of the 68 rights.³⁵

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

²⁵ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

²⁶ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

²⁷ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

²⁸ Philip Alston, *Bills of Rights: An Analytical Framework*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 2 (Philip Alston ed., 1999).

²⁹ *Id.* at 3.

³⁰ *Id.* at 2.

³¹ Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 816 (Michel Rosenfeld & András Sajó eds., 2012).

³² *Id.*

³³ *Id.* at 816 n.2.

³⁴ David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1164 (2011).

³⁵ *See infra* Section II.A.

Somewhat paradoxically, the United States was both a leader and a laggard in incorporating global human rights norms into domestic law. The United States was a leader because the process of federalization in the United States was essentially complete by 1976. In contrast, aside from Western democracies, most of which developed robust constitutional protection for human rights by the 1970s, the process of incorporating human rights norms into national constitutions did not gain significant momentum in most other countries until after 1980. However, the United States was also a laggard in the sense that it has declined to participate fully in human rights treaties. The United States waited almost forty years to ratify the Genocide Convention. The United States was also slow to ratify the CERD and the ICCPR. It has still not ratified the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), or the Convention on the Rights of the Child (CRC). When the United States does ratify human rights treaties, it routinely limits domestic judicial enforcement of the treaties by stipulating that they are not self-executing.³⁶

The remainder of this Article proceeds in four parts. Part I explains how we derived the set of sixty-eight rights that form the basis for our analysis. Part II analyzes data from the Comparative Constitutions Project database to examine constitutionalization of human rights in other countries. Part III analyzes the federalization of human rights in the United States. Part IV contends that the diffusion of human rights as a global political morality was an important factor contributing to the federalization of human rights in the United States.

Before proceeding further, one cautionary note is in order. The judicial decisions and legislative enactments that federalized human rights law in the United States rarely mention international human rights instruments. That fact, combined with the United States' reluctance to ratify human rights treaties, provides some support for the conventional view that the global diffusion of human rights norms exerted minimal influence over constitutional change in the United States in the decades after World War II. Nevertheless, we suggest that the true story is more complicated. There is ample evidence that the political morality of human rights influenced key civil rights leaders, such as Martin Luther King, Jr.³⁷ and Thurgood Marshall.³⁸ In the period from 1948 to 1976, a burgeoning moral commitment to the human rights principles of equality and universality made it untenable to maintain the traditional federal system in which every state decided for itself the scope of legal protection for inalienable

³⁶ See DAVID SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 306–10 (2016).

³⁷ See THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* 326 (2007).

³⁸ No scholar has yet undertaken a detailed study of the influence of international human rights norms on the thinking of Justice Thurgood Marshall. We present some suggestive evidence in Part IV. See *infra* Section IV.B. See also CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955*, at 94 (2003).

rights. The moral commitment to universality required federal uniformity, and federal uniformity required a transfer of power from the states to the federal government. Although judges and legislators rarely cited international human rights instruments, they frequently invoked the moral principles associated with international human rights law—the political morality of human rights—to justify the exercise of federal judicial or legislative power over matters previously reserved to the states.

I. CONSTRUCTING A LIST OF RIGHTS

We developed a single list of rights to provide a quantitative measurement of both the federalization of human rights in the United States and the constitutionalization of human rights in other countries. To be included, a right must be present in both the UDHR and the Comparative Constitutions Project (CCP) database.³⁹ Using the codebook “Characteristics of National Constitutions” from the CCP database, we determined which rights in the CCP data correspond with specific UDHR rights. Some rights in the UDHR do not appear in the CCP codebook. For example, Article 6 of the UDHR states: “Everyone has the right to recognition everywhere as a person before the law.”⁴⁰ Since the CCP codebook does not include a corresponding right, Article 6 is excluded from our list of rights. Similarly, some rights in the CCP codebook do not appear in the UDHR. For example, variable 521 addresses due process.⁴¹ The right to due process is not specifically enumerated in the UDHR, so we do not include it as a separate right.

Determining which rights appear in both the UDHR and the CCP codebook involves some judgment calls. Two particular choices we made in constructing a list of rights merit comment. The first choice relates to equality and non-discrimination. Article 7 of the UDHR guarantees “equal protection of the law.”⁴² It corresponds to variable 552 in the codebook. Article 2 of the UDHR bars discrimination based on nine separate grounds, including race, color, sex, etc.⁴³ We count each of those prohibited grounds as a distinct right, corresponding to different elements in variable 553 in the codebook. Thus, our list of sixty-eight rights includes ten distinct rights related to equality and non-discrimination. Given the central importance of non-discrimination in modern international human rights law, we believe it is appropriate to include ten separate antidiscrimination rights.

The second key choice relates to Article 11(1) of the UDHR. Article 11(1) identifies “the right to be presumed innocent.”⁴⁴ Counting the presumption of innocence as a single right is straightforward. However, Article 11(1) also specifies that a criminal

³⁹ See Elkins et al., *supra* note 14.

⁴⁰ UDHR, *supra* note 6, art. 6.

⁴¹ Elkins et al., *supra* note 14, at 99.

⁴² UDHR, *supra* note 6, art. 7.

⁴³ *Id.* art. 2.

⁴⁴ *Id.* art. 11.

defendant is entitled to “all the guarantees necessary for his defence.”⁴⁵ The UDHR does not specify which guarantees are necessary, but Article 14 of the ICCPR lists those guarantees in detail.⁴⁶ Our list of sixty-eight rights includes eight separate rights that are encompassed within the phrase “all the guarantees necessary,” specifically enumerated in Article 14 of the ICCPR and listed separately in the CCP codebook. Those rights are: the right to a speedy trial; the right to confront witnesses; the privilege against self-incrimination; the ban on double jeopardy; the right to appeal; the right to counsel; the right of indigent defendants to government-appointed counsel; and the right to an interpreter.⁴⁷ Since these criminal procedure rights figured prominently in the federalization of human rights in the United States, we decided to count each one separately.

Our coding produced a list of sixty-eight rights. Our list differs somewhat from those produced in earlier, similar exercises. For example, Elkins, Ginsburg, and Simmons constructed a list of seventy-four rights included in the CCP data, of which, in their coding, the UDHR contained thirty-five.⁴⁸ Using the same sources, Beck, Meyer et al. generated a set of sixty-five human rights that are found in both the UDHR and in CCP data.⁴⁹ Our list differs somewhat from the Beck-Meyer set. Of the sixty-eight rights in our list, Beck-Meyer include fifty-two.⁵⁰ For twenty-seven UDHR rights, we were unable to identify a corresponding CCP right; the Beck-Meyer list contains thirteen of those.⁵¹ The preceding example regarding UDHR Article 11 illustrates the potential for different coding results. Whereas we include eight distinct rights associated with the phrase “all the guarantees necessary,” the Beck-Meyer list does not include any of those rights. In contrast, whereas Beck-Meyer include rights named in the preamble to the UDHR, we exclude the preamble as containing general principles or aspirations, rather than specific rights. As another example, whereas Beck-Meyer match “the right to change his nationality” (UDHR Article 15) to CCP variable 547, we do not. We do not claim that one coding is more correct than the other. We do believe that our coding provides a useful tool for measuring both the federalization of human rights in the United States and the constitutionalization of human rights in other countries.

II. UDHR RIGHTS IN NATIONAL CONSTITUTIONS

The Universal Declaration of Human Rights, adopted in 1948, laid the foundation for the international human rights regime.⁵² The human rights treaties adopted

⁴⁵ *Id.* art. 11.

⁴⁶ ICCPR, *supra* note 26, art. 14.

⁴⁷ *Id.*

⁴⁸ Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT. L.J. 61, 76 (2013).

⁴⁹ Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights* 8 (Jan. 27, 2017), <https://ssrn.com/abstract=2906946> [<https://perma.cc/9GYS-DUCG>].

⁵⁰ *Id.* at 23–24.

⁵¹ Our complete list is in the Appendix.

⁵² *See* UDHR, *supra* note 6.

since 1948 have generally clarified, developed, or extended rights identified in the UDHR. The two covenants, the ICCPR and the ICESCR, were explicitly designed to convert the high principles of the UDHR into “hard” law.⁵³ Some treaties, such as the Convention Against Torture (CAT), reinforced specific rights.⁵⁴ Other treaties—such as the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC)—elaborated on rights for specific populations.⁵⁵

The UDHR has also shaped the development of rights in domestic constitutions.⁵⁶ As Elkins, Ginsburg, and Simmons have argued, the UDHR “presented a broadly accepted menu of rights viewed internationally as legitimate,” thus influencing “the rights content of new constitutions that were adopted in its wake.”⁵⁷ Rights enumerated in the UDHR have appeared at an increasing rate in constitutions written since 1948. This section looks briefly at the longer trend of their incorporation in constitutions (1948–2013), then focuses more closely on the period from 1948 to 1976. Although the growth in the number of UDHR rights in national constitutions occurred mostly after 1976, the growth that occurred between 1948 and 1976 was concentrated primarily in countries that are similar to the United States. In particular, the constitutionalization of human rights between 1948 and 1976 occurred mostly in western, democratic countries that existed as independent states before 1948.⁵⁸ In contrast, there is little evidence of constitutionalization before 1976 in non-western, non-democratic states that gained independence after 1948.⁵⁹ Thus, the federalization of human rights in the United States between 1948 and 1976 was contemporaneous with the constitutionalization of human rights in western, democratic countries.

A. The Full Human Rights Era, 1948–2013

Previous research has demonstrated the increasing incorporation of UDHR rights into national constitutions over time. Elkins, Ginsburg, and Simmons show the influence of the UDHR on constitutional rights in several ways. For instance, the similarity

⁵³ ICCPR, *supra* note 26; ICESCR, *supra* note 27.

⁵⁴ Convention Against Torture, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

⁵⁵ Convention on Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child, Sept. 2, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁵⁶ See Beck et al., *supra* note 49; Mila Versteeg, *Law Versus Norms: The Impact of Human-Rights Treaties on National Bills of Rights*, 171 J. INST. & THEORETICAL ECON. 87 (2015) [hereinafter Versteeg, *Law Versus Norms*]; Elkins et al., *supra* note 48; David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 763 (2012).

⁵⁷ Elkins et al., *supra* note 48, at 76.

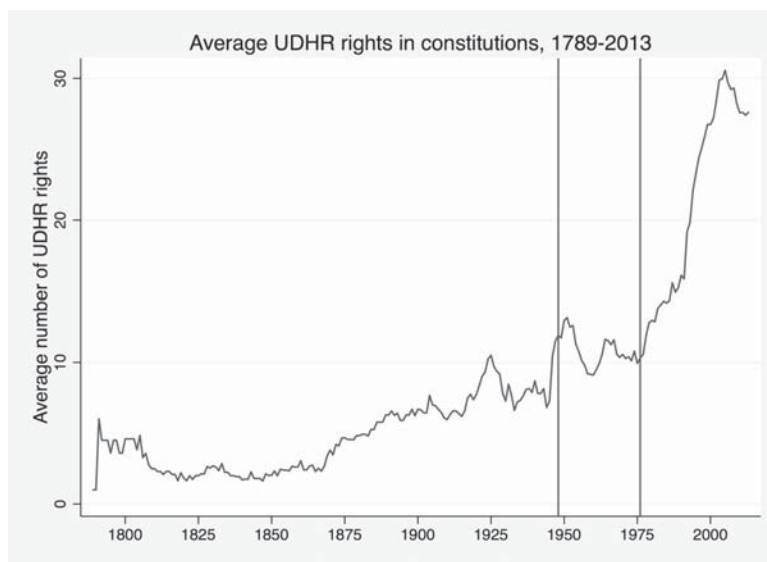
⁵⁸ See *infra* Figures 5–7 and accompanying text.

⁵⁹ See *infra* Figures 5–7 and accompanying text.

between new constitutions and the UDHR is greater after 1948 than before.⁶⁰ In addition, the average percentage of UDHR rights included in constitutions rises dramatically after 1948.⁶¹ Finally, analyzing constitutions written after 1948 and a total of seventy-three rights, they find that UDHR rights are more than one and one-half times as likely as non-UDHR rights to be included.⁶² Beck, Meyer et al. report similar findings. The average number of UDHR rights included in national constitutions rises from about 15 in 1900, to 20 in 1948, to about 35 in 2013.⁶³ They explain the rise in terms of the influence of world society: the larger the number of global human rights treaties in existence at the time of a constitution's initial adoption, and the more of those treaties a country has signed, the larger the number of UDHR rights the constitution will include.⁶⁴

Using our data on UDHR rights, we find the same broad trends. Figure 1 shows that the number of UDHR rights included in national constitutions rises dramatically after 1948. Note that for pre-1948 constitutions, "UDHR rights" refers to rights that would eventually be included in the Universal Declaration. The average number of UDHR rights in constitutions in 1947 was 11.5; by 2005 it reached a peak of 30.6, after which it dropped slightly (to 27.6 in 2013).

Figure 1



⁶⁰ Elkins et al., *supra* note 48, at 77.

⁶¹ *Id.* at 79.

⁶² *Id.* at 80.

⁶³ Beck et al., *supra* note 49, at 10.

⁶⁴ *Id.*

We note two additional observations regarding the full time period. First, the growth in the number of UDHR rights in national constitutions occurred mostly after 1976. This should not be surprising, because major waves of democratic transitions and the expansion of the global human rights regime also occurred after 1976. The period from about 1980 to 2000 included two major waves of democratization. The first involved the end of civil wars and authoritarian rule and a shift toward democratic governance across much of Latin America.⁶⁵ The second witnessed transitions to democratic institutions across much of Central and Eastern Europe and the former Soviet Union after 1990.⁶⁶ Human rights figured prominently in virtually all of the constitutions drafted in the democratic transitions of that era.

The period from 1976 onward also saw the consolidation and expansion of the international human rights regime. Both the number of human rights treaties and the number of states parties rose substantially. The two covenants entered into force in 1976, followed by CEDAW (1981), CAT (1987), and the CRC (1990).⁶⁷ Some of these treaties have now received nearly universal ratification. Figure 2 depicts the growth in the cumulative number of states parties to ten core human rights treaties.⁶⁸ The most rapid growth begins around 1980. The growth in the number of international human rights instruments and in the number of state ratifications indicates the development of an increasingly accepted set of core human rights. That set of rights was available during the 1980–2000 period as a legitimized template for what a modern list of constitutional rights should include. Empirical research has shown that the international and regional human rights treaties did in fact serve as a template for constitutional rights provisions.⁶⁹

⁶⁵ See Law & Versteeg, *supra* note 56, at 799.

⁶⁶ See *id.* at 792.

⁶⁷ CRC, *supra* note 55; CAT, *supra* note 54; CEDAW, *supra* note 55.

⁶⁸ The ten treaties included in Figure 2 are (as listed top to bottom in the figure): International Convention for the Protection of all Persons from Enforced Disappearances G.A. Res. 61/177 (2006); Convention on the Rights of Persons with Disabilities, Dec. 16, 2006, 2515 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 8, 1990, 2220 U.N.T.S. 3; CRC, *supra* note 55; CAT, *supra* note 54; CEDAW, *supra* note 55; ICESCR, *supra* note 27; ICCPR, *supra* note 26; CERD, *supra* note 25; and Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 75 U.N.T.S. 277.

⁶⁹ See Elkins et al., *supra* note 48, at 76; Versteeg, *Law Versus Norms*, *supra* note 56, at 91.

Figure 2

A second observation regarding the average number of UDHR rights in national constitutions concerns the immediate post-1948 period. Figure 1 shows that, for the three decades beginning in 1948, the average number of UDHR rights in constitutions did not change. The average in 1948 was 12.0 and in 1978 it was 12.0. There was a marked increase from 1945 (7.3) to 1951 (13.2), followed by a significant drop between 1951 and 1960 (9.2), then a substantial recovery by 1964 (11.7). The early 1950s drop and the lack of net growth in the average number of UDHR rights are also visible in the data presented by Elkins, Ginsburg, and Simmons.⁷⁰ Thus, the trends we observe for 1948–1976 are not simply artifacts of our coding. The averages, of course, can hide contrary trends among different groups of states. That is, the average number of UDHR rights in constitutions could well be declining for some states and rising for others. In fact, that is what we find, as the next subsection reports.

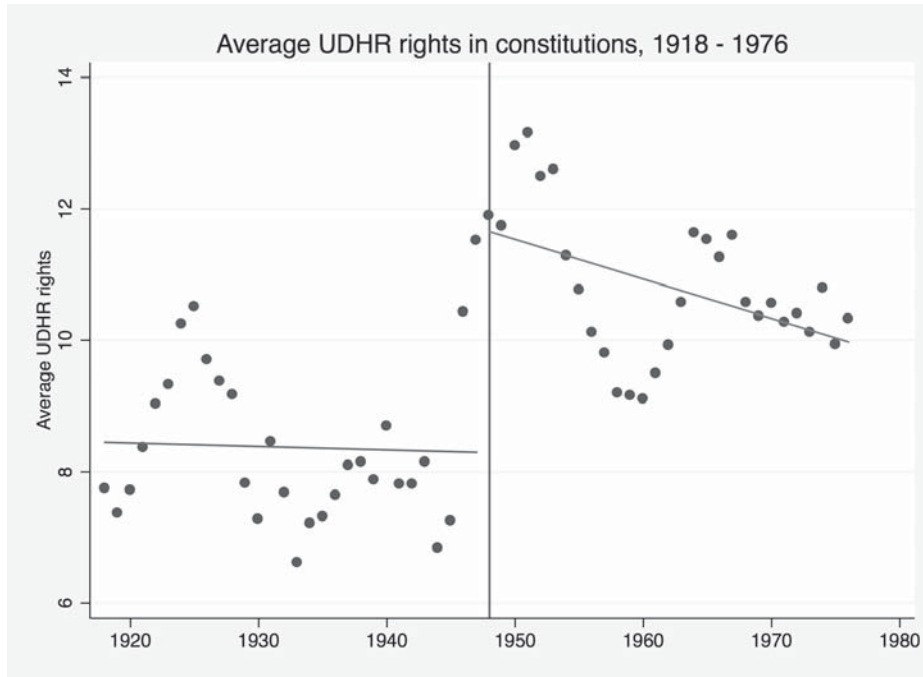
B. A Closer Look at 1948–1976

Though the dramatic increase in UDHR rights in constitutions occurred after 1976, the average level of UDHR rights was higher in the period 1948–1976 than in the period 1918–1948. The decline in the early 1950s, noted above, occurred at an average level that was higher than in the preceding decades, as shown in Figure 3. The

⁷⁰ Elkins et al., *supra* note 48, at 79.

markers in Figure 3 represent the annual average of UDHR rights in constitutions; the lines depict the linear best fit for each period. The average number of UDHR rights was significantly higher after adoption of the UDHR, even though there was a slight decline in that average from 1949 to 1976.

Figure 3



The averages mask the reality that in some states the number of UDHR rights in the constitution declined from 1948 to 1976, but in others it increased. During that period, numerous states amended or replaced their existing constitutions.⁷¹ Either mechanism could increase or decrease the number of UDHR rights. We evaluate the changes in UDHR rights to identify patterns regarding which states are increasing UDHR rights and which states are decreasing them. To measure change, we take the first year after 1947 in which a state appears in the CCP data. For some states this is 1948, but for states achieving independence after decolonization, the first year in which they appear in the data is the year they became independent states with new constitutions. That year provides the beginning level of UDHR rights. The end year is either 1976 or the last previous year in which data is available in the CCP database. Subtracting the former from the latter provides the net change in UDHR rights. Figure 4 displays the distribution of those values of net change for 153 states. The width of each bar is three; for example, the tall middle bar represents states whose

⁷¹ *Id.* at 69.

constitutions experienced a decline of one UDHR right, no change (0), or an increase of one UDHR right. It is striking that the majority of states experienced virtually no net change in UDHR rights over the period. The two wings of the histogram are nearly balanced, with similar numbers of states undergoing a net decline in UDHR rights as those registering a net gain. A slightly larger number of states experienced a decline, which fits with the gradually decreasing post-1948 trend line in Figure 3.

Figure 4



The next step is to look more closely at which types of states underwent increases and declines. Table 1 lists the ten largest declines and the ten largest net increases in UDHR rights.

Table 1: Largest Declines and Increases in UDHR Rights

Country	Year of independence	Change in UDHR rights	Number of amendment events	New constitutions	Start year	End year
<i>Bottom 10 (net decrease)</i>						
Bangladesh	1971	-39	3	1	1972	1976
Bahrain	1971	-37	1	1	1973	1976
Lesotho	1966	-33	1	1	1966	1969
Malawi	1964	-32	9	2	1964	1976

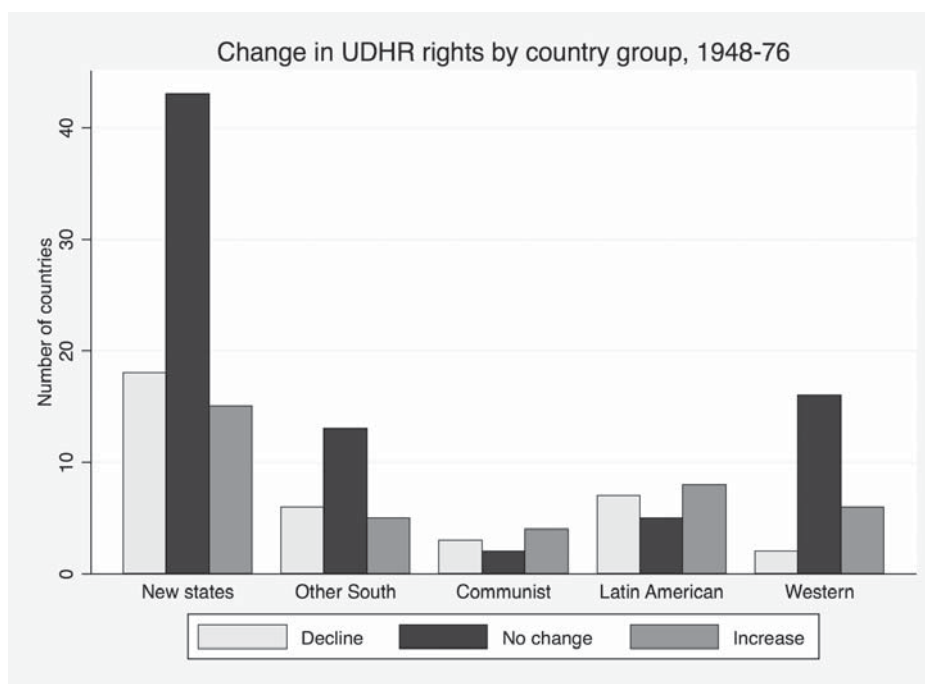
Country	Year of independence	Change in UDHR rights	Number of amendment events	New constitutions	Start year	End year
Sierra Leone	1961	-32	5	1	1961	1976
Bolivia	1825	-30	1	2	1948	1976
Ecuador	1822	-30	4	1	1948	1976
Kenya	1963	-30	8	1	1963	1976
Vietnam	1954	-30	2	2	1956	1975
Trinidad And Tobago	1962	-27	6	2	1962	1976
<i>Top 10 (net increase)</i>						
Gabon	1960	19	2	3	1960	1976
Portugal	1143	25	3	1	1948	1976
Zimbabwe (Rhodesia)	1965	26	3	2	1965	1976
Uganda	1962	32	3	3	1962	1970
German Federal Republic	1955	33	18	1	1949	1976
Ghana	1957	33	2	3	1957	1971
Philippines	1946	33	1	1	1948	1976
Egypt	1922	34	1	2	1948	1976
Venezuela	1811	34	3	2	1948	1976
Italy	1861	41	4	0	1948	1976

Eight of the ten largest declines occurred in newly independent states. Those states adopted initial constitutions with large numbers of UDHR rights (ranging from 27 to 39 rights), but then dropped many of those rights in subsequent amendments or new constitutions. Five of the ten greatest increases occurred in older states. These lists suggest that there may be differences between newly independent states and older, established states in terms of how they incorporated UDHR rights during this period.

We placed the 153 states in groups, as shown in Figure 5. “New states” are those that gained independence after 1947; “Other South” refers to developing countries that were independent before 1948, excluding Latin American states; and “Western” includes Western Europe, the United States, Canada, Japan, Australia, and New Zealand. The other two categories are self-explanatory. Note that in three of the groups, the largest category is that of no change in UDHR rights between 1948 and 1976. In three groups—Communist, Latin American, and Western—more states registered an increase in UDHR rights than experienced a decrease, with Western countries showing the largest difference. Thus, the federalization of human rights in the United States

between 1948 and 1976 was contemporaneous with the constitutionalization of human rights in Western countries.

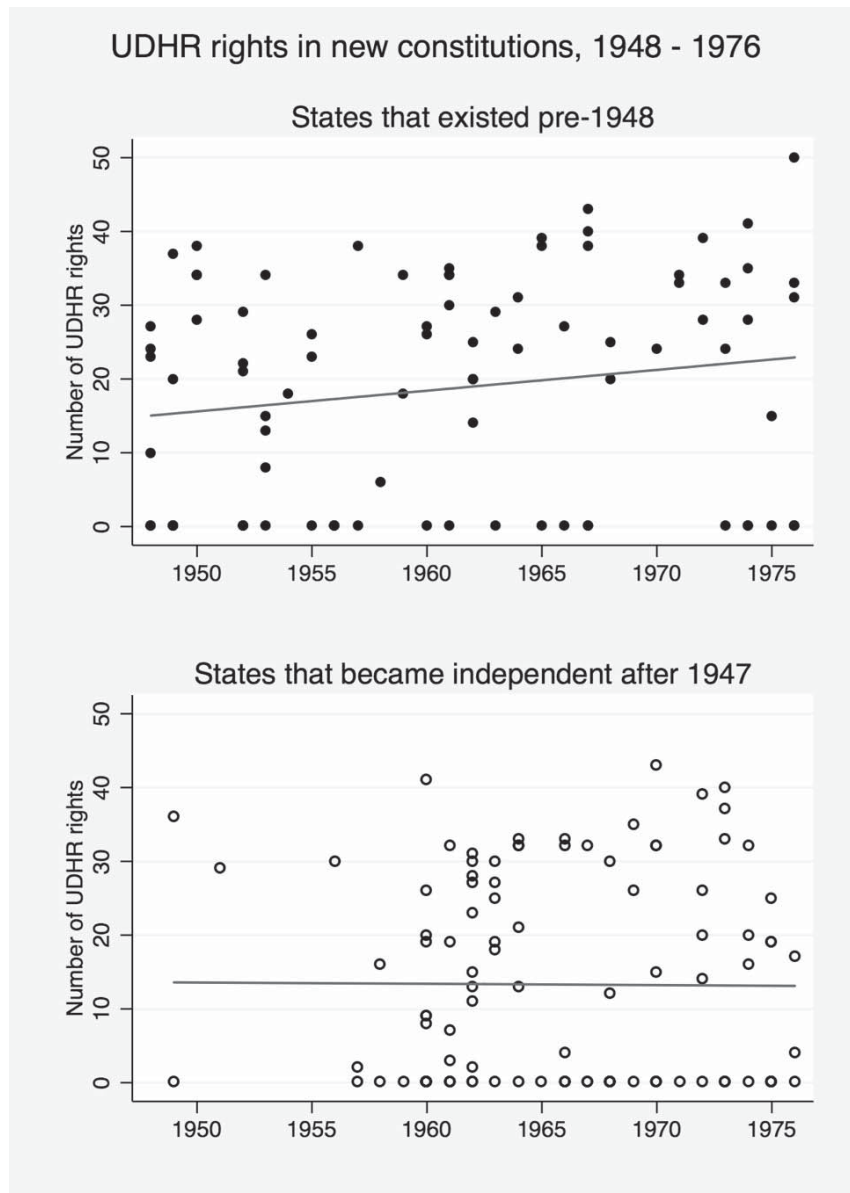
Figure 5



We also examined what happened with UDHR rights when states enacted new constitutions. The drafting of a new constitution is an opportunity to borrow (or not) from the menu of international human rights. Whereas the previous figures included all constitutions in effect in a given year, the next two charts depict only new constitutions (new “constitutional systems” in CCP terms). In Figure 6, we plot the number of UDHR rights in new constitutions by the year in which they were approved, graphing separately two groups of states: those that existed pre-1948 and those that became independent in 1948 or later. Each point plotted in the figure represents a newly enacted constitution. Over the 1948–1976 period, new constitutions in newly independent states show a declining tendency to incorporate UDHR rights. But among older states, the opposite is true: new constitutions show an increasing tendency to incorporate UDHR rights. Our dataset includes sixty-nine states that existed in 1947; we refer to them as “old states.” Of these sixty-nine old states, forty-nine enacted at least one new constitution during the 1948–1976 period, with a total of eighty-eight new constitutions. The number of UDHR rights included in new constitutions enacted by old states rose between 1948 and 1976. For old states, the average number of UDHR rights included

in constitutions enacted in 1948 was 14; the average in new constitutions written in 1976 was 19—a more than thirty-three percent increase. Thus, countries that existed as independent states before 1948 experienced significant constitutionalization of human rights between 1948 and 1976, during the same time frame that the United States was federalizing human rights.

Figure 6

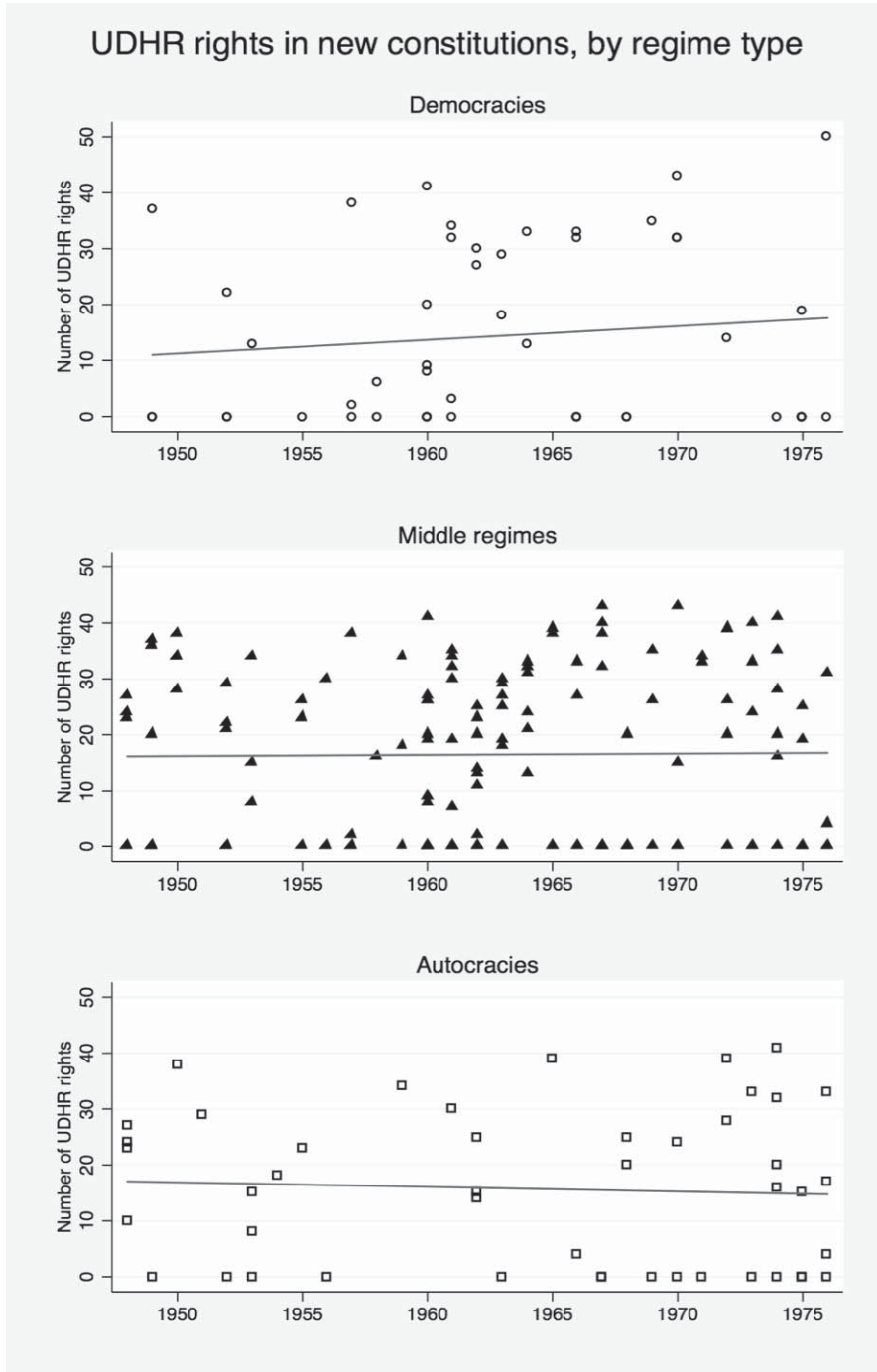


We also explore the intuition that constitutional incorporation of human rights varies by regime type. Democracies, for instance, may be more inclined to include rights protections in their constitutions. We employ data from the Varieties of Democracy (V-Dem) Project to define regime categories.⁷² V-Dem includes a continuous variable (*v2x_polyarchy*) composed of multiple components.⁷³ We classified as “democracies” those values of the variable above the 75th percentile. Values in the 25th–75th percentile range are categorized as “middle regimes,” and those below the 25th percentile are “autocracies.” Again looking only at new constitutions, we find the expected pattern for democracies, namely, increasing inclusion of UDHR rights between 1948 and 1976 (see Figure 7). Within the middle regime category, the trend line is essentially flat, although a large number of new constitutions in this group include more than thirty UDHR rights. These are counterbalanced by a substantial number of new constitutions incorporating no UDHR rights at all. Among autocracies, there is a slight trend toward including fewer UDHR rights in new constitutions over time, though a number of new constitutions in this group include more than twenty UDHR rights. Thus, the democratic countries that are most similar to the United States were constitutionalizing human rights between 1948 and 1976, during roughly the same time period that the United States was federalizing human rights.

⁷² Michael Coppedge, et al., *V-Dem Dataset—Version 8*, VARIETIES OF DEMOCRACY PROJECT (2018), <http://doi.org/10.23696/vdemcy18> [<https://perma.cc/7QEH-E724>].

⁷³ *See id.*

Figure 7



Finally, we also examine the incorporation of specific rights. That is, our unit of interest becomes not the state or the constitution, but the specific UDHR right. We compare the average number of new and amended constitutions that included a particular right before 1948 to the same average for 1948–1976. Rights appearing in the lower part of Figure 8 were uncommon in constitutions before 1948; rights in the upper portion of the graph were quite common before 1948. The vast majority of UDHR rights (60 out of 68) show growth in constitutional incorporation. The eight exceptions are: the right to marry, the right to equality of parentage, intellectual property rights, the prohibition on arbitrary deprivation of property, the prohibition of slavery, the right against self-incrimination, the right to privacy in the home and correspondence, and freedom of the press. It bears emphasis that the graph covers the period only up to 1976, that is, the early decades of the human rights era. If we extend the data to 2013, all of the UDHR rights are more commonly included in constitutions written or amended after 1948 than before. Table 2 shows the ten rights with the smallest difference in constitutional inclusion (pre- and post-1948) as well as the ten rights with the largest increase. It bears emphasis that the right to racial equality was the single right manifesting the greatest degree of constitutionalization between 1948 and 1976. This fact is significant because the prohibition on racial discrimination is one of the core defining characteristics of the political morality of human rights.

Figure 8

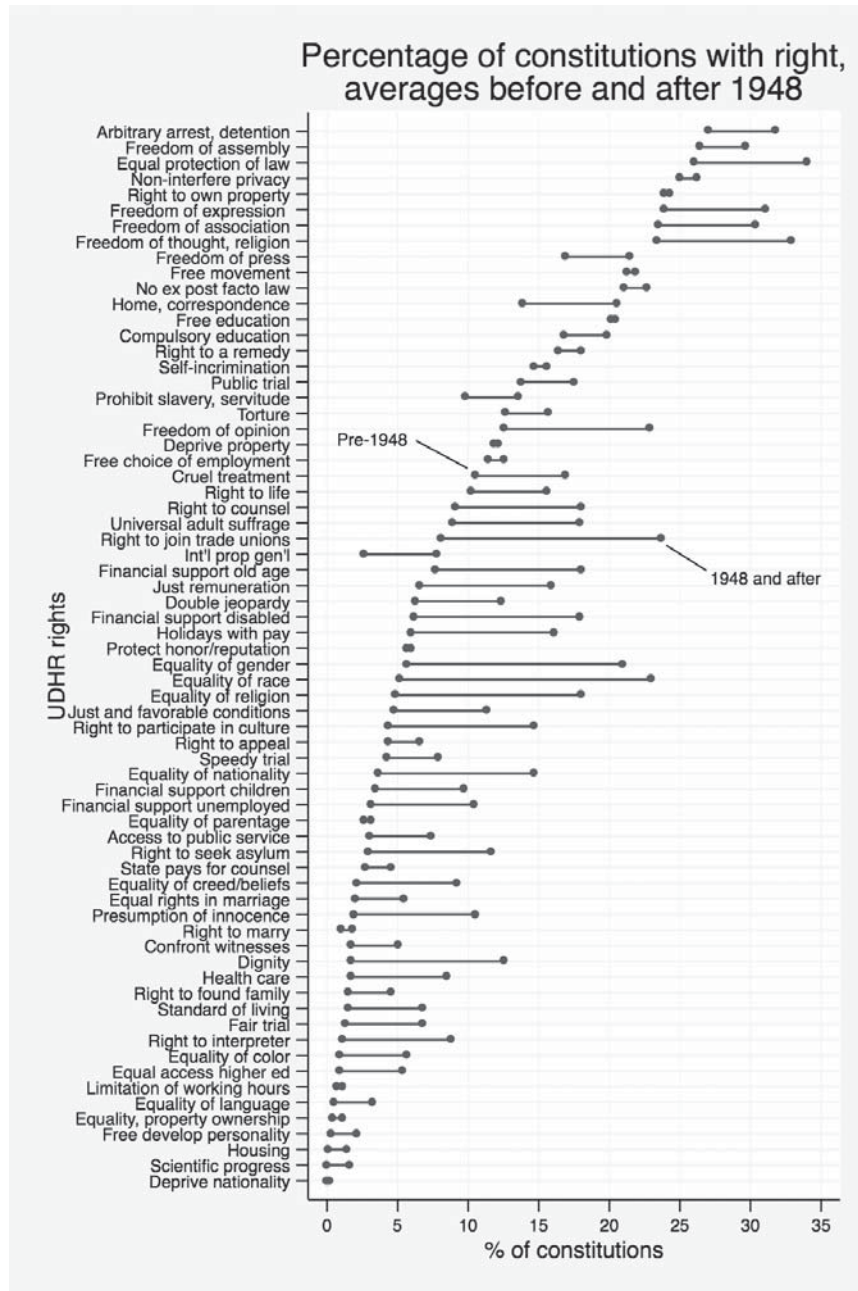


Table 2: Percentage of new & amended constitutions including a UDHR right

	Pre-1948	1948–1976	Change
<i>Smallest increases</i>			
Home & correspondence	20.5	13.9	-6.6
Intellectual property	7.8	2.7	-5.2
Press	21.5	16.9	-4.5
Slavery	13.6	9.8	-3.8
Self-incrimination	15.6	14.6	-1.0
Marry	1.8	1.0	-0.9
Equality: parentage	3.1	2.7	-0.5
Arbitrary deprivation property	12.2	11.9	-0.3
Nationality	0.0	0.2	0.2
Free education	20.2	20.5	0.3
<i>Largest increases</i>			
Freedom of opinion	12.6	22.9	10.3
Right to participate in culture	4.3	14.6	10.3
Financial support old age	7.7	18.0	10.3
Dignity	1.7	12.6	10.9
Equality of nationality	3.7	14.6	11.0
Financial support disabled	6.2	17.9	11.7
Equality of religion	4.9	18.0	13.2
Equality of gender	5.6	20.9	15.3
Right to join trade unions	8.1	23.7	15.6
Equality of race	5.2	23.0	17.8

III. FEDERALIZATION OF HUMAN RIGHTS IN THE UNITED STATES

Professor Ackerman and other scholars have written about the civil rights revolution in the United States.⁷⁴ Professor Tushnet has written about the “New Deal—Great Society” constitutional regime.⁷⁵ Here, we emphasize that the constitutional

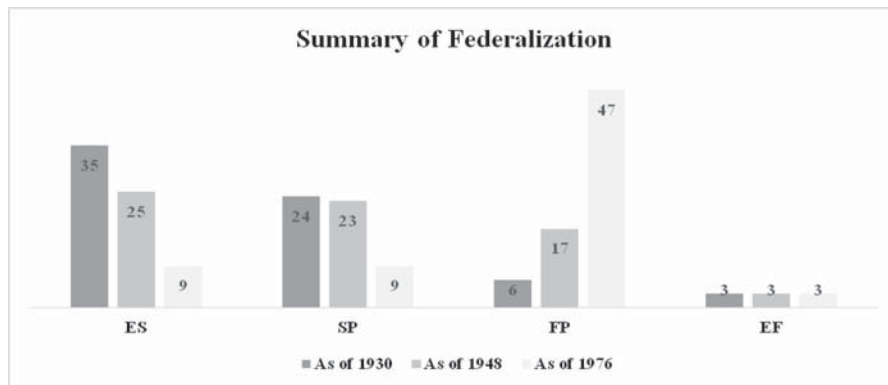
⁷⁴ See ACKERMAN, *supra* note 1.

⁷⁵ See Mark Tushnet, *Foreward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 30 (1999); see also Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE

revolution that produced the New Deal—Great Society regime was not merely a civil rights revolution; it was a human rights revolution. Not only did the human rights revolution expand the scope of protection for human rights in the United States, it also transferred regulatory authority over human rights from the states to the federal government. We refer to that transfer of authority as the “federalization of human rights.” The federalization of human rights altered the balance of power between the states and the federal government for both civil/political rights and economic/social rights.

Part III documents the federalization of human rights in the United States between 1930 and 1976. To measure federalization, we classify rights into four categories: exclusive state authority (ES); concurrent authority, state primacy (SP); concurrent authority, federal primacy (FP); and exclusive federal authority (EF). For all sixty-eight rights in the data set, we present snapshots at three different points in time: 1930, 1948, and 1976. For any particular right, “federalization” occurs when classification of that right changes from weaker to stronger federal control. Classification of rights as ES or EF is fairly straightforward. Drawing distinctions between SP and FP is more problematic. However, we adopted a simple default rule: if there is a roughly equal balance between state and federal control, we classify the right as SP (state primacy). This conservative approach avoids overstating the degree of federalization. Figure 9 summarizes federalization over time. The vertical axis measures the number of rights at specific points in time that fit into each of the four categories. Overall, the data demonstrates a significant transfer of regulatory authority over human rights from the states to the federal government between 1930 and 1976.

Figure 9



The claim that the federal government assumed greater control over protection of individual rights after 1930 is not novel. Even so, the quantitative analysis presented

L. REV. 841 (2001) [hereinafter Tushnet, *Federalism and International Human Rights in the New Constitutional Order*].

here is novel in three respects. First, quantification shows that the degree of federalization was perhaps even more dramatic than is generally assumed. Second, whereas many scholarly accounts of American constitutional history emphasize the 1930s as the critical period for expansion of federal power,⁷⁶ our data show that the greatest expansion of federal control over human rights occurred after 1948.⁷⁷ Third, conventional accounts of U.S. constitutional history understate the degree to which federalization affected economic/social rights as well as civil/political rights (as shown in Section III.D).

As noted in the Introduction, three primary mechanisms drove the process of federalization: congressional legislation, judicial recognition of unenumerated rights, and incorporation. Incorporation doctrine merits a brief explanation. The Bill of Rights is a set of constitutional amendments adopted in 1791. Those amendments protect numerous rights included in the UDHR.⁷⁸ However, as originally understood, the Bill of Rights merely protected rights against infringement by the federal government; it did not preclude state governments from infringing those rights.⁷⁹ “Incorporation doctrine” consists of a series of Supreme Court decisions holding that specific provisions of the Bill of Rights are binding on the states by virtue of the Fourteenth Amendment Due Process Clause.⁸⁰ The Due Process Clause “incorporates” those rights and makes them binding on the states. Sixteen of the sixty-eight rights in our data set are included in the Bill of Rights. All sixteen rights are subject to concurrent state and federal regulatory authority. We classify those rights as “state primacy” before they were incorporated. We classify them as “federal primacy” after they were incorporated because incorporation transferred substantial control over those rights from the states to the federal courts.⁸¹

Part III is divided into five sections. The first section addresses twenty of sixty-eight rights (29%) that were not federalized between 1930 and 1976. The next section discusses thirteen of sixty-eight rights (19%) that were federalized between 1930 and 1948. The third section analyzes thirty-five of sixty-eight rights (51%) that were federalized between 1948 and 1976. The fourth section demonstrates that federalization affected both civil/political rights and economic/social rights. The final section contends that the balance between state and federal authority over human rights has not changed substantially since 1976. Thus, as depicted in Figure 9, the period from 1948 to 1976 was the key period for federalization of human rights.

⁷⁶ See Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, *supra* note 75, at 842.

⁷⁷ *Accord* PRIMUS, *supra* note 3.

⁷⁸ See David Sloss, *Incorporation, Federalism, and International Human Rights*, in HUMAN RIGHTS AND LEGAL JUDGMENTS: AN AMERICAN STORY (Austin Sarat ed., 2017).

⁷⁹ See *Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

⁸⁰ See AMAR, *supra* note 18, at 6–7.

⁸¹ See Sloss, *supra* note 78, at 77.

A. Rights That Were Not Federalized Between 1930 and 1976

Twenty of the sixty-eight rights in our data set were not federalized after 1930. In other words, the federal government exercised no greater control over those rights in 1976 than it did in 1930. Those twenty rights can be divided into three groups: nine rights that were subject to exclusive or primary federal authority before 1930; nine rights that remained subject to exclusive state authority throughout the relevant time period; and two rights that we classify as “state primacy” throughout the relevant time period. Notably, nine of the twenty rights that were not federalized after 1930 were already federalized previously. In other words, only eleven of the sixty-eight rights were not federalized by 1976. Table 3 summarizes key information about rights that were not federalized after 1930.

Consider, first, rights that remained subject to exclusive state authority. UDHR Article 27(1) guarantees “the right freely to participate in the cultural life of the community” and the right “to share in scientific advancement and its benefits.”⁸² Article 26(1) specifies that “[e]lementary education shall be compulsory.”⁸³ Article 24 guarantees a right to “periodic holidays with pay.”⁸⁴ Article 23(1) promises “free choice of employment.”⁸⁵ Article 22 provides that everyone has a right to “the free development of his personality.”⁸⁶ All six of these rights are economic/social rights, not civil/political rights. As of 1976, no federal constitutional or statutory provisions protected these rights. The scope of state regulation varies widely. In theory, though, states have the authority to regulate all these rights pursuant to their general police powers.⁸⁷

Table 3: Rights That Were Not Federalized After 1930

UDHR Article	Right	In Text of Const?	As of 1930	As of 1948	As of 1976
2	Equality of creed/beliefs	No	ES	ES	ES
12	Protect honor/reputation	No	ES	ES	ES
16	Equal rights in marriage	No	ES	ES	ES
22	Free develop personality	No	ES	ES	ES
24	Holidays with pay	No	ES	ES	ES
23(1)	Free choice of employment	No	ES	ES	ES
26(1)	Compulsory education	No	ES	ES	ES

⁸² UDHR, *supra* note 6, art. 27(1).

⁸³ *Id.* art. 26(1).

⁸⁴ *Id.* art. 24.

⁸⁵ *Id.* art. 23(1).

⁸⁶ *Id.* art. 22.

⁸⁷ Under the U.S. constitutional system, the federal government is a government of limited, enumerated powers, but state legislatures have plenary authority to enact legislation to promote the general welfare.

UDHR Article	Right	In Text of Const?	As of 1930	As of 1948	As of 1976
27(1)	Scientific progress	No	ES	ES	ES
27(1)	Right to participate in culture	No	ES	ES	ES
21(2)	Access to public service	No	SP	SP	SP
17(1)	Right to own property	No	SP	SP	SP
19	Freedom of expression	1st Am	FP	FP	FP
17(2)	Deprive property	5th Am	FP	FP	FP
4	Prohibit slavery, servitude	13th Am	FP	FP	FP
7	Equal protection of law	14th Am	FP	FP	FP
13	Free movement	Art. IV(2)	FP	FP	FP
11(2)	No ex post facto law	Art. I(10)	FP	FP	FP
14	Right to seek asylum	No	EF	EF	EF
27(2)	Intellectual property, general	No	EF	EF	EF
15	Deprive nationality	No	EF	EF	EF

Three other rights in our set of sixty-eight rights also remained subject to exclusive state control, even though they are civil/political rights, not economic/social rights. UDHR Article 16(1) specifies that men and women “are entitled to equal rights as to marriage, during marriage and at its dissolution.”⁸⁸ State laws provide substantial protection for equal marital rights, but federal law does not regulate this particular right.⁸⁹ UDHR Article 12 states: “No one shall be subjected to . . . attacks upon his honour and reputation.”⁹⁰ State defamation laws protect this right, but there is no federal defamation law in the United States.⁹¹ UDHR Article 2 prohibits discrimination based on “political or other opinion.”⁹² Federal civil rights statutes prohibit discrimination on the basis of race, gender, religion, and national origin.⁹³ However, those statutes do not explicitly address discrimination based on political opinion, and the Supreme

⁸⁸ UDHR, *supra* note 6, art. 16(1).

⁸⁹ Our set of sixty-eight rights includes three distinct rights related to marriage and procreation that are linked to UDHR Article 16. The Supreme Court federalized the right to procreate in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Court federalized the right to interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967). *See infra* note 227–28 and accompanying text. The right to be free from gender-based discrimination is also a distinct right subject to federal control. *See infra* notes 317–21 and accompanying text. The specific rights at issue here are associated with Married Women’s Property Acts that states adopted in the nineteenth century. Those rights have not been federalized.

⁹⁰ UDHR, *supra* note 6, art. 12.

⁹¹ The First Amendment establishes constitutional limits on state defamation laws. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). However, the First Amendment does not provide federal constitutional protection for reputational harms.

⁹² UDHR, *supra* note 6, art. 2.

⁹³ *See, e.g.*, 42 U.S.C. § 2000a (2001).

Court has never recognized political opinion as a “suspect classification” under the Equal Protection Clause. Moreover, as a matter of custom, elected officials in both state and federal governments have broad discretion to discriminate based on political opinion when deciding whom to hire for senior appointed positions.

We classify two rights as “state primacy” throughout the relevant time period. UDHR Article 21(2) states: “Everyone has the right of equal access to public service in his country.”⁹⁴ Federal civil service laws, which date to the nineteenth century, protect this right for federal employees and those who seek federal employment.⁹⁵ However—aside from general antidiscrimination statutes, which implicate other rights addressed separately in this Article—federal law does not regulate state governments in this respect. Every state has its own rules for state employees that operate in parallel with federal rules governing federal employees. UDHR Article 17(1) states: “Everyone has the right to own property.”⁹⁶ The Fifth and Fourteenth Amendments prohibit the federal government and state governments, respectively, from depriving individuals of property without due process of law.⁹⁷ The Civil Rights Act of 1866 guarantees all citizens “the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁹⁸ Despite this overlay of federal regulation, the right to own property is regulated primarily by state law in the United States.

Three of the sixty-eight rights in our data set are classified as “exclusively federal” throughout the relevant time period. Article 27(2) protects the rights of authors and inventors to the “material interests resulting from any scientific, literary or artistic production.”⁹⁹ The federal government exercises exclusive authority over patents and copyrights. Relying on its power to enact laws “to promote the Progress of Science and useful Arts,”¹⁰⁰ Congress enacted the first federal patent and copyright laws in 1790.¹⁰¹ Article 14 protects “the right to seek and to enjoy in other countries asylum from persecution.”¹⁰² Article 15 specifies that “[n]o one shall be arbitrarily deprived of his nationality.”¹⁰³ The federal government augmented protection for both of these rights after 1948.¹⁰⁴ However, in doing so, the federal government was not displacing

⁹⁴ UDHR, *supra* note 6, art. 21(2).

⁹⁵ See Civil Service Act of 1883, 22 Stat. 403 (Jan. 16, 1883).

⁹⁶ UDHR, *supra* note 6, art. 17(1).

⁹⁷ U.S. CONST. amends. V, XIV.

⁹⁸ 42 U.S.C. § 1982 (1991). See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding the validity of Section 1982 as a valid exercise of Congress’s power under the Thirteenth Amendment).

⁹⁹ UDHR, *supra* note 6, art. 27(2).

¹⁰⁰ U.S. CONST. art. I, § 8, cl. 8.

¹⁰¹ See Patent Act of 1790, 1 Stat. 109 (April 10, 1790); Copyright Act of 1790, 1 Stat. 124 (May 31, 1790).

¹⁰² UDHR, *supra* note 6, art. 14(1).

¹⁰³ *Id.* art. 15(2).

¹⁰⁴ The Supreme Court established federal constitutional limits on arbitrary deprivation of nationality in *Trop v. Dulles*, 356 U.S. 86 (1958) and *Afroyim v. Rusk*, 387 U.S. 253 (1967).

pre-existing state law. States exercised a degree of independent control over immigration until the 1880s.¹⁰⁵ Since the late nineteenth century, though, the plenary power doctrine has granted the federal government exclusive control over matters related to immigration and nationality.¹⁰⁶

Finally, six other rights were subject to concurrent authority, with federal primacy, throughout the relevant time period. Two such rights were included in the original Constitution. UDHR Article 11(2) states: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offense . . . at the time when it was committed.”¹⁰⁷ That provision corresponds to the Ex Post Facto Clause in Article I, section 10 of the Constitution.¹⁰⁸ UDHR Article 13 provides: “Everyone has the right to freedom of movement and residence within the borders of each State.”¹⁰⁹ That clause corresponds to the Privileges and Immunities Clause in Article IV, section 2 of the Constitution.¹¹⁰ Since the mid-nineteenth century, if not earlier, the Privileges and Immunities Clause has protected the individual right to move freely between states.¹¹¹ Both freedom of movement and ex post facto punishment are subject to state regulation, but the Constitution establishes federal primacy over those rights.

The Civil War Amendments established federal primacy over two additional rights. UDHR Article 4 specifies that “[n]o one shall be held in slavery or servitude.”¹¹² Article 4 corresponds to the Thirteenth Amendment, which states: “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”¹¹³ UDHR Article 7 states: “All are equal before the law and are

The United States acceded to the Protocol Relating to the Status of Refugees in 1968, the most important international treaty related to the right to asylum. 189 U.N.T.S. 150 (1968). Congress enhanced protection for asylum rights in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980).

¹⁰⁵ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

¹⁰⁶ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 113–14, 119–27 (5th ed. 2009). *But see infra* notes 357–63 and accompanying text (noting that certain rights related to immigration law, which were previously subject to exclusive federal control, are now subject to concurrent state authority).

¹⁰⁷ UDHR, *supra* note 6, art. 11(2).

¹⁰⁸ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . ex post facto Law.”). A similar Ex Post Facto Clause is included in Article I, Section 9 as a limitation on the federal government. U.S. CONST. art. I, § 9.

¹⁰⁹ UDHR, *supra* note 6, art. 13.

¹¹⁰ U.S. CONST. art. IV, § 2, cl. 1.

¹¹¹ See *Crandall v. Nevada*, 73 U.S. 35, 47 (1868) (“[T]he right of passing through a State by a citizen of the United States is one guaranteed to him by the Constitution.”); *The Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (“We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”).

¹¹² UDHR, *supra* note 6, art. 4.

¹¹³ U.S. CONST. amend. XIII, § 1.

entitled without any discrimination to equal protection of the law.”¹¹⁴ Article 7 corresponds to the Fourteenth Amendment Equal Protection Clause, which states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁵ The prohibition on slavery and involuntary servitude and the guarantee of equal protection are both subject to concurrent state regulation. However, the Thirteenth and Fourteenth Amendments established federal primacy over those rights.

The Supreme Court’s earliest incorporation decisions established federal primacy over two other rights before 1930. The Court decided in 1897 that the Fifth Amendment Takings Clause is binding on the states.¹¹⁶ That decision established federal primacy over the right not to be arbitrarily deprived of one’s property.¹¹⁷ The Court decided in 1925 that the First Amendment Free Speech Clause is binding on the states.¹¹⁸ That decision established federal primacy over the right to freedom of expression in Article 19 of the UDHR.

B. Federalization of Human Rights Between 1930 and 1947

Between 1935 and 1938, Congress enacted several statutes that can fairly be described as federal human rights legislation. (The Supreme Court had previously invalidated several other federal “human rights” statutes.¹¹⁹) Meanwhile, between 1931 and 1940, the Supreme Court incorporated four other rights in the Bill of Rights.¹²⁰ Additionally, in the early 1940s, the Court decided two cases establishing federal constitutional protection for UDHR rights that are not specifically enumerated in the Constitution.¹²¹ Overall, between 1930 and 1947, Congress and the Supreme Court federalized thirteen of the sixty-eight rights under review.¹²² However, the degree of federalization was not uniform. Two of the thirteen rights moved from “exclusive state authority” to “concurrent authority, state primacy.” Four others moved from state

¹¹⁴ UDHR, *supra* note 6, art. 7.

¹¹⁵ U.S. CONST. amend. XIV, § 1. Our data set includes four other rights—in addition to the Article 7 equal protection right—that are linked to the Fourteenth Amendment. They are: non-discrimination on the basis of race (UDHR, art. 2), non-discrimination on the basis of color (UDHR, art. 2); the right to life (UDHR, art. 3); and the prohibition on arbitrary deprivation of property (UDHR, art. 17(2)). We discuss arbitrary deprivation of property in the next paragraph. We discuss the other rights in Section III.C.

¹¹⁶ *Chicago B&Q R. Co. v. Chicago*, 166 U.S. 226 (1897).

¹¹⁷ UDHR, *supra* note 6, art. 17(2).

¹¹⁸ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹¹⁹ *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating a law establishing maximum working hours and minimum wages in coal mines); *Hammer v. Dagenhart* (The Child Labor Case), 247 U.S. 251 (1918) (invalidating a federal statute that imposed restrictions on child labor).

¹²⁰ *See infra* notes 151–59 and accompanying text.

¹²¹ *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹²² *See* Table 4.

primacy to federal primacy. Seven of the thirteen rights underwent more radical federalization, shifting from exclusive state authority to federal primacy. Table 4 summarizes information about the thirteen rights federalized during this period. The following discussion begins with federalization by congressional legislation. We then address rights federalized by Supreme Court decisions.

Congress enacted the Social Security Act¹²³ and the National Labor Relations Act (NLRA)¹²⁴ in 1935. Soon thereafter, it adopted the Housing Act of 1937¹²⁵ and the Fair Labor Standards Act (FLSA).¹²⁶ All four statutes established federal protection for rights later included in the UDHR. Titles I and II of the Social Security Act created federal programs to provide financial support for the elderly;¹²⁷ those provisions establish federal protection for rights recognized in UDHR Article 25(1).¹²⁸ Title III of the Social Security Act provided federal funding for state unemployment compensation laws and made that funding contingent on compliance with federal standards.¹²⁹ Thus, Title III established federal standards for the Article 25 “right to security in the event of unemployment.”¹³⁰ Title IV of the Social Security Act provided federal funding for states “to furnish financial assistance . . . to needy dependent children” and made that funding contingent upon state compliance with federal standards.¹³¹ Thus, Title IV created a federal program (later known as “Aid to Families with Dependent Children,” or AFDC¹³²) corresponding to UDHR Article 25(2).

Table 4: Federalization of Human Rights Between 1930 and 1947

UDHR Article	Right	In Text of Const?	Fed'lize Process	As of 1930	As of 1948	As of 1976
25(1)	Housing	No	Statute	ES	SP	SP
24	Limitation of working hours	No	Statute	ES	FP	FP
23(3)	Just remuneration	No	Statute	ES	FP	FP
23(4)	Right to join trade unions	No	Statute	ES	FP	FP
25(1)	Financial support unemployed	No	Statute	ES	FP	FP
25(1)	Right to social security	No	Statute	ES	FP	FP

¹²³ Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935).

¹²⁴ Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935).

¹²⁵ Pub. L. No. 75-412, 50 Stat. 888 (Sept. 1, 1937).

¹²⁶ Pub. L. No. 75-718, 52 Stat. 1060 (June 25, 1938).

¹²⁷ See 49 Stat. at 620–25 (Aug. 14, 1935).

¹²⁸ See UDHR, *supra* note 6, art. 25(1). See also UDHR, *supra* note 6, art. 22.

¹²⁹ See 49 Stat. at 626–27.

¹³⁰ UDHR, *supra* note 6, art. 25(1). See also UDHR, *supra* note 6, art. 23(1).

¹³¹ See §§ 401–06, 49 Stat. at 627–29.

¹³² See Pub. L. No. 87-543, § 104(a)(2), 76 Stat. 185 (1962).

UDHR Article	Right	In Text of Const?	Fed'lize Process	As of 1930	As of 1948	As of 1976
25(2)	Financial support children	No	Statute	ES	FP	FP
16	Right to found family	No	Interp	ES	SP	SP
19	Freedom of opinion	No	Interp	ES	FP	FP
18	Freedom of thought, religion	1st Am	Incorp	SP	FP	FP
19	Freedom of press	1st Am	Incorp	SP	FP	FP
20	Freedom of assembly	1st Am	Incorp	SP	FP	FP
11(1)	Right to counsel	6th Am	Incorp	SP	FP	FP

Section 7 of the NLRA creates a federal right for employees “to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.”¹³³ Thus, the NLRA protects “the right to form and to join trade unions” in UDHR Article 23(4).¹³⁴ The FLSA created federal standards for minimum wages and maximum working hours;¹³⁵ those provisions established federal protection for “the right to just and favourable remuneration” in Article 23(3)¹³⁶ and the right to “reasonable limitation of working hours” in Article 24.¹³⁷ The Housing Act of 1937 created several federal programs designed to help the states “remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . that are injurious to the health, safety, and morals of the citizens of the Nation.”¹³⁸ The statute established federal protection for the right to adequate housing included in UDHR Article 25(1).

Under the constitutional standards that prevailed before 1935, all the statutory provisions summarized in the previous paragraphs were probably unconstitutional. Shortly after Congress enacted the statutes, petitioners challenged the constitutionality of the NLRA, the Social Security Act, and the FLSA, arguing that Congress had exceeded the scope of its enumerated powers and invaded the reserved powers of the States. In a series of decisions between 1937 and 1941, the Supreme Court upheld the validity of all three statutes. In *NLRB v. Jones & Laughlin Steel Corp.*,¹³⁹ the Court held that the NLRA was a valid exercise of Congress’s power under the Commerce Clause.¹⁴⁰ The dissenters¹⁴¹ argued forcefully that the majority decision was at odds with recent decisions in *Schechter Poultry Corp. v. United States*¹⁴² and *Carter v.*

¹³³ Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935).

¹³⁴ UDHR, *supra* note 6, art. 23(4).

¹³⁵ Pub. L. No. 75-718, §§ 6–8, 52 Stat. 1060, 1062–65 (1938).

¹³⁶ UDHR, *supra* note 6, art. 23(3).

¹³⁷ *Id.* art. 24.

¹³⁸ Pub. L. No. 75-412, § 1, 50 Stat. 888 (1937).

¹³⁹ 301 U.S. 1 (1937).

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 76 (McReynolds, J., dissenting).

¹⁴² 295 U.S. 495 (1935).

Carter Coal Co.,¹⁴³ but the majority brushed aside those objections. In *Charles C. Steward Machine Co. v. Davis*¹⁴⁴ and *Helvering v. Davis*,¹⁴⁵ the Court rebuffed various challenges to the Social Security Act, holding that the Act was a valid exercise of Congress's Spending Power.¹⁴⁶ The dissenters in *Steward Machine Co.* argued that the Act invaded the reserved powers of the states and violated the Tenth Amendment.¹⁴⁷ Finally, in *United States v. Darby*,¹⁴⁸ the Court rejected a constitutional challenge to the FLSA, holding that it was a valid exercise of Congress's Commerce Power.¹⁴⁹

All seven statutory rights summarized above were subject to exclusive state regulatory authority before 1930. By 1941, though, after the Court's decision in *Darby*, all seven rights were subject to concurrent state and federal authority. Reasonable minds could differ about which rights qualify as "state primacy" and which ones qualify as "federal primacy." We classify the right to housing as "state primacy" because the Housing Act of 1937 established relatively weak federal control over housing rights.¹⁵⁰ We classify the other six rights as "federal primacy" because the NLRA, the FLSA, and the Social Security Act created a high degree of federal uniformity for those rights, while also leaving states a degree of flexibility in implementation.

The First Amendment to the Constitution and UDHR Article 19 protect freedom of the press.¹⁵¹ The Supreme Court decided in 1931 that the Free Press Clause is binding on the states.¹⁵² The Sixth Amendment to the Constitution and UDHR Article 11 protect the right to counsel.¹⁵³ The Court decided in 1932 that the right to counsel is binding on the states.¹⁵⁴ The First Amendment and UDHR Article 20 protect freedom of assembly.¹⁵⁵ The Court decided in 1937 that the right of peaceful assembly is binding on the states.¹⁵⁶ Finally, the First Amendment and UDHR Article 18 protect freedom of religion.¹⁵⁷ The Court decided in 1940 that the Free Exercise Clause is binding on the states.¹⁵⁸ For all four rights incorporated between 1931 and 1940, the

¹⁴³ 298 U.S. 238 (1936).

¹⁴⁴ 301 U.S. 548 (1937).

¹⁴⁵ 301 U.S. 619 (1937).

¹⁴⁶ See *supra* notes 144–45.

¹⁴⁷ See 301 U.S. at 598 (McReynolds, J., dissenting); *id.* at 610 (Sutherland, J., dissenting); *id.* at 616 (Butler, J., dissenting).

¹⁴⁸ 312 U.S. 100 (1941).

¹⁴⁹ *Id.*

¹⁵⁰ See Pub. L. No. 412, 5 Stat. 888 (1937).

¹⁵¹ See U.S. CONST. amend. I; UDHR, *supra* note 6, art. 19.

¹⁵² *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁵³ See U.S. CONST. amend. VI; UDHR, *supra* note 6, art. 11(1). See *supra* Part I (discussing Article 11(1)).

¹⁵⁴ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁵⁵ See U.S. CONST. amend. I; UDHR, *supra* note 6, art. 20(1).

¹⁵⁶ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

¹⁵⁷ See U.S. CONST. amend. I; UDHR, *supra* note 6, art. 18.

¹⁵⁸ *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Court also incorporated the Establishment Clause in 1947. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The Establishment

Court's decisions shifted the degree of federal control from "state primacy" to "federal primacy."¹⁵⁹ Yet, as of 1947, most rights in the Bill of Rights did not bind the states.¹⁶⁰ With a few exceptions, the Bill of Rights continued to operate—as it had since the Founding—as a constraint on the federal government, not a source of legal protection for universal, inalienable rights.

UDHR Article 19 states: "Everyone has the right to freedom of opinion and expression."¹⁶¹ Article 18 states: "Everyone has the right to freedom of thought, conscience and religion."¹⁶² The First Amendment explicitly protects freedom of expression and freedom of religion, but it does not explicitly protect freedom of opinion or thought.¹⁶³ The key distinction is that freedom of opinion/thought protects purely private ruminations, whereas freedom of expression and freedom of religion protect the public manifestations of those opinions.¹⁶⁴ *West Virginia State Bd. of Educ. v. Barnette*¹⁶⁵ invalidated a state rule requiring all pupils to participate in a flag salute ceremony.¹⁶⁶ The Court held that the rule violated the First Amendment even though it did not prohibit any speech or any public manifestation of religious belief.¹⁶⁷ Justice Jackson said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . We think the action of the local authorities in compelling the flag salute and pledge . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.¹⁶⁸

Barnette was the first Supreme Court decision establishing federal constitutional protection for freedom of opinion. *Barnette* established federal primacy over a right previously subject to exclusive state regulatory authority.

Clause is not included in our list of sixty-eight rights because there is no comparable provision in the UDHR.

¹⁵⁹ See *supra* notes 79–81 and accompanying text.

¹⁶⁰ See Sloss, *supra* note 78, at 10.

¹⁶¹ UDHR, *supra* note 6, art. 19.

¹⁶² *Id.* art. 18.

¹⁶³ See U.S. CONST. amend. I.

¹⁶⁴ The CCP codebook classifies "freedom of religion," "freedom of expression," and "freedom of opinion, thought, and/or conscience" as three distinct rights. Elkins et al., *supra* note 14.

¹⁶⁵ 319 U.S. 624 (1943). Professors Sullivan and Gunther treat *Barnette* as an example of the right not to speak. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1140–42 (17th ed. 2010). They acknowledge that the right not to speak is not "separately enumerated in the First Amendment." *Id.* at 1140.

¹⁶⁶ *Barnette*, 319 U.S. 624.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 642.

UDHR Article 16 states: “Men and women of full age . . . have the right to marry and to found a family.”¹⁶⁹ The right to “marry” and the right to “found a family” are distinct rights. The U.S. Constitution does not explicitly mention either. An early draft of the UDHR specified that “[m]en and women shall have equal rights as to marriage,” but did not address the right to found a family.¹⁷⁰ Rene Cassin, the French representative to the Commission on Human Rights, proposed the phrase “to found a family” in June 1948.¹⁷¹ The delegates approved his proposal.¹⁷² Mr. Cassin emphasized “the importance of the fundamental right of a human being to found a family,”¹⁷³ but he never explained the scope of that right. On its face, the right “to found a family” seems, at a minimum, to include the right to procreate. The UN Human Rights Committee affirmed this understanding in a comment on Article 23 of the ICCPR, which also protects the right “to found a family.”¹⁷⁴ In *Skinner v. Oklahoma*,¹⁷⁵ the Supreme Court invalidated a state law authorizing forced sterilization of certain criminals.¹⁷⁶ The Court declared that procreation is “one of the basic civil rights of man” that is “fundamental to the very existence and survival of the race.”¹⁷⁷ Thus, *Skinner* was the first Supreme Court decision to recognize a federal right “to found a family.” Even so, federal control remains weak. Given traditional state autonomy in family law matters, we classify the right to found a family as “concurrent authority, state primacy.”

C. Federalization of Human Rights Between 1948 and 1976

The period between the adoption of the Universal Declaration in 1948 and the entry into force of the two Covenants in 1976 coincided with a dramatic expansion of federal power over human rights in the United States. During this period, the Supreme Court incorporated ten distinct rights from the Bill of Rights that are included in our list of sixty-eight rights. Through expansive interpretation of the First, Fourth, Eighth and Fourteenth Amendments, the Court also established federal constitutional protection for nine other, unenumerated rights. Meanwhile, Congress passed laws creating federal statutory protection for nine additional rights. Finally, seven other rights were federalized through some mixture of legislative and judicial action and constitutional

¹⁶⁹ UDHR, *supra* note 6, art. 16.

¹⁷⁰ 2 WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES 1603–08 (2013).

¹⁷¹ *Id.* at 1751–53.

¹⁷² *Id.* at 1786–88.

¹⁷³ 1 WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES 859 (2013).

¹⁷⁴ See U.N. Office of the High Comm’r for Human Rights, 39 Human Rights Comm., Gen. Comment No. 19, ¶ 5 (July 27, 1990); ICCPR, art. 23, ¶ 2.

¹⁷⁵ 316 U.S. 535 (1942).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 541.

amendments. Overall, the federal government augmented its control over thirty-five of the sixty-eight rights in our data set during this period.

Table 5: Federalization of Human Rights Between 1948 and 1976

UDHR Article	Right	In Text of Const?	Fed'lize Process	As of 1930	As of 1948	As of 1976
2	Equality of language	No	Statute	ES	ES	SP
26(1)	Free education	No	Statute	ES	ES	SP
26(1)	Equal access higher ed	No	Statute	ES	ES	SP
23(1)	Just and favorable conditions	No	Statute	ES	ES	FP
25(1)	Financial support disabled	No	Statute	ES	ES	FP
25(1)	Health care	No	Statute	ES	ES	FP
2	Equality of religion	No	Statute	ES	ES	FP
25(1)	Standard of living	No	Statute	ES	SP	FP
2	Equality of nationality	No	Statute	SP	SP	FP
16	Right to marry	No	Interp	ES	ES	SP
11(1)	Right to interpreter	No	Interp	ES	ES	SP
2	Equality of parentage	No	Interp	ES	ES	FP
12	Non-interfere privacy	No	Interp	ES	ES	FP
20	Freedom of association	No	Interp	ES	ES	FP
11(1)	Presumption of innocence	No	Interp	ES	ES	FP
11(1)	State pays for counsel	No	Interp	ES	ES	FP
11(1)	Right to appeal	No	Interp	ES	ES	FP
1	Dignity	No	Interp	ES	ES	FP
5	Cruel treatment	8th Am	Incorp	SP	SP	FP
5	Torture	8th Am	Incorp	SP	SP	FP
9	Arbitrary arrest, detention	4th Am	Incorp	SP	SP	FP
10	Fair trial	5th, 6th	Incorp	SP	SP	FP
10	Public trial	6th Am	Incorp	SP	SP	FP
12	Home, correspondence	4th Am	Incorp	SP	SP	FP
11(1)	Double jeopardy	5th Am	Incorp	SP	SP	FP
11(1)	Self-incrimination	5th Am	Incorp	SP	SP	FP
11(1)	Confront witnesses	6th Am	Incorp	SP	SP	FP
11(1)	Speedy trial	6th Am	Incorp	SP	SP	FP
2	Equality of gender	No	Mixed	SP	SP	FP
2	Equality of race	14th Am	Mixed	SP	SP	FP
2	Equality of color	14th Am	Mixed	SP	SP	FP

UDHR Article	Right	In Text of Const?	Fed'lize Process	As of 1930	As of 1948	As of 1976
21(3)	Universal adult suffrage	Various	Mixed	SP	SP	FP
2	Equality property ownership	No	Mixed	SP	SP	FP
3	Right to life	14th Am	Mixed	SP	SP	FP
8	Right to a remedy	No	Mixed	SP	SP	FP

As was true in the 1930–47 period, the degree of federalization varied among the rights federalized between 1948 and 1976. Nineteen of the thirty-five rights moved from “state primacy” to “federal primacy.” Eleven other rights underwent more radical federalization, shifting from exclusive state authority to federal primacy. Five other rights shifted from exclusive state authority to state primacy. Table 5 summarizes information about the thirty-five rights federalized during this period. The following analysis of those rights is divided into four subsections: incorporation, unenumerated rights, federal statutes, and mixed federalization processes.

1. Federalization by Incorporation

In a series of decisions between 1948 and 1971, the Court decided that every right in the Bill of Rights that has an analogue in the UDHR is binding on the states. The Court never cited the UDHR in its incorporation decisions. However, the Court repeatedly said that only “fundamental rights” bind the states under the Fourteenth Amendment.¹⁷⁸ In practice, the concept of fundamental rights that guided the Court’s decisions was quite similar to the concept embodied in the UDHR and very different from the concept of fundamental rights that the Court applied before World War II.¹⁷⁹

UDHR Article 5 prohibits torture and “cruel, inhuman or degrading treatment or punishment.”¹⁸⁰ We count “torture” and “cruel treatment” as two distinct rights.¹⁸¹ The Court made both rights binding on the states when it held in *Robinson v. California*¹⁸² that the Fourteenth Amendment incorporates the Eighth Amendment Cruel and Unusual Punishments Clause.¹⁸³ UDHR Article 9 prohibits arbitrary arrest and detention.¹⁸⁴

¹⁷⁸ See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

¹⁷⁹ See *infra* Section IV.C.

¹⁸⁰ UDHR, *supra* note 6, art. 5.

¹⁸¹ The rights to be free from “torture” and “cruel treatment” are generally treated as distinct rights under international human rights law. They are also classified as distinct rights in the CCP codebook. See Elkins et al., *supra* note 14.

¹⁸² 370 U.S. 660 (1962).

¹⁸³ *Id.*

¹⁸⁴ UDHR, *supra* note 6, art. 9.

Article 12 states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”¹⁸⁵ Similarly, the Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects.”¹⁸⁶ The Court made the substance of Articles 9 and 12 binding on the states by incorporating the Fourth Amendment warrant requirement and the Fourth Amendment ban on “unreasonable searches and seizures.”¹⁸⁷ UDHR Article 10 provides that everyone is entitled to “a fair and public hearing.”¹⁸⁸ Similarly, the Sixth Amendment provides for both a “public trial” and “an impartial jury.”¹⁸⁹ The Court held in *In re Oliver*¹⁹⁰ that the right to a public trial is binding on the states.¹⁹¹ In *Irvin v. Dowd*,¹⁹² the Court assumed without deciding that the right to an impartial jury—which corresponds to the Article 10 right to a fair hearing—binds the states under the Fourteenth Amendment.¹⁹³

UDHR Article 11(1) provides that “[e]veryone charged with a penal offence” is entitled to “all the guarantees necessary for his defence.”¹⁹⁴ For reasons explained previously, we identify eight distinct rights that are encompassed within the phrase “all the guarantees necessary.” The Supreme Court incorporated four of those rights in the 1960s.¹⁹⁵ *Malloy v. Hogan*¹⁹⁶ incorporated the Fifth Amendment Self-Incrimination Clause, which corresponds to ICCPR Article 14(3)(g).¹⁹⁷ *Pointer v. Texas*¹⁹⁸ incorporated the Sixth Amendment Confrontation Clause, which corresponds to ICCPR Article 14(3)(e).¹⁹⁹ *Klopper v. North Carolina*²⁰⁰ incorporated the Sixth Amendment right to a speedy trial, which corresponds to ICCPR Article 14(3)(c).²⁰¹ Finally, *Benton v. Maryland*²⁰² incorporated the Fifth Amendment Double Jeopardy Clause, which corresponds to ICCPR Article 14(7).²⁰³

¹⁸⁵ *Id.* art. 12.

¹⁸⁶ U.S. CONST. amend. IV.

¹⁸⁷ *See id.*; *Aguilar v. Texas*, 378 U.S. 108 (1964) (incorporating the warrant requirement); *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Search and Seizure Clause).

¹⁸⁸ UDHR, *supra* note 6, art. 10.

¹⁸⁹ U.S. CONST. amend. VI.

¹⁹⁰ 333 U.S. 257 (1948).

¹⁹¹ *Id.*

¹⁹² 366 U.S. 717 (1961).

¹⁹³ *Id.*

¹⁹⁴ UDHR, *supra* note 6, art. 11(1).

¹⁹⁵ The Court incorporated a fifth right, the right to counsel, in the 1930s. *Powell v. Alabama*, 287 U.S. 45 (1932). We address the other three rights—the right to appeal, the right to an interpreter, and the state’s duty to pay for an attorney—in the section on unenumerated rights.

¹⁹⁶ 378 U.S. 1 (1964).

¹⁹⁷ ICCPR, *supra* note 26, art. 14(3)(g).

¹⁹⁸ 380 U.S. 400 (1965).

¹⁹⁹ ICCPR, *supra* note 26, art. 14(3)(e).

²⁰⁰ 386 U.S. 213 (1967).

²⁰¹ ICCPR, *supra* note 26, art. 14(3)(c).

²⁰² 395 U.S. 784 (1969).

²⁰³ ICCPR, *supra* note 26, art. 14(7).

In sum, the Court's incorporation decisions between 1948 and 1976 expanded federal power over ten distinct human rights: the prohibitions on torture, cruel treatment, arbitrary arrest, and arbitrary interference with the home and correspondence; the rights to a fair trial, a public trial, and a speedy trial; the right to confront adverse witnesses; and restrictions on self-incrimination and double jeopardy. For all ten rights incorporated between 1948 and 1976, the Court's decisions shifted the degree of federal control from "state primacy" to "federal primacy."

2. Judicial Recognition of Unenumerated Rights

Between 1948 and 1976, U.S. courts established federal constitutional protection for nine additional rights that are not specifically mentioned in the Constitution's text. Eight of those rights are based on Supreme Court decisions. The ninth, the right to an interpreter, never reached the Supreme Court, but the right is firmly established in decisions by federal appellate courts. Two of the key Supreme Court decisions expressly use the term "human rights" to help justify constitutional protection for unenumerated rights.²⁰⁴

The first right in this group—the right to be treated with dignity—might be called a "principle" rather than a "right." We include it in our list of sixty-eight rights because dignity is a foundational principle in the UDHR.²⁰⁵ Moreover, as Professors Resnik and Suk explain:

During the eighteenth and nineteenth centuries, the Supreme Court mentioned the word "dignity" only in terms of entities such as sovereigns and courts. . . . It was not until the 1940s . . . that the Court embraced dignity as something possessed by individuals. Since then, the Court has embedded the term dignity in interpretations of the U.S. Constitution.²⁰⁶

The first Supreme Court opinion linking "dignity" to the Bill of Rights was a dissenting opinion by Justice Frankfurter in 1942.²⁰⁷ The concept of dignity became entrenched in Eighth Amendment jurisprudence in 1958 when Chief Justice Warren

²⁰⁴ See *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (stating that the right to counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (stating that a search "without authority of law but solely on the authority of the police" must be "condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.").

²⁰⁵ The first clause of the Preamble refers to "the inherent dignity . . . of all members of the human family." The word "dignity" also appears in Article 1, Article 22, and Article 23. See UDHR, *supra* note 6.

²⁰⁶ Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934 (2003).

²⁰⁷ *Glasser v. United States*, 315 U.S. 60, 89 (1942) (Frankfurter, J., dissenting).

declared in *Trop v. Dulles*²⁰⁸: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”²⁰⁹ In *Trop*, the Chief Justice “relied heavily on international sources to interpret the Eighth Amendment’s Cruel and Unusual Punishment Clause.”²¹⁰ A few years later, the Court announced that the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”²¹¹ Since then, the Court has invoked the term “dignity” in relation to “the Fourteenth and Fifteenth Amendment rights to be free from discrimination, and the Ninth and Fourteenth Amendment rights to make one’s own decisions on procreation.”²¹² Professors Resnik and Suk conclude: “[D]ignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents.”²¹³

Closely related to dignity is the right to privacy. UDHR Article 12 explicitly recognizes a right to privacy.²¹⁴ However, the term “privacy” does not appear in the U.S. Constitution. Thus, the Supreme Court declared in 1922: “[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States . . . confer[s] any right of privacy upon either persons or corporations.”²¹⁵ A few years later, in *Olmstead v. United States*,²¹⁶ Justice Brandeis wrote in dissent that the Constitution should be construed to protect “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”²¹⁷ Two decades after *Olmstead*, the Court held in *Wolf v. Colorado*²¹⁸: “The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore . . . enforceable against the States through the Due Process Clause.”²¹⁹ Later, in *Griswold v. Connecticut*,²²⁰ the Court found a right to privacy in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments.²²¹ Since *Griswold*, the right to privacy has been at the heart of the Court’s substantive due process jurisprudence.²²²

²⁰⁸ 356 U.S. 86 (1958).

²⁰⁹ *Id.* at 100.

²¹⁰ Melissa A. Waters, *International Law as an Interpretive Tool in the Supreme Court, 1946–2000*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 380, 410 (Sloss, Ramsey & Dodge eds., 2011).

²¹¹ *Schmerber v. California*, 384 U.S. 757, 767 (1966).

²¹² Resnik & Suk, *supra* note 206, at 1935.

²¹³ *Id.* at 1926.

²¹⁴ UDHR, *supra* note 6, art. 12 (“No one shall be subjected to arbitrary interference with his privacy . . .”).

²¹⁵ *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 543 (1922).

²¹⁶ 227 U.S. 438 (1928).

²¹⁷ *Id.* at 478 (1928) (Brandeis, J., dissenting).

²¹⁸ 338 U.S. 25 (1949).

²¹⁹ *Id.* at 27–28.

²²⁰ 381 U.S. 479 (1965).

²²¹ *Id.* at 484–85.

²²² *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

Aside from dignity and privacy, other unenumerated rights that the Court recognized are more specific. UDHR Article 2 bars discrimination based on “birth.”²²³ Before the human rights revolution, many state laws discriminated against “illegitimate” children.²²⁴ However, in a series of decisions between 1968 and 1972, the Court ruled that the Equal Protection Clause constrains the power of states to discriminate against children born out of wedlock.²²⁵ UDHR Article 16 states: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry.”²²⁶ Until the 1960s, many states banned interracial marriage, but the Supreme Court held in *Loving v. Virginia*²²⁷ that state laws prohibiting interracial marriage violate the Fourteenth Amendment.²²⁸ UDHR Article 20 recognizes a right to freedom of association.²²⁹ The Constitution does not explicitly guarantee freedom of association, but the Court held in *National Ass’n for Advancement of Colored People v. Alabama*²³⁰ that a court order requiring “disclosure of membership in an organization engaged in advocacy of particular beliefs” violated the members’ rights to freedom of association under the Fourteenth Amendment.²³¹

UDHR Article 11(1) states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty.”²³² The presumption of innocence has been a central feature of criminal law in every state since the Founding.²³³ However, the Supreme Court did not establish federal constitutional protection for that presumption until 1970.²³⁴ The Court held in *In re Winship*²³⁵ that the Due Process Clause mandates proof beyond a reasonable doubt because the reasonable doubt “standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’”²³⁶

Article 11(1) provides that criminal defendants are entitled to “all the guarantees necessary” for their defense.²³⁷ As explained above, we identify eight distinct rights encompassed within this phrase. Three of those rights are relevant here. First, ICCPR

²²³ UDHR, *supra* note 6, art. 2.

²²⁴ See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Glonn v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

²²⁵ See sources cited *supra* note 224.

²²⁶ UDHR, *supra* note 6, art. 16.

²²⁷ 388 U.S. 1 (1967).

²²⁸ *Id.*

²²⁹ UDHR, *supra* note 6, art. 20.

²³⁰ 357 U.S. 449 (1958).

²³¹ *Id.* at 462.

²³² UDHR, *supra* note 6, art. 11(1).

²³³ See *In re Winship*, 397 U.S. 358, 363 (1970).

²³⁴ *Id.*

²³⁵ 397 U.S. 358 (1970).

²³⁶ *Id.* at 363.

²³⁷ UDHR, *supra* note 6, art. 11.

Article 14(5) protects the right to appeal a criminal conviction.²³⁸ The Constitution does not explicitly guarantee criminal defendants a right of appeal, but *Griffin v. Illinois*²³⁹ established federal constitutional protection for the right to appeal state criminal convictions.²⁴⁰ Second, ICCPR Article 14(3)(d) requires states to provide an attorney at no cost for an indigent criminal defendant.²⁴¹ The Sixth Amendment guarantees “Assistance of Counsel,” but it does not explicitly require the state to provide counsel free of charge.²⁴² Nevertheless, *Gideon v. Wainwright*²⁴³ held that states have a constitutional duty, absent a valid waiver of the right, to provide appointed counsel free of charge for indigent criminal defendants.²⁴⁴

Third, ICCPR Article 14(3)(f) protects the right of criminal defendants to the assistance of an interpreter.²⁴⁵ The Constitution does not include any comparable provision. The Supreme Court has never explicitly decided whether the Constitution guarantees a right to an interpreter. As of 1976, both the First and Second Circuits had held that the Constitution guarantees a criminal defendant’s right to an interpreter in some cases.²⁴⁶ At least three other circuits recognized this right in the 1980s and 1990s.²⁴⁷ No federal appellate court has held to the contrary.²⁴⁸ Therefore, although the matter is not free from doubt, we classify the right to an interpreter as an unenumerated constitutional right established by federal judicial decisions.

In sum, judicial decisions between 1948 and 1976 established federal constitutional protection for nine distinct unenumerated rights. All nine were subject to exclusive state regulatory authority before 1948. Seven of the nine rights—the right to be treated with dignity, the right to privacy, the presumption of innocence, the right to appeal, the right to state-appointed counsel, the right to freedom of association, and the prohibition on discriminating against illegitimate children—have been subject to federal primacy since 1976 as a result of the Supreme Court’s constitutional jurisprudence. In contrast, despite the Court’s landmark decision in *Loving v. Virginia*, we classify the right to marry as state primacy, due to traditional state control over family law matters. Finally, we also classify the right to an interpreter as state primacy.

²³⁸ ICCPR, *supra* note 26, art. 14(5).

²³⁹ 351 U.S. 12 (1956).

²⁴⁰ *See id.* (holding that the Fourteenth Amendment precludes states from charging a fee to an indigent defendant to obtain the transcript needed to appeal his conviction).

²⁴¹ ICCPR, *supra* note 26, art. 14(3)(d).

²⁴² U.S. CONST. amend. VI.

²⁴³ 372 U.S. 335 (1963).

²⁴⁴ *Id.* at 344–45.

²⁴⁵ ICCPR, *supra* note 26, art. 14(3)(f).

²⁴⁶ *See United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973); *U.S. ex rel. Negron v. New York*, 434 F.2d 386, 389–90 (2d Cir. 1970).

²⁴⁷ *See United States v. Mayans*, 17 F.3d 1174, 1179–81 (9th Cir. 1994); *Valladeres v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989); *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985).

²⁴⁸ *See United States v. Johnson*, 248 F.3d 655, 663–64 (7th Cir. 2001) (reviewing cases).

Federal rules govern the right to an interpreter in federal court,²⁴⁹ but federal courts exercise fairly weak supervision over the right to an interpreter in state court.

3. Federalization by Statute

The previous sections focused on courts, however, Congress also contributed to the federalization of human rights between 1948 and 1976. UDHR Article 25(1) declares a “right to security in the event of . . . disability.”²⁵⁰ The Social Security Amendments Act of 1956 created the first federal program for disability benefits.²⁵¹ The Social Security Act of 1935 created federal old-age benefits, but it did not provide benefits for people who become disabled before reaching retirement age.²⁵² State workmen’s compensation laws provided disability benefits, but state programs varied widely.²⁵³ The federal government provided disability benefits for federal employees before 1956, but those programs were quite limited in scope.²⁵⁴ The 1956 statute established a broad class of individuals who are “entitled to a disability insurance benefit” under federal law.²⁵⁵

UDHR Article 2 prohibits discrimination based on “religion” and “national or social origin.”²⁵⁶ The Civil Rights Act of 1964 bars discrimination based on both religion and national origin in the context of public accommodations²⁵⁷ and employment.²⁵⁸ The Act also bars discrimination based on national origin, but not religion, in the context of federally assisted programs.²⁵⁹ The Civil Rights Act of 1875 also barred discrimination based on race and color in the context of public accommodations,²⁶⁰ but the Supreme Court declared that law unconstitutional in 1883.²⁶¹ In contrast, the Court upheld the validity of the public accommodations provisions in the 1964 Civil

²⁴⁹ See An Act to Provide More Effectively for the Use of Interpreters in Courts of the United States, Pub. L. No. 95-539, 92 Stat. 2040 (1978).

²⁵⁰ UDHR, *supra* note 6, art. 25(1).

²⁵¹ Pub. L. No. 84-880, § 103, 70 Stat. 815 (1956).

²⁵² See Pub. L. No. 74-271, 49 Stat. 620, 620–25 (1935).

²⁵³ SOCIAL SECURITY OFFICE OF POLICY, SOC. SEC. BULL., Vol. 65, No. 4, WORKERS’ COMPENSATION: A BACKGROUND FOR SOCIAL SECURITY PROFESSIONALS (2003/2004), <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p7.html> [<https://perma.cc/5H37-MN98>].

²⁵⁴ See *Social Security Amendments of 1955: Hearing Before the S. Fin. Comm.*, 84th Cong. 51–55 (Memorandum on Disability Provisions of Retirement Systems for Federal Civilian Employees).

²⁵⁵ Pub. L. No. 84-880, § 103, 70 Stat. 815 (1956).

²⁵⁶ UDHR, *supra* note 6, art. 2.

²⁵⁷ Pub. L. No. 88-352, § 201(a), 78 Stat. 243 (1964).

²⁵⁸ *Id.* §§ 703(a–d), 78 Stat. 255–56.

²⁵⁹ See *id.* § 601, 78 Stat. 252. The 1964 Act also prohibits discrimination based on race, color, and sex. We discuss those issues below. See *infra* notes 303–21 and accompanying text.

²⁶⁰ An Act to Protect All Citizens in Their Civil and Legal Rights, 18 Stat. 335, 336 (Mar. 1, 1875).

²⁶¹ Civil Rights Cases, 109 U.S. 3, 25 (1883).

Rights Act shortly after its enactment.²⁶² Thus, the 1964 Act established federal legislative control over discrimination by private actors throughout the country.

The 1965 Voting Rights Act also enhanced federal power over human rights.²⁶³ UDHR Article 2 prohibits discrimination based on language. Section 4(e) of the Voting Rights Act addressed the rights “of persons educated in American-flag schools in which the predominant classroom language was other than English.”²⁶⁴ The Act prohibits “States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.”²⁶⁵ Section 4(e) was intended, at least in part, to secure the rights of New York City’s Puerto Rican community.²⁶⁶ In *Katzenbach v. Morgan*,²⁶⁷ voters challenged the constitutionality of section 4(e), contending that it interfered with the state’s constitutional power to determine the appropriate qualifications for New York voters.²⁶⁸ The plaintiffs had a strong argument: the Supreme Court had recently ruled that state laws conditioning the right to vote on an English language literacy test were constitutional.²⁶⁹ Nevertheless, the Court upheld the constitutionality of Section 4(e), reasoning that section 5 of the Fourteenth Amendment empowers Congress to enact legislation to displace state laws that would otherwise be constitutional.²⁷⁰ Although federal law does not bar discrimination based on language in other contexts, the Voting Rights Act provides federal protection for the right to be free from discrimination based on language when exercising the right to vote.²⁷¹

UDHR Article 23(1) states: “Everyone has the right . . . to just and favourable conditions of work.”²⁷² The Fair Labor Standards Act of 1938 created federal rules related to minimum wages and maximum working hours.²⁷³ However, the Occupational Safety and Health Act of 1970²⁷⁴ was the first federal statute creating significant federal protection for the Article 23 right to “just and favourable conditions of work.”²⁷⁵ Congress specifically found “that personal injuries and illnesses arising out

²⁶² See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964).

²⁶³ Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

²⁶⁴ § 4(e), 79 Stat. 437 (1965).

²⁶⁵ *Id.*

²⁶⁶ See *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966); ACKERMAN, *supra* note 1, at 116–21.

²⁶⁷ 384 U.S. 641 (1966).

²⁶⁸ *Id.*

²⁶⁹ *Lassiter v. Northampton Cty. Election Bd.*, 360 U.S. 45 (1959).

²⁷⁰ *Katzenbach*, 384 U.S. at 649–58.

²⁷¹ The right to an interpreter, discussed previously, is also relevant to discrimination based on language.

²⁷² UDHR, *supra* note 6, art. 23(1).

²⁷³ See *supra* note 135 and accompanying text.

²⁷⁴ Pub. L. No. 91-596, 84 Stat. 1590 (1970).

²⁷⁵ UDHR, *supra* note 6, art. 23.

of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce.”²⁷⁶ Thus, the Act’s purpose was “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”²⁷⁷ Before enactment of the 1970 legislation, state laws varied widely in the type and quality of regulations protecting worker health and safety.²⁷⁸ Moreover, prior federal laws on occupational safety applied “only to workers performing Government contracts and then only for the period of time they are actually working on these contracts.”²⁷⁹

UDHR Article 25(1) recognizes a right to “medical care.”²⁸⁰ Title V of the Social Security Act of 1935 included provisions on medical care for mothers and children.²⁸¹ However, federal law did not provide significant protection for the right to medical care until Congress enacted the Social Security Amendments Act of 1965.²⁸² The 1965 amendments created the modern Medicare and Medicaid programs.²⁸³ The legislation added a new Title XVIII to the Social Security Act, which created a federal entitlement to hospital insurance benefits for Americans aged 65 or older (Medicare).²⁸⁴ The 1965 amendments also added a new Title XIX (Medicaid), which expanded both federal support and federal oversight for state programs for individuals “whose income and resources are insufficient to meet the costs of necessary medical services.”²⁸⁵ Federal regulation of the right to medical care continued to expand after 1965,²⁸⁶ but the 1965 amendments established federal primacy over the right to medical care.

UDHR Article 26 recognizes a right to free education “in the elementary and fundamental stages,” as well as a right of equal access to “higher education . . . on the basis of merit.”²⁸⁷ Congress provided federal protection for the right of equal access to higher education in Title IX of the Education Amendments of 1972.²⁸⁸ Section 901(a) states: “No person in the United States shall, on the basis of sex, be

²⁷⁶ § 2, 84 Stat. 1590 (1970).

²⁷⁷ § 2(b), 84 Stat. 1590.

²⁷⁸ *See A Review of State Occupational Health Legislation: Hearing Before the Select Subcomm. on Labor*, 91st Cong. 74–110 (1969).

²⁷⁹ *Occupational Safety and Health: Hearing on H.R. 14816 and H.R. 15571 Before the Select Subcomm. on Labor*, 90th Cong. (1968) (Statement of Willard Wirtz, Secretary of Labor).

²⁸⁰ UDHR, *supra* note 6, art. 25.

²⁸¹ Pub. L. No. 74-271, 49 Stat. 620, 629–33 (Aug. 14, 1935).

²⁸² Pub. L. No. 89-97, 79 Stat. 286 (July 30, 1965).

²⁸³ *See id.*

²⁸⁴ *See id.* § 226, 79 Stat. 290–91; *id.* §§ 1811–1812, 79 Stat. 291–92; S. Rep. No. 89-213, at 4–6 (1965).

²⁸⁵ *See* Pub. L. No. 89-97, §§ 1901–05, 79 Stat. 286, 343–53; *see also* S. Rep. No. 89-213, at 9–10 (1965).

²⁸⁶ *See* CENTERS FOR MEDICARE AND MEDICAID SERVICES, MEDICARE & MEDICAID MILESTONES: 1937–2015, <https://www.cms.gov/About-CMS/Agency-Information/History/Downloads/Medicare-and-Medicaid-Milestones-1937-2015.pdf> [<https://perma.cc/L3ET-LRUW>].

²⁸⁷ UDHR, *supra* note 6, art. 26.

²⁸⁸ Pub. L. No. 92-318, 86 Stat. 235, 373 (June 23, 1972).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under” any federally funded program of higher education.²⁸⁹ Congress provided federal protection for the right to free elementary education in the Education for All Handicapped Children Act of 1975.²⁹⁰ When it adopted the statute, Congress made explicit findings that “more than half of the handicapped children in the United States do not receive appropriate educational services,” and that “one million of the handicapped children in the United States are excluded entirely from the public school system.”²⁹¹ The primary purpose of the act was “to assure that all handicapped children have available to them . . . a *free* appropriate public education.”²⁹² The statute appropriated federal funds and created federal rules providing legal protection for the Article 26 right to free elementary education.²⁹³

UDHR Article 25(1) states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.”²⁹⁴ The right to an adequate standard of living is an amalgam of several component rights, including the rights to food, housing, and medical care, as well as rights to government financial support in the event of unemployment, disability, and old age.²⁹⁵ We have discussed most of these component rights previously. Congress provided federal financial support for the elderly and unemployed in the Social Security Act of 1935.²⁹⁶ Congress created federal statutory protection for a right to housing in 1937²⁹⁷ and for a right to medical care in 1965.²⁹⁸ It provided federal financial support for people with disabilities in the 1956 Amendments to the Social Security Act.²⁹⁹ The right to food is the only remaining component right that we have not discussed previously.³⁰⁰ Congress established federal statutory protection for the right to food in the Food Stamp Act of 1964.³⁰¹ The right to an adequate standard of living was subject to exclusive state regulation before 1930. Reasonable people could disagree about the proper classification of the right after 1930. We classify it as “concurrent authority with state primacy” as of 1948, based on the 1935 Social Security Act and the 1937 Housing Act. We classify

²⁸⁹ 86 Stat. at 373. The statute includes various exclusions and limitations. *See* 86 Stat. at 373–75. Even so, it does provide significant federal protection for the right of equal access to higher education. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979).

²⁹⁰ Pub. L. No. 94-142, 89 Stat. 773 (Nov. 29, 1975).

²⁹¹ *Id.* § 3(a), 89 Stat. 774.

²⁹² *Id.* § 3(c), 89 Stat. 775 (emphasis added).

²⁹³ *See id.*

²⁹⁴ UDHR, *supra* note 6, art. 25(1).

²⁹⁵ *See id.*

²⁹⁶ *See supra* notes 127–32 and accompanying text.

²⁹⁷ *See supra* note 138 and accompanying text.

²⁹⁸ *See supra* notes 280–86 and accompanying text.

²⁹⁹ *See supra* notes 251–55 and accompanying text.

³⁰⁰ We do not include the right to food as a distinct right in our list of sixty-eight rights because the CCP database does not identify it as a separate right. *See Elkins et al., supra* note 14.

³⁰¹ Pub. L. No. 88-525, 78 Stat. 703 (Aug. 31, 1964).

it as “federal primacy” as of 1976, based on federal disability benefits created in 1956, the Food Stamp Act of 1964, and the federal Medicare and Medicaid programs enacted in 1965.

Setting aside the right to an adequate standard of living, seven of the other eight rights examined in this section were subject to exclusive state regulatory authority before 1948: non-discrimination based on language, non-discrimination based on religion, the right to free elementary education, the right of equal access to higher education, the right to medical care, the right to just and favorable working conditions, and the right to financial support in case of disability. The one exception is the right to non-discrimination based on national origin. Beginning in the late eighteenth century, the United States entered into a series of bilateral treaties that restricted the power of state governments to discriminate on the basis of national origin.³⁰² Hence, before 1948, that right was subject to concurrent authority, with state primacy. Civil rights legislation enacted in the 1960s augmented federal control. Therefore, as of 1976, the right to non-discrimination based on national origin was subject to federal primacy.

The seven other rights addressed in this section can be divided into two categories. After 1948, the right to free elementary education, the right of equal access to higher education, and the right to non-discrimination based on language shifted from “exclusive state control” to “state primacy.” Federal control over those rights remains relatively weak. In contrast, the right to non-discrimination based on religion, the right to medical care, the right to just and favorable working conditions, and the right to financial support in case of disability shifted from “exclusive state control” to “federal primacy.” The federal statutes referenced above establish fairly robust federal control over those rights.

4. Complex Federalization Processes

The other seven rights that were federalized between 1948 and 1976 do not fit neatly into any of the previous groups—incorporation, unenumerated rights, or federalization by statute—because federalization involved a mix of different processes. UDHR Article 2 prohibits discrimination based on both “race” and “colour.”³⁰³ We count non-discrimination based on race and color as two separate rights. The Fourteenth Amendment Equal Protection Clause protects both rights.³⁰⁴ Nevertheless, as of 1948, we classify both rights as “state primacy” because states had broad latitude to discriminate based on race and color, as evidenced by pervasive Jim Crow laws throughout the South. The Supreme Court decisions in *Brown v. Board of Education*³⁰⁵ and

³⁰² See John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANS'L L. 302, 306–16 (2013).

³⁰³ UDHR, *supra* note 6, art. 2.

³⁰⁴ U.S. CONST. amend. XIV.

³⁰⁵ 347 U.S. 483 (1954).

its progeny, followed by the Civil Rights Act of 1964,³⁰⁶ the Voting Rights Act of 1965,³⁰⁷ and the Fair Housing Act of 1968,³⁰⁸ solidified robust federal control over those rights. Hence, by 1976, both rights were subject to federal primacy.

UDHR Article 3 protects “the right to life.”³⁰⁹ Under international human rights law, the right to life is inextricably linked to the death penalty. Both the Fifth and Fourteenth Amendment Due Process Clauses preclude deprivation of life “without due process of law.”³¹⁰ The Fifth and Fourteenth Amendments imposed some limitations on capital punishment before 1948, but state law predominated in this area until the 1970s.³¹¹ The 1972 Supreme Court decision in *Furman v. Georgia*³¹² was a key turning point. The Court in *Furman*, in a deeply divided opinion, temporarily halted capital punishment in the United States, holding that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”³¹³ Justice Brennan’s concurring opinion characterized the Cruel and Unusual Punishments Clause as a “basic guaranty of human rights.”³¹⁴ *Furman* and its progeny established robust federal protection for the right to life.³¹⁵ Accordingly, we classify the right to life as “federal primacy” as of 1976.

UDHR Article 2 prohibits gender-based discrimination. The Nineteenth Amendment, ratified in 1920, provides that the right “to vote shall not be denied or abridged . . . on account of sex.”³¹⁶ As of 1948, though, the Nineteenth Amendment was the only significant federal law prohibiting gender discrimination. Since federal regulation did not address matters other than voting rights, we classify this right as “state primacy” as of 1948. Between 1948 and 1976, though, Congress and the Supreme Court joined forces to provide robust federal rules barring gender discrimination. Title VII of the 1964 Civil Rights Act made it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s” sex.³¹⁷ Similarly, Title IX of the 1972 Education Amendments states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of,

³⁰⁶ Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

³⁰⁷ Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

³⁰⁸ Pub. L. No. 90-284, 82 Stat. 81 (Apr. 11, 1968).

³⁰⁹ UDHR, *supra* note 6, art. 3.

³¹⁰ U.S. CONST. amend. V; *id.* amend. XIV.

³¹¹ *See generally* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2003).

³¹² 408 U.S. 238 (1972).

³¹³ *Id.* at 239–40.

³¹⁴ *Id.* at 268 (Brennan, J., concurring). *See also id.* at 320 (Marshall, J., concurring) (quoting a statement from Patrick Henry at the Virginia ratifying Convention to the effect that a Bill of Rights was necessary to protect “human rights”).

³¹⁵ *See* VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* (2013).

³¹⁶ U.S. CONST. amend. XIX.

³¹⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (July 2, 1964).

or be subjected to discrimination under” any federally funded program of higher education.³¹⁸ Meanwhile, the Supreme Court decided in *Reed v. Reed*³¹⁹ and *Frontiero v. Richardson*³²⁰ that the Fourteenth Amendment Equal Protection Clause provides additional protection from gender-based discrimination.³²¹ Thus, as of 1976, the prohibition on gender-based discrimination was subject to federal primacy.

UDHR Article 2 also prohibits discrimination based on property ownership.³²² The Civil Rights Act of 1866 guaranteed all citizens the same right “as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”³²³ Even so, this right was subject to state primacy as of 1948 because federal rules barring discrimination based on property were fairly weak at that time. By 1976, though, the balance between state and federal regulation had changed significantly. The Twenty-Fourth Amendment, ratified in 1964, provided that the right to vote “shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”³²⁴ The Supreme Court held in *Griffin v. Illinois* that the Fourteenth Amendment precludes states from charging a fee to an indigent defendant to obtain the transcript needed to appeal his conviction.³²⁵ A few years later, the Court held in *Gideon v. Wainwright* that states have a constitutional duty to provide appointed counsel free of charge for indigent criminal defendants.³²⁶ Granted, the Court held in *San Antonio Independent School Dist. v. Rodriguez*³²⁷ that poverty is not a suspect classification under the Equal Protection Clause.³²⁸ However, Justice Powell’s opinion in *Rodriguez* distinguished a series of cases in which the Court had previously held that the Constitution provides special protection for impoverished people in particular contexts.³²⁹ Moreover, the federal statutes establishing federal primacy over the right to an adequate standard of living, discussed previously,³³⁰ are also highly relevant to discrimination based on property. Thus, although poverty is not a suspect classification under the Equal Protection Clause, by 1976, the Twenty-Fourth Amendment and a series of federal statutes and Supreme Court decisions had

³¹⁸ Pub. L. No. 92-318, 86 Stat. 235, 373 (June 23, 1972).

³¹⁹ 404 U.S. 71 (1971).

³²⁰ 411 U.S. 677 (1973).

³²¹ *Id.* at 690–91; *Reed*, 404 U.S. at 77.

³²² UDHR, *supra* note 6, art. 2.

³²³ 42 U.S.C. § 1982 (1866).

³²⁴ U.S. CONST. amend. XXIV.

³²⁵ 351 U.S. 12 (1956).

³²⁶ 372 U.S. 335 (1963).

³²⁷ 411 U.S. 1 (1973).

³²⁸ *Id.*

³²⁹ *See id.* at 20–22 (citing, inter alia, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Illinois*, 399 U.S. 235 (1970); and *Tate v. Short*, 401 U.S. 395 (1971)); *see also* *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (holding that state courts cannot require an indigent welfare recipient to pay court fees to file a divorce action).

³³⁰ *See supra* notes 294–301 and accompanying text.

established federal primacy over the right to be free from discrimination based on property ownership.

UDHR Article 8 states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”³³¹ Two federal statutes enacted shortly after the Civil War are especially important for the Article 8 right to a remedy. The Reconstruction Act of 1867 authorized federal courts to grant habeas corpus relief to state prisoners detained in violation of federal law.³³² Although the statute existed on paper for decades, state prisoners had little practical success obtaining federal habeas relief before World War II.³³³ The Supreme Court’s 1953 decision in *Brown v. Allen*³³⁴ was a key turning point. *Brown* adopted an expansive interpretation of the federal habeas statute, holding that state prisoners could relitigate any constitutional claims in a federal habeas petition.³³⁵ Congress enacted 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871.³³⁶ Section 1983 authorizes individuals to file civil suits in federal court to obtain remedies for violations by state and local officers of federally protected rights.³³⁷ Like the federal habeas statute, before World War II Section 1983 did very little practical work to make federal remedies available to civil plaintiffs.³³⁸ The Supreme Court’s 1961 decision in *Monroe v. Pape*³³⁹ effectively opened the floodgates to federal civil rights claims under Section 1983. Since 1961, the federal habeas statute and 42 U.S.C. § 1983 have been the two most important remedial mechanisms that implement the Article 8 right to a remedy as a matter of federal law. In light of the above, we classify the right to a remedy as “state primacy” until 1948 and “federal primacy” as of 1976.

UDHR Article 21(3) proclaims a right to “universal and equal suffrage.”³⁴⁰ The road to universal suffrage in the United States has been long and rocky. Key constitutional amendments include: the Fifteenth Amendment, ratified in 1870, which gave blacks the right to vote;³⁴¹ the Nineteenth Amendment, ratified in 1920, which gave women the right to vote;³⁴² the Twenty-Third Amendment, ratified in 1961, which gave residents of the District of Columbia the right to vote;³⁴³ the Twenty-Fourth Amendment, ratified in 1964, which abolished poll taxes;³⁴⁴ and the Twenty-Sixth

³³¹ UDHR, *supra* note 6, art. 8.

³³² Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241–2255).

³³³ See ERWIN CHEREMINSKY, FEDERAL JURISDICTION 930–33 (2012).

³³⁴ 344 U.S. 443 (1953).

³³⁵ *Id.* at 460–65.

³³⁶ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

³³⁷ See CHEREMINSKY, *supra* note 333, at 497–500.

³³⁸ See *id.* at 505–06.

³³⁹ 365 U.S. 167 (1961).

³⁴⁰ UDHR, *supra* note 6, art. 21(3).

³⁴¹ U.S. CONST. amend. XV.

³⁴² *Id.* amend. XIX.

³⁴³ *Id.* amend. XXIII.

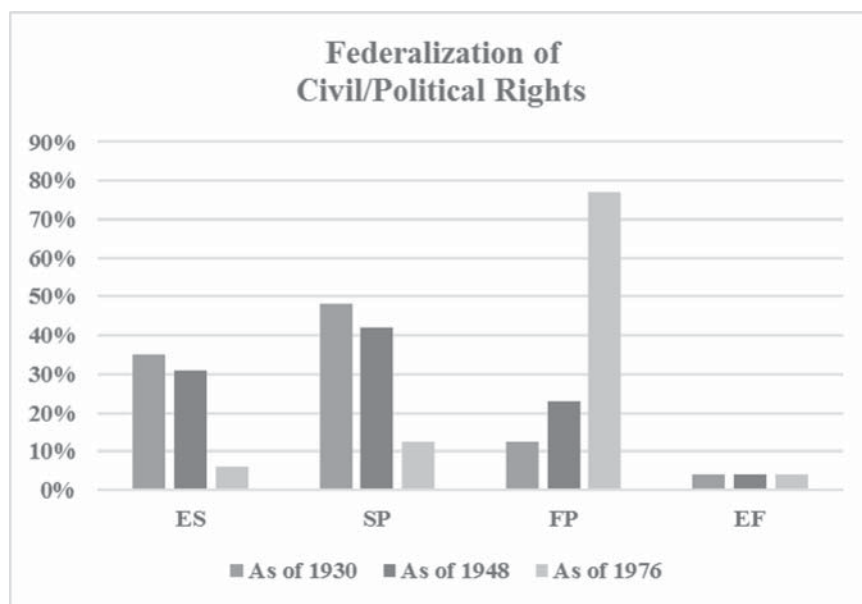
³⁴⁴ *Id.* amend. XXIV.

Amendment, ratified in 1971, which gave eighteen-year-olds the right to vote.³⁴⁵ As a practical matter, though, the 1965 Voting Rights Act³⁴⁶ and the Supreme Court's decision in *Reynolds v. Sims*³⁴⁷ provided more robust federal protection for voting rights than the various constitutional amendments.³⁴⁸ Given widespread restrictions on voting rights throughout the South during the Jim Crow era,³⁴⁹ we classify the right to vote as "state primacy" as of 1948. However, the combination of constitutional amendments, federal statutes and Supreme Court decisions meant the right to vote was subject to federal primacy by 1976.

D. Comparing Civil/Political Rights to Economic/Social Rights

We noted previously that the constitutional revolution establishing the New Deal/Great Society constitutional regime was a human rights revolution. International human rights law distinguishes between civil/political rights and economic/social rights. Between 1930 and 1976, the federal government substantially expanded its control over both civil/political rights and economic/social rights. Figures 10 and 11 depict the transfer of authority from the states to the federal government for both sets of rights between 1930 and 1976.

Figure 10



³⁴⁵ *Id.* amend. XXVI.

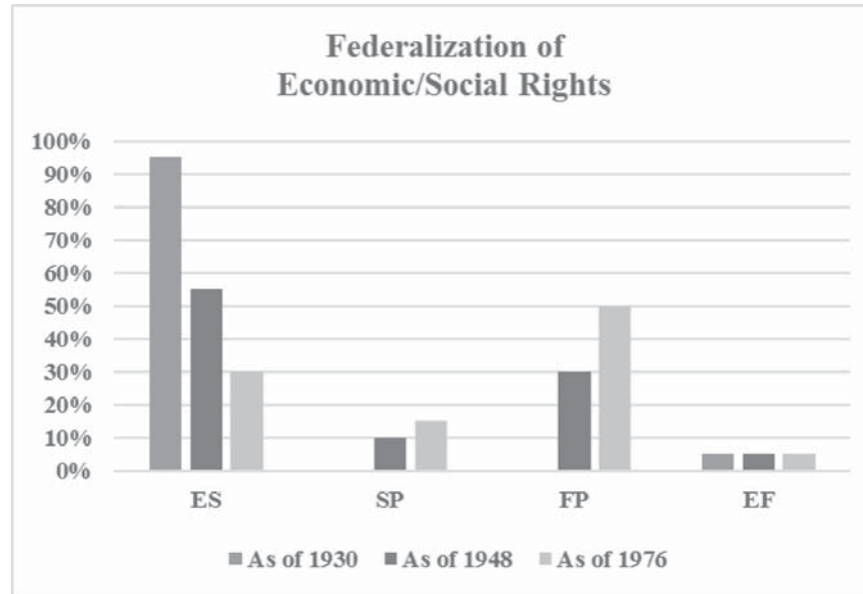
³⁴⁶ Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

³⁴⁷ 377 U.S. 533, 534, 558 (1964) (holding that the Equal Protection Clause restricts gerrymandering and establishes a "one person, one vote" rule).

³⁴⁸ See ACKERMAN, *supra* note 1, at 158–65.

³⁴⁹ See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

Figure 11



The sixty-eight rights in our data set include forty-eight rights in the civil/political category; those rights correspond to Articles 1 to 21 of the UDHR. The data set also includes twenty rights in the economic/social category; those rights correspond to Articles 22 to 27 of the UDHR. As of 1930, eighty-three percent of the civil/political rights were subject to exclusive or primary state control. By 1976, though, eighty-one percent of the civil/political rights were subject to exclusive or primary federal control. Compare those figures to the corresponding figures for economic/social rights. As of 1930, ninety-five percent of the economic/social rights (19 out of 20) were subject to exclusive state regulatory authority.³⁵⁰ (Interestingly, as of 1930, none of the economic/social rights in our data set were subject to concurrent federal/state authority.) By 1976, fifty-five percent of the economic/social rights were subject to exclusive or primary federal control. Thus, in the modern era, the federal government undoubtedly exercises greater control over civil/political rights than it does over economic/social rights.

Even so, the “baseline” distribution of power in 1930 for economic/social rights weighed more heavily in favor of state control than it did for civil/political rights. As of 1930, states exercised *exclusive* regulatory authority over ninety-five percent of economic/social rights and thirty-five percent of civil/political rights. In comparison, as of 1976, states exercised *exclusive* regulatory authority over just thirty percent of economic/social rights and six percent of civil/political rights. In sum, there are various ways to quantify the transfer of regulatory authority from the states to the

³⁵⁰ The one exception involves intellectual property rights, which are subject to exclusive federal control in the United States. U.S. CONST. art. I, § 8, cl. 8.

federal government between 1930 and 1976. By some measures, though, the federalization of economic/social rights was even more dramatic than the federalization of civil/political rights because the states exercised virtually complete control over economic/social rights before the New Deal revolution.

E. Maintenance of the Status Quo Since 1976

The Rehnquist Court launched a federalism revolution with its landmark decisions in *New York v. United States*,³⁵¹ *United States v. Lopez*,³⁵² *Seminole Tribe of Florida v. Florida*,³⁵³ *City of Boerne v. Flores*,³⁵⁴ and *United States v. Morrison*.³⁵⁵ Collectively, these and related cases imposed significant new federalism limits on Congress's legislative powers. Nevertheless, two decades after the Rehnquist Court's federalism revolution, the division of power over human rights between the states and the federal government is roughly the same as in 1976. As of 1976, the sixty-eight rights in our data set included three rights classified as EF, forty-seven rights classified as FP, nine rights classified as SP, and nine rights classified as ES.³⁵⁶ With one exception, those same classifications still apply in 2018.

The one exception involves the right to asylum under UDHR Article 14. That right was subject to exclusive federal control throughout the period from 1930 to 1976. Due to recent developments in immigration federalism, the right to asylum is now subject to concurrent state authority, with federal primacy.³⁵⁷ In *Arizona v. United States*,³⁵⁸ the Supreme Court affirmed federal primacy over immigration law, but gave states leeway to enact their own immigration regulations.³⁵⁹ Recently, several state and local governments have adopted sanctuary laws designed to protect the Article 14 right to asylum.³⁶⁰ President Trump issued an executive order that purports to deny federal funding to local governments enacting such sanctuary laws.³⁶¹ In response, several local governments filed lawsuits challenging that executive order.³⁶² As of this writing, the lower federal courts have uniformly ruled in favor of local governments in the "sanctuary city" cases.³⁶³

³⁵¹ 505 U.S. 144 (1992).

³⁵² 514 U.S. 549 (1995).

³⁵³ 517 U.S. 44 (1996).

³⁵⁴ 521 U.S. 507 (1997).

³⁵⁵ 529 U.S. 598 (2000).

³⁵⁶ See Figure 9 and Tables 3, 4, & 5.

³⁵⁷ See PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 3–8 (2015).

³⁵⁸ 567 U.S. 387, 400–03, 408–10 (2012).

³⁵⁹ *Id.*

³⁶⁰ See, e.g., California Values Act, CAL. GOV'T CODE §§ 7284–7284.12 (West 2017) (effective Jan. 1, 2018).

³⁶¹ Exec. Order No. 13768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

³⁶² See, e.g., *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1225 (9th Cir. 2018).

³⁶³ See *id.*; *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018); *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018); *City of Philadelphia v. Sessions*, 280 F.

It would be tedious to review the current status of all sixty-eight rights in our data set. A few examples suffice. First, the data set includes sixteen rights in the Bill of Rights federalized by Supreme Court incorporation decisions.³⁶⁴ The Court has not reversed any of those decisions. To the contrary, it extended the federalization of the Bill of Rights in *McDonald v. City of Chicago*,³⁶⁵ holding that the Second Amendment binds state and local governments.³⁶⁶ More recently, the Court doubled down on federalization by incorporation, holding in *Timbs v. Indiana*³⁶⁷ that the Eighth Amendment Excessive Fines Clause is binding on the states.³⁶⁸ Thus, all sixteen rights in the data set that are included in the Bill of Rights remain subject to federal primacy today.

The data set includes eleven rights federalized by Supreme Court decisions establishing constitutional protection for unenumerated rights.³⁶⁹ The Court has not reversed any of those decisions. In fact, the Court has augmented protection for several of those rights. For example, in *Obergefell v. Hodges*,³⁷⁰ the Court built on the foundation of *Loving v. Virginia*³⁷¹ to extend federal constitutional protection for the right to marry to same sex couples.³⁷²

The data set includes sixteen rights federalized primarily via Congressional legislation.³⁷³ All of the statutes establishing federal legislative protection for human rights discussed previously in this Article remain in force today, with one exception. In *Shelby County v. Holder*,³⁷⁴ the Supreme Court invalidated the “preclearance” requirement in section 4 of the 1965 Voting Rights Act. Notwithstanding the decision in *Shelby County*, the right to universal suffrage in Article 21 of the UDHR remains subject to federal primacy today, as it was in 1976. One other recent Supreme Court decision is noteworthy in this context. In *National Federation of Independent Business v. Sebelius*,³⁷⁵ the Court addressed constitutional challenges to the Patient Protection and Affordable Care Act (PPACA) (known as “Obamacare”).³⁷⁶ Congress federalized the right to medical care when it enacted the Social Security Amendments Act of

Supp. 3d 579 (E.D. Pa 2017); *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017); *City of Seattle v. Trump*, 2017 WL 4700144 (W.D. Wash. 2017). *But see* *City of El Cenizo, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018) (upholding validity of Texas state law that effectively preempted sanctuary city laws enacted by several cities and counties in Texas).

³⁶⁴ See Tables 3, 4, & 5 for details.

³⁶⁵ 561 U.S. 742 (2010).

³⁶⁶ *Id.* at 791.

³⁶⁷ 139 S. Ct. 682 (2019).

³⁶⁸ *Id.*

³⁶⁹ See Tables 4 & 5 for details.

³⁷⁰ 135 S. Ct. 2584 (2015).

³⁷¹ 388 U.S. 1 (1967).

³⁷² *Obergefell*, 135 S. Ct. at 2607.

³⁷³ See Tables 2 & 3 for details.

³⁷⁴ 570 U.S. 529 (2013).

³⁷⁵ 567 U.S. 519 (2012).

³⁷⁶ *Id.*

1965, which created the modern Medicare and Medicaid programs.³⁷⁷ The PPACA expanded federal protection for the right to medical care beyond the scope of prior federal legislation.³⁷⁸ In *Sebelius*, the Court upheld the PPACA's individual mandate provision as a valid exercise of Congress's taxing power.³⁷⁹ However, the Court invalidated a different provision of the PPACA that authorized the Secretary of Health and Human Services to penalize states that opt out of the Medicaid expansion program.³⁸⁰ *Sebelius*, *Shelby County*, and other cases suggest that the Court may limit further expansion of federal statutory regulation of human rights. However, the Court has shown little inclination to reverse the federalization of human rights that resulted from enactment of federal human rights statutes between 1930 and 1976.

IV. FEDERALIZATION AND THE GLOBAL POLITICAL MORALITY OF HUMAN RIGHTS

Part IV contends that the diffusion of human rights as a global political morality was an important factor contributing to the federalization of human rights law in the United States between 1948 and 1976. We do not claim that the global diffusion of human rights norms was the only factor, or even the most important factor, that led to federalization of human rights. We claim only that it was one significant causal factor that has been underappreciated in prior scholarly accounts of the civil rights revolution.

A simple search on Westlaw provides support for this thesis. We searched for the term "human rights" in U.S. Supreme Court opinions in three different time periods. That search yielded only eight cases before 1930, just nine cases between 1930 and 1947, and a total of seventy-eight Supreme Court decisions between 1948 and 1976 that use the term "human rights." Ten of those cases played a significant role in the federalization of human rights law: *Skinner v. Oklahoma*,³⁸¹ *Adamson v. California*,³⁸² *Oyama v. California*,³⁸³ *Wolf v. Colorado*,³⁸⁴ *Monroe v. Pape*,³⁸⁵ *Gideon*

³⁷⁷ See *supra* notes 280–86 and accompanying text.

³⁷⁸ Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

³⁷⁹ See *Sebelius*, 567 U.S. at 561–74.

³⁸⁰ See *id.* at 575–85.

³⁸¹ 316 U.S. 535, 536 (1942) ("This case touches a sensitive and important area of human rights."). See *supra* notes 175–77 and accompanying text (discussing *Skinner*).

³⁸² 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring) (referring to previous Supreme Court Justices "whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history."). See *infra* Section IV.C (discussing *Adamson*).

³⁸³ 332 U.S. 633, 649–50 (1948) (Black, J., concurring) ("we have recently pledged ourselves to cooperate with the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); *id.* at 673 (Murphy, J., concurring) (similar). See *infra* Section IV.B (discussing *Oyama*).

³⁸⁴ 338 U.S. 25, 28 (1949) (stating that a search "without authority of law but solely on the authority of the police . . . [is] inconsistent with the conception of human rights . . ."). See *supra* notes 187, 204, 218 and accompanying text and *infra* note 507 (discussing *Wolf*).

³⁸⁵ 365 U.S. 167, 244 (1961) (Frankfurter, J., dissenting in part) ("It is very queer to try

v. Wainwright,³⁸⁶ *Reynolds v. Sims*,³⁸⁷ *Heart of Atlanta Motel, Inc. v. United States*,³⁸⁸ *Duncan v. Louisiana*,³⁸⁹ and *Furman v. Georgia*.³⁹⁰ As Professor Primus has noted, the increased use of the term “human rights” after World War II “represented the rise of a new concept, a new set of substantive commitments.”³⁹¹

Scholars have developed different theories to explain how international human rights norms influence the development of rights-protecting laws and practices within domestic legal systems. Professors Goodman and Jinks posit a process of “acculturation.”³⁹² Professor Linos writes about “policy diffusion.”³⁹³ Professor Koh refers to “transnational legal process.”³⁹⁴ Professors Keck and Sikkink describe “transnational advocacy networks.”³⁹⁵ From our perspective, the similarities among these theories are more important than the differences: they all maintain that global norms influence domestic legal change, whether through legislation, judicial interpretation or constitutional amendment. We do not offer a novel theory about the mechanics of that process. Instead, we contend that—regardless of what terminology is used to describe transnational norm diffusion—that process helps explain the federalization of human rights law in the United States. Several leading scholarly accounts of constitutional change in the United States after World War II adopt an insular perspective that largely ignores global human rights developments.³⁹⁶ In contrast, we offer a transnational

to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant.”). *See supra* note 339 and accompanying text (discussing *Monroe v. Pape*).

³⁸⁶ 372 U.S. 335, 343 (1963) (stating that the right to counsel “is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty”). *See supra* notes 204, 243, 326 and accompanying text; *infra* Section IV.C (discussing *Gideon*).

³⁸⁷ 377 U.S. 533, 561 (1964) (“[this] case touches a sensitive and important area of human rights”). *See supra* notes 347–48 and accompanying text (discussing *Reynolds*).

³⁸⁸ 379 U.S. 241, 279 (1964) (Douglas, J., concurring). *See supra* note 262 and accompanying text (discussing *Heart of Atlanta Motel*).

³⁸⁹ 391 U.S. 145, 171 (1968) (Fortas, J., concurring) (“Congress, state courts, and state legislatures have moved forward with the advancing conception of human rights in according procedural as well as substantive rights to individuals accused of” crimes). *See supra* 178 and accompanying text; *infra* Section IV.C (discussing *Duncan*).

³⁹⁰ 408 U.S. 238, 268 (Brennan, J., concurring) (describing the Cruel and Unusual Punishments Clause as a “basic guaranty of human rights”). *See supra* notes 312–15 and accompanying text (discussing *Furman*).

³⁹¹ PRIMUS, *supra* note 3, at 191.

³⁹² RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 38–52 (2013).

³⁹³ LINOS, *supra* note 5, at 13–35.

³⁹⁴ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2602 (1997).

³⁹⁵ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1 (1998).

³⁹⁶ *See generally* ACKERMAN, *supra* note 1; JACK M. BALKIN, *LIVING ORIGINALISM* (2011); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

perspective that, we believe, provides a richer understanding of the factors that influenced constitutional change in the United States between 1948 and 1976.

In the decades after World War II, the United States presented itself as the leader of the free world. A core message of U.S. foreign policy was explicitly moralistic: our capitalist, democratic system is morally superior to the alternatives.³⁹⁷ However, persistent human rights violations at home undermined the effort to sell the virtues of American democracy to a skeptical global audience. For other countries to accept the United States as leader of the free world, the United States needed to exercise moral leadership by enhancing domestic protection for human rights. Equality, universality, and inalienability are central principles of the morality of human rights. As a practical matter, the United States could not fully realize these principles within the traditional system of constitutional federalism, which granted states primary responsibility for protection of human rights. By appropriating greater control over human rights, the federal government reinforced the nation's claim to moral leadership of the free world.³⁹⁸

Part IV is divided into four sections. The first section addresses the relationship between international diplomacy and domestic human rights violations. We show that the United States was especially vulnerable to diplomatic pressure for human rights reform, due to the jarring contrast between its claim of moral leadership and the reality of legally sanctioned racial segregation. The next section focuses on Supreme Court decisions between 1948 and 1954 in which advocates cited the UDHR and/or the UN Charter's human rights provisions in Supreme Court briefs. We contend that frequent invocation of international human rights norms by domestic litigants helped persuade the Court to reinterpret the Equal Protection Clause to strengthen constitutional anti-discrimination norms. The third section focuses on the "incorporation debate" in the Supreme Court from 1947 to 1971. We show that the diffusion of human rights norms as a global political morality helps explain the incorporation cases. The final section responds to potential objections to our claim that the global diffusion of human rights norms contributed to the federalization of human rights in the United States.

A. Human Rights and International Diplomacy

The United Nations Charter entered into force in 1945. Articles 55 and 56 obligate states "to take joint and separate action" to promote "human rights . . . for all *without distinction as to race, sex, language, or religion.*"³⁹⁹ Soon after the Charter took effect, the General Assembly created the Commission on Human Rights to implement the organization's human rights mandate.⁴⁰⁰ The Commission drafted the Universal

³⁹⁷ See, e.g., David P. Forsythe, *US Foreign Policy and Human Rights: Situating Obama*, 3 HUMAN RIGHTS Q. 767, 773–74 (2011).

³⁹⁸ See generally DUDZIAK, *supra* note 2.

³⁹⁹ U.N. Charter arts. 55(c), 56 (emphasis added).

⁴⁰⁰ U.N. Economic and Social Council, *Commission on Human Rights*, U.N. Doc. E/259 (27 Jan.–10 Feb. 1947).

Declaration, which established the prohibition against discrimination on the basis of “race, colour, sex [or] national or social origin”⁴⁰¹ as a central norm of the then-emerging international human rights regime. In light of that norm, the continued practice of racial segregation posed a substantial obstacle to the United States’ diplomatic effort to promote itself as leader of the free world.⁴⁰²

In December 1946, President Truman established the President’s Committee on Civil Rights, directing the Committee to develop recommendations for measures to promote “more adequate and effective means and procedures for the protection of the civil rights of the people of the United States.”⁴⁰³ The Committee delivered its report the next year. The report identified “a moral reason . . . and an international reason for believing that the time” was ripe for taking affirmative steps to end racial discrimination in the United States.⁴⁰⁴ The moral reason related to the shocking “difference between what we preach about civil rights and what we practice”⁴⁰⁵

The Committee explained the international reason for civil rights reform: “Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. . . . But our domestic civil rights shortcomings are a serious obstacle []” to accomplishment of those foreign policy objectives.⁴⁰⁶ The Committee continued:

We cannot escape the fact that our civil rights record has been an issue in world politics. The world’s press and radio are full of it. . . . We and our friends have been, and are, stressing our achievements. Those with competing philosophies . . . have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people.⁴⁰⁷

The Committee added:

[O]ur civil rights record has growing international implications. . . . The subject of human rights, itself, has been made a major concern of the United Nations. . . . A lynching in a rural American community is not a challenge to that community’s conscience alone. The repercussions of such a crime are heard not only in the locality, or indeed only in our own nation. They echo from one end of the globe to the other Similarly, interference with the

⁴⁰¹ UDHR, *supra* note 6, art. 2.

⁴⁰² The analysis in this section borrows liberally from SLOSS, *supra* note 36, at 183–85.

⁴⁰³ THE PRESIDENT’S COMM. ON CIVIL RTS., REP., TO SECURE THESE RIGHTS, at vii (1947).

⁴⁰⁴ *Id.* at 139.

⁴⁰⁵ *Id.* at 139–40.

⁴⁰⁶ *Id.* at 146.

⁴⁰⁷ *Id.* at 147.

right of a qualified citizen to vote locally cannot today remain a local problem. An American diplomat cannot forcefully argue for free elections in foreign lands without meeting the challenge that in many sections of America qualified voters do not have free access to the polls.⁴⁰⁸

In sum, by establishing human rights promotion as a primary goal of the United Nations, the nations of the world had determined that lynching and free elections would henceforth be matters of international concern. Race discrimination in the United States was a foreign policy issue because the international community made it a foreign policy issue.

Racial discrimination—including lynching, Jim Crow laws, and restrictions on political participation by African Americans—was a reality in the United States from the end of Reconstruction until World War II.⁴⁰⁹ During that period, the “difference between what we preach about civil rights and what we practice,” in the Committee’s words, was as wide as the gap that existed after World War II.⁴¹⁰ Nevertheless, in the early twentieth century, racial discrimination was generally not a subject of international diplomacy. Adoption of the UN Charter and the UDHR signaled a change in the conduct of international diplomacy by creating a new norm that effectively internationalized the problem of “domestic” human rights violations. This helps explain why racial discrimination in the United States became a subject of intense media interest throughout the world in the late 1940s,⁴¹¹ even though foreign media generally ignored the problem previously.

We do not claim that the Charter itself caused a change in the conduct of international diplomacy. Rather, the decision to include human rights provisions in the UN Charter, and to adopt the Genocide Convention and the UDHR, manifested a changed attitude about “domestic” human rights violations. Before World War II, diplomats typically did not criticize other countries for the treatment of their own racial minorities, unless the complaining country shared a national, ethnic, or religious affiliation with the persecuted minority. Widely accepted principles of international law dictated that a country’s treatment of its own citizens was a purely domestic matter.⁴¹² Thus, before World War II, if an Asian or European state criticized the United States for its treatment of African Americans, it was a sufficient response to say, “That’s none of your business.” After adoption of the Charter, though, that response was no longer adequate. The decision by States to create modern international human rights law manifested a belief—rooted in a shared sense of outrage about the horrors of Nazi

⁴⁰⁸ *Id.* at 100–01.

⁴⁰⁹ See generally KLARMAN, *supra* note 349, at 8–170.

⁴¹⁰ THE PRESIDENT’S COMM. ON CIVIL RTS., REP., *supra* note 403.

⁴¹¹ See DUDZIAK, *supra* note 2, at 29–39.

⁴¹² See EMER DE VATEL, THE LAW OF NATIONS (1758), at 74–76 (Bela Kapossy & Richard Whatmore eds., 2008).

concentration camps and other wartime abuses⁴¹³—that a nation’s treatment of its own minorities was no longer a purely domestic matter. By codifying human rights norms in international instruments, States converted “domestic” human rights violations into a subject of international diplomacy.

In the late 1940s and early 1950s, two factors made the United States especially vulnerable to diplomatic pressure for human rights reform. First, the United States was one of the few countries in the world that maintained legally sanctioned racial segregation. Second, U.S. government leaders were committed to a moral vision of the United States as leader of the free world. The juxtaposition of that moral vision with the reality of racial segregation made the United States unusually susceptible to international pressure on human rights.

President Truman was persuaded that civil rights reform at home was necessary to advance U.S. foreign policy interests. In February 1948, Truman delivered a special message to Congress proposing enactment of civil rights laws to “establish a permanent civil rights commission, outlaw lynching, and protect the right to vote, among other proposals.”⁴¹⁴ The President stated:

If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.⁴¹⁵

Thus, Truman told Congress that the United States needed civil rights legislation to promote its foreign policy interests. However, Southern Democrats who controlled key committees in Congress blocked civil rights legislation for the duration of Truman’s presidency.⁴¹⁶ Unable to secure legislative support for civil rights reform, the Truman Administration decided to support the efforts of human rights litigants who were trying to persuade the Supreme Court to align U.S. federal law with then-emerging international human rights norms.⁴¹⁷ That litigation is the subject of the next section.

B. Early Human Rights Litigation: 1948 to 1954

Between 1948 and 1954, the Supreme Court decided eleven cases in which a party challenged racial or ethnic discrimination and one or more briefs cited the UDHR or the Charter’s human rights provisions.⁴¹⁸ After 1954—thanks to the narrow defeat of

⁴¹³ See G.A. Res. 217(III)A, U.N. Doc. A/810 at 71 (1948) (“disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”).

⁴¹⁴ See DUDZIAK, *supra* note 2, at 82.

⁴¹⁵ Special Message to the Congress on Civil Rights, 20 PUB. PAPERS 121 (Feb. 2, 1948).

⁴¹⁶ See SLOSS, *supra* note 36, at 193.

⁴¹⁷ *Id.*

⁴¹⁸ Those cases are summarized in the next paragraph. Additionally, the Supreme Court decided at least seven other cases between 1948 and 1954 that did not involve racial or ethnic

the Bricker Amendment in the Senate and the Supreme Court decision in *Brown v. Board of Education*—activists who had been pressing human rights arguments made a tactical decision to stop invoking international human rights instruments in domestic litigation, and to rely instead on the Fourteenth Amendment.⁴¹⁹ This section focuses on the period when citations to international human rights instruments appeared regularly in Supreme Court briefs.

The antidiscrimination cases addressed in this section include four cases challenging school segregation,⁴²⁰ two cases challenging California laws that discriminated against Japanese nationals,⁴²¹ one case involving discrimination in interstate transportation,⁴²² one case involving a state civil rights statute,⁴²³ and three cases challenging racially restrictive covenants.⁴²⁴ (A racially restrictive covenant is a contract between private parties to prohibit sale or rental of property to non-whites.) In nine of the eleven cases, the party challenging discrimination cited the UDHR and/or the Charter in its main brief.⁴²⁵ In the other two cases, the reference to international human rights

discrimination, but where one or more briefs cited the UDHR and/or the UN Charter's human rights provisions. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347 (1952); *Rochin v. California*, 342 U.S. 165 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Ludecke v. Watkins*, 335 U.S. 160 (1948). This section focuses on antidiscrimination cases.

⁴¹⁹ See SLOSS, *supra* note 36, at 178, 231.

⁴²⁰ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in D.C. public schools is unconstitutional); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that racial segregation in a University of Oklahoma graduate program violated the Equal Protection Clause); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that racial segregation in the University of Texas Law School violated the Equal Protection Clause); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (holding that University of Oklahoma violated the Equal Protection Clause by denying applicant admission because of his race).

⁴²¹ *Oyama v. California*, 332 U.S. 633 (1948) (holding that part of California's Alien Land Law violated the Fourteenth Amendment); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (holding that California violated Fourteenth Amendment by denying fishing license to Japanese national).

⁴²² *Henderson v. United States*, 339 U.S. 816 (1950) (holding that private railroad company violated the Interstate Commerce Act by maintaining racially segregated dining cars).

⁴²³ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948) (affirming conviction under Michigan Civil Rights Act for private company that engaged in racial discrimination).

⁴²⁴ *Barrows v. Jackson*, 346 U.S. 249 (1953) (holding that state court damages award for breach of racially restrictive covenant would violate Fourteenth Amendment); *Hurd v. Hodge*, 334 U.S. 24 (1948) (applying *Shelley* to restrictive covenant in District of Columbia); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state court award of injunctive relief to enforce racially restrictive covenant violated Fourteenth Amendment).

⁴²⁵ Brief for Petitioners at 6, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 8), 1952 WL 47257; Brief for Respondent at 7, *Barrows v. Jackson*, 346 U.S. 249 (1953) (No. 517), 1953 WL 78408; Brief for Elmer W. Henderson at 74–75, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25), 1949 WL 50667; Brief for Appellant at 33, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (No. 34), 1950 WL 78675; Brief for Petitioner at 66,

law appeared only in an amicus brief.⁴²⁶ The party challenging racial or ethnic discrimination won all eleven cases. The fact that “human rights claimants”⁴²⁷ won all eleven antidiscrimination cases suggests that the Justices were receptive to the moral force of human rights arguments.

The antidiscrimination cases summarized in the previous paragraph contributed to the federalization of human rights law. *Shelley v. Kraemer*⁴²⁸ and the other restrictive covenant cases expanded the role of federal courts in enforcing the Fourteenth Amendment by expanding the concept of state action. *Oyama v. California*⁴²⁹ and *Takahashi v. Fish & Game Comm’n*⁴³⁰ heralded the end of decades of legislation in California and other states that discriminated against Chinese and Japanese nationals. *Sipuel v. Bd. of Regents of Univ. of Okla.*,⁴³¹ *Sweatt v. Painter*,⁴³² and *McLaurin v. Oklahoma State Regents*,⁴³³ laid the groundwork for *Brown* by chipping away at the fiction that racially segregated educational facilities could ever truly be equal.⁴³⁴ Finally, *Brown* and *Bolling v. Sharpe*⁴³⁵ set the Supreme Court firmly on a path that led to the demise of the American system of apartheid.⁴³⁶ In all the cases except *Bob-Lo Excursion Co. v. Michigan*,⁴³⁷ the Court invalidated discriminatory practices that had deep roots in American law, politics and culture, and that were widely accepted as lawful before the modern human rights revolution. The Court’s consistent record of invalidating racially discriminatory laws and practices between 1948 and 1954 heralded a moral and political revolution in the United States. That revolution aligned

Sweatt v. Painter, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681; Brief for Petitioner at 33–34, *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (No. 533), 1948 WL 47429; Consolidated Brief for Petitioners at 108, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291), 1947 WL 44429; Brief for Petitioners in *McGhee v. Sipes* at 9, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 87), 1947 WL 30427; Supplemental Brief of Petitioners in Support of Review by Certiorari at 7, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72), 1947 WL 44156; Brief for Petitioners at 10, *Oyama v. California*, 332 U.S. 633 (1948) (No. 44), 1947 WL 44264.

⁴²⁶ See Motion and Brief for the NAACP et al. as Amici Curiae at 13, *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948) (No. 374), 1947 WL 44321; Motion of the National Lawyers Guild for Leave to File Brief as Amicus Curiae at 6, *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369), 1948 WL 47425.

⁴²⁷ The term “human rights claimants” refers to parties who cited international human rights instruments, as well as parties whose supporting *amici* cited international human rights instruments.

⁴²⁸ 334 U.S. 1 (1948).

⁴²⁹ 332 U.S. 633 (1948).

⁴³⁰ 334 U.S. 410 (1948).

⁴³¹ 332 U.S. 631 (1948).

⁴³² 339 U.S. 629 (1950).

⁴³³ 339 U.S. 637 (1950).

⁴³⁴ See *McLaurin*, 339 U.S. at 637; *Sweatt*, 339 U.S. at 629; *Sipuel*, 332 U.S. at 631.

⁴³⁵ 347 U.S. 497 (1954).

⁴³⁶ See DUDZIAK, *supra* note 2, at 102.

⁴³⁷ 333 U.S. 28 (1948).

closely with the political morality of human rights, which was just beginning a process of global diffusion in the late 1940s and early 1950s.

The Supreme Court did not rely on international law, as such, to decide the cases under review. *Oyama* is the only case that includes a significant discussion of the Charter's human rights provisions.⁴³⁸ Even in *Oyama*, discussion of the Charter appears only in concurring opinions.⁴³⁹ Although the Court rarely addressed international law arguments explicitly, several factors suggest that the political morality of human rights influenced the Court's decisions.

The Truman Administration filed briefs supporting human rights claimants in seven of the cases under review. The Administration filed a single brief in *Shelley v. Kraemer* and *Hurd v. Hodge*.⁴⁴⁰ It filed briefs in both *Takahashi* and *Henderson*.⁴⁴¹ (In *Henderson*, the government filed a brief supporting Henderson, although he was technically an opposing party.⁴⁴²) It filed a single brief in *Sweatt v. Painter* and *McClaurin v. Oklahoma State Regents*.⁴⁴³ Finally, after Eisenhower was elected President, the lame duck Truman Administration filed a single amicus brief in *Bolling v. Sharpe* and *Brown v. Board of Education*.⁴⁴⁴ The government briefs generally highlighted the foreign policy implications of racial/ethnic discrimination and urged the Court to consider the contested issues in the context of global human rights norms.⁴⁴⁵

For example, the narrow question in *Shelley* was whether a state court injunction to enforce a racially restrictive covenant constituted "state action" under the Fourteenth Amendment.⁴⁴⁶ The government's brief noted that the United States has a treaty obligation under the UN Charter to promote "universal respect for, and observance of, human rights and fundamental freedoms, for all without distinction as to race, sex, language, or religion."⁴⁴⁷ The brief also cited a General Assembly resolution calling on governments "to put an immediate end to religious and so-called racial

⁴³⁸ See *Oyama*, 332 U.S. at 649–50.

⁴³⁹ Four Justices joined two separate concurring opinions that relied partly on the Charter. See *Oyama*, 332 U.S. at 649–50 (Black, J., concurring); *id.* at 673 (Murphy, J., concurring).

⁴⁴⁰ See Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291), 1947 WL 44159 [hereinafter Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*].

⁴⁴¹ See Brief for the United States, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25), 1949 WL 50329; Brief for the United States as Amicus Curiae, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (No. 533), 1948 WL 47431.

⁴⁴² See SLOSS, *supra* note 36, at 226.

⁴⁴³ Memorandum for the United States as Amicus Curiae, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (No. 34).

⁴⁴⁴ Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), 1952 WL 82045 [hereinafter Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ.*].

⁴⁴⁵ For detailed support of this claim, see SLOSS, *supra* note 36, at 193–94, 226–29, 245–46.

⁴⁴⁶ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁴⁴⁷ Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*, *supra* note 440, at 97.

persecutions and discrimination⁴⁴⁸ The government concluded this portion of its brief as follows:

The legislative, executive, and international pronouncements set out above reflect a public policy wholly inconsistent with the enforcement of racial restrictive covenants. . . . [E]ven if the decrees below are not stricken on specific constitutional grounds, they may properly be set aside as being inconsistent with the public policy of the United States.⁴⁴⁹

Thus, the government cited the Charter and other international instruments to support its argument that judicial enforcement of racially restrictive covenants would contravene national public policy.

Thurgood Marshall represented either a party, an amicus, or a related party in ten of the antidiscrimination cases referenced above.⁴⁵⁰ Marshall personally filed briefs presenting arguments based on the UN Charter in *McLaurin v. Oklahoma State Regents*,⁴⁵¹ *Sweatt v. Painter*,⁴⁵² *Takahashi v. Fish & Game Comm'n*,⁴⁵³ *Bob-Lo Excursion Co. v. Michigan*,⁴⁵⁴ and *McGhee v. Sipes*.⁴⁵⁵ Marshall's brief in *Sweatt* argued that "we have fought two World Wars for the preservation and maintenance of democracy, and have become a signatory of the United Nations Charter which provides that there shall be no discrimination based on race, creed or color."⁴⁵⁶ His brief in *McGhee v. Sipes* (the companion case to *Shelley*) said: "The human rights provisions of the United Nations Charter, as treaty provisions, are the supreme law of the land and no citizen may lawfully enter into a contract in subversion of their purposes. The

⁴⁴⁸ *Id.* at 98.

⁴⁴⁹ *Id.* at 101–02.

⁴⁵⁰ Marshall represented the petitioners in *Sipuel*, 332 U.S. 631, and *Sweatt*, 339 U.S. 629. He represented the appellant in *McLaurin*, 339 U.S. 637, and the respondent in *Barrows*, 346 U.S. 249. He filed amicus briefs on behalf of the NAACP in *Bob-Lo*, 333 U.S. 28, *Henderson*, 339 U.S. 816, and *Takahashi*, 334 U.S. 410. He was counsel for petitioner in *McGhee v. Sipes*, 333 U.S. 28 (1948); *McGhee* was joined with *Shelley*, 334 U.S. 1, and closely related to *Hurd*, 334 U.S. 24. Finally, he served as counsel for several parties in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was litigated in tandem with *Bolling v. Sharpe*, 347 U.S. 497 (1954). *Oyama v. California*, 332 U.S. 633 (1948), was the only case in which he did not participate.

⁴⁵¹ Brief for Appellant at 33, 339 U.S. 637 (1950) (No. 34), 1950 WL 78675 (quoting Justice Black's concurring opinion in *Oyama*, 332 U.S. 633).

⁴⁵² Brief for Petitioner, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681.

⁴⁵³ Motion and Brief for the NAACP as Amicus Curiae, 334 U.S. 410 (1948) (No. 533), 1948 WL 47434.

⁴⁵⁴ Motion and Brief for the NAACP et al. as Amici Curiae, 333 U.S. 28 (1948) (No. 374), 1947 WL 44321.

⁴⁵⁵ Brief for Petitioners, 331 U.S. 804 (1947) (No. 87), 1947 WL 44154.

⁴⁵⁶ Brief for Petitioner at 66, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681.

restrictive agreement here presented for enforcement falls within this proscription.⁴⁵⁷ Marshall's involvement in these cases is significant because he personally—more than almost any other lawyer in the United States—became a symbol for the moral force of the civil rights movement. His repeated reliance on the Charter's human rights provisions suggests that the political morality of human rights influenced his thinking about antidiscrimination law. Moreover, Thurgood Marshall, in his capacity as a litigator and a Supreme Court Justice, exerted as much influence on the development of antidiscrimination law in the United States as any other single individual in the decades after World War II.

Bolling v. Sharpe is the single most important decision among the cases under review.⁴⁵⁸ *Bolling* involved a challenge to racial segregation in Washington D.C. public schools; it was litigated and decided together with *Brown v. Board of Education*. The Truman Administration filed a single amicus brief in *Brown* and *Bolling*.⁴⁵⁹ The brief highlighted the special problems posed by racial discrimination in the District of Columbia.

This city is the window through which the world looks into our house. . . . Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital. . . . The shameful and absurdity of Washington's treatment of Negro Americans is highlighted by the presence of many dark-skinned foreign visitors. Capital custom not only humiliates colored citizens, but is a source of considerable embarrassment to these visitors. Foreign officials are often mistaken for American Negroes and refused food, lodging and entertainment.⁴⁶⁰

Although the brief emphasized the unique problems caused by racial discrimination in the nation's capital, it also placed those concerns in a broader, global context.

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy. The existence of discrimination against minority groups in the United

⁴⁵⁷ Brief for Petitioners, *supra* note 455, at 9.

⁴⁵⁸ See 347 U.S. 497 (1954).

⁴⁵⁹ Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ.*, *supra* note 444.

⁴⁶⁰ *Id.* at 4–5.

States has an adverse effect upon our relations with other countries. . . . [T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.⁴⁶¹

In sum, the government's argument in *Brown* and *Bolling* was emphatically moral and global, rather than legal and domestic. Moreover, as other commentators have noted, the government's brief had an important influence on the votes of undecided Justices.⁴⁶²

From a legal standpoint, petitioners' argument that racial segregation in public schools violated the Constitution was exceptionally weak.⁴⁶³ Justice Jackson "ridiculed the NAACP's brief as sociology, not law."⁴⁶⁴ Referring jointly to *Brown* and *Bolling*, Jackson assessed the legal arguments as follows:

I find nothing in the *text* that says this [racial segregation in schools] is *unconstitutional*. Nothing in the opinions of the courts says that it is unconstitutional. Nothing in the history of the Fourteenth Amendment says that it is unconstitutional. . . . On the basis of precedents, I would have to say that it is constitutional.⁴⁶⁵

When the Justices first met in private conference to discuss *Brown* and *Bolling*, only four Justices expressed clear support for a holding that racial segregation in public schools is unconstitutional.⁴⁶⁶ The other five Justices were either undecided or were prepared to affirm the constitutionality of racial segregation.⁴⁶⁷ Even so, about eighteen months after that initial conference, the Court ruled unanimously that racial segregation in public schools is unconstitutional.⁴⁶⁸

How can we explain the unanimous decisions in *Brown* and *Bolling*, despite the dearth of legal authority to support those decisions? To support the foreign policy goals articulated by the Truman Administration, the Court had to hold that racial segregation

⁴⁶¹ *Id.* at 6–8.

⁴⁶² See KLARMAN, *supra* note 349, at 299; John Q. Barrett, *Supreme Court Law Clerks' Recollections of Brown v. Board of Education*, 78 ST. JOHN'S L. REV. 515, 547 (2004).

⁴⁶³ See SLOSS, *supra* note 36, at 241–45. We are not suggesting that *Brown* was wrongly decided. Our point is simply that the Court's decision in *Brown* relied heavily on moral reasoning, rather than strictly legal reasoning. Moreover, the key moral idea that influenced the Court's reasoning in *Brown*—the idea that racial discrimination is morally wrong—is one of the central tenets of the political morality of human rights. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴⁶⁴ SLOSS, *supra* note 36, at 243.

⁴⁶⁵ DEL DICKSON, *THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 652 (2001).

⁴⁶⁶ See SLOSS, *supra* note 36, at 243.

⁴⁶⁷ *Id.*

⁴⁶⁸ See *Brown*, 347 U.S. 483 (1954); *Bolling*, 347 U.S. 497 (1954).

was illegal. It could have reached that result without overruling *Plessy v. Ferguson*⁴⁶⁹ by holding that racial segregation in public schools violates the UN Charter, and that the Charter supersedes state laws under the Supremacy Clause. Indeed, the petitioner's brief in *Bolling* defended the Charter argument at great length.⁴⁷⁰ From a strictly legal perspective, the Charter argument was arguably stronger than the Fifth and Fourteenth Amendment arguments.⁴⁷¹ However, the Charter argument presented a dilemma for the Justices. If the Court applied the Charter to invalidate racial segregation, rather than applying the Fifth and Fourteenth Amendments, it would have been tacitly admitting that the Charter provides stronger protection against racial discrimination than does the Equal Protection Clause. The Justices were not prepared, either psychologically or politically, to make such an admission.⁴⁷² As a prominent Stanford law professor commented in a related case: "It would seem, indeed, a reproach to our constitutional system to confess that the values it establishes fall below any requirement of the Charter. One should think very seriously before admitting such a deficiency."⁴⁷³ To avoid admitting such a deficiency, the Justices adopted a moral reading of the Constitution,⁴⁷⁴ rather than a strictly legal interpretation. Their moral reading of the Constitution was starkly at odds with the "separate but equal" doctrine that had prevailed for more than half a century. However, their moral reading aligned perfectly with the morality of human rights that was slowly spreading around the world at that time. In sum, the Court incorporated the political morality of human rights into its interpretation of the Equal Protection Clause through a process of silent incorporation.

Brown and *Bolling* were landmark constitutional decisions. Not only did the Court's decisions fundamentally transform equal protection doctrine, they also made a substantial contribution to the ongoing federalization of human rights in the United States. Therefore, insofar as the political morality of human rights influenced the Court's decisions, that political morality also exerted indirect influence over subsequent constitutional changes because the Court's decisions in *Brown* and *Bolling* converted the prohibition on racial discrimination from an attractive moral ideal into a core principle of U.S. constitutional law.

C. The Incorporation Debate

Justice Hugo Black sparked the "incorporation debate" with his dissenting opinion in *Adamson v. California*,⁴⁷⁵ one year before the United Nations adopted the

⁴⁶⁹ 163 U.S. 537 (1896).

⁴⁷⁰ See Brief for Petitioners at 54–55, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 8), 1952 WL 47257.

⁴⁷¹ See SLOSS, *supra* note 36, at 243.

⁴⁷² See *id.* at 246–48.

⁴⁷³ Charles Fairman, *Editorial Comment, Finis to Fujii*, 46 AM. J. INT'L L. 682, 689 (1952).

⁴⁷⁴ See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

⁴⁷⁵ 332 U.S. 46, 71 (1947) (Black, J., dissenting).

UDHR.⁴⁷⁶ Black acknowledged that the Bill of Rights, as originally understood, merely operated as a constraint on the federal government and did not bind state governments.⁴⁷⁷ However, he claimed, a central purpose of the Fourteenth Amendment was to make the Bill of Rights binding on the states.⁴⁷⁸ Black's position came to be known as "total incorporation" because he contended that the Fourteenth Amendment made the *entire* Bill of Rights binding on the states.⁴⁷⁹

Justice Black never persuaded a majority of the Supreme Court to endorse his total incorporation theory. Instead, in a series of decisions between 1948 and 1971, the Court developed the doctrine of "selective incorporation."⁴⁸⁰ Under selective incorporation doctrine, rights included in the Bill of Rights that qualify as "fundamental rights" are incorporated into the Fourteenth Amendment Due Process Clause and are binding on state governments.⁴⁸¹ However, some rights included in the Bill of Rights are not "fundamental rights" and are therefore not binding on state governments. The Court never cited the UDHR or other international human rights instruments to justify its decisions about which rights are "fundamental." Nevertheless, the pattern of judicial decisions in selective incorporation cases is broadly consistent with the political morality of human rights. The Court generally held, with a couple of notable exceptions, that provisions in the Bill of Rights that lack analogues in the UDHR are not fundamental, whereas provisions in the Bill of Rights that do have analogues in the UDHR are fundamental.⁴⁸²

The Court's decisions in selective incorporation cases were broadly consistent with the "human rights theory," which holds that a specific right codified in the Bill of Rights qualifies as "fundamental" for selective incorporation doctrine if and only if the right is included in the UDHR and/or the ICCPR.⁴⁸³ The Supreme Court employed the rubric of "fundamental rights" in the early twentieth century to determine which rights bind the states under the Fourteenth Amendment.⁴⁸⁴ However, the concept of fundamental rights that guided judicial decisions in the early twentieth century was starkly at odds with the political morality of human rights. In contrast, the concept of fundamental rights that the Court applied in incorporation decisions between 1948 and 1976 was generally consistent with the morality of human rights. The Court continued to use the term "fundamental rights," but the meaning of the term

⁴⁷⁶ The analysis in this section borrows liberally from Sloss, *supra* note 78.

⁴⁷⁷ *Adamson*, 332 U.S. at 79.

⁴⁷⁸ *See id.* at 71–72 (Black, J., dissenting).

⁴⁷⁹ *See* Sloss, *supra* note 78, at 79–82.

⁴⁸⁰ *Id.* at 79, 83.

⁴⁸¹ *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

⁴⁸² *See* Sloss, *supra* note 78, at 78.

⁴⁸³ *See id.* at 80.

⁴⁸⁴ *See, e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 91–98 (1908).

changed.⁴⁸⁵ In essence, the Court shifted from a narrow conception of fundamental rights that emphasized state sovereignty to a broader, universalist conception that emphasized federal supremacy.

Four examples illustrate the distinction between competing concepts of fundamental rights. In 1904, the Court held that the Sixth Amendment right to confront adverse witnesses is not fundamental and therefore not binding on the states.⁴⁸⁶ The Court reversed that decision in 1965 in *Pointer v. Texas*.⁴⁸⁷ The Court held in 1937 that subjecting a criminal defendant to double jeopardy did not violate “fundamental principles of liberty and justice.”⁴⁸⁸ Thirty years later, the Court decided “that the double jeopardy prohibition of the Fifth Amendment” binds the states because it “represents a fundamental ideal in our constitutional heritage.”⁴⁸⁹ In 1942, the Court held in *Betts v. Brady*⁴⁹⁰ that the right of an indigent criminal defendant to have counsel appointed for him was not a fundamental right.⁴⁹¹ The Court reversed that decision twenty years later, holding that indigent criminal defendants have a fundamental right to appointed counsel.⁴⁹² Finally, the Court held in 1947 in *Adamson v. California* that the Fifth Amendment protection from self-incrimination did not bind the states.⁴⁹³ The Court overruled *Adamson* less than two decades later, holding in *Malloy v. Hogan* “that the Fifth Amendment’s exception from compulsory self-incrimination is . . . protected by the Fourteenth Amendment against abridgment by the States.”⁴⁹⁴ All four of the pre-1948 decisions were inconsistent with the morality of human rights because they denied “fundamental” status to rights protected under international human rights law.⁴⁹⁵ In contrast, all of the post-1948 decisions were consistent with the morality of human rights because they granted “fundamental” status to those same rights.

To understand selective incorporation doctrine, one must consider both cases and clauses. As of 1976, five provisions in the Bill of Rights (the five “unincorporated clauses”) were not binding on the states: the Second Amendment right to bear arms,⁴⁹⁶ the Third Amendment prohibition on quartering of soldiers,⁴⁹⁷ the Fifth Amendment

⁴⁸⁵ *Accord* PRIMUS, *supra* note 3.

⁴⁸⁶ *West v. Louisiana*, 194 U.S. 258 (1904).

⁴⁸⁷ 380 U.S. 400 (1965).

⁴⁸⁸ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

⁴⁸⁹ *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁴⁹⁰ 316 U.S. 455 (1942).

⁴⁹¹ *Id.*

⁴⁹² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁹³ 332 U.S. 46 (1947).

⁴⁹⁴ 378 U.S. 1, 6 (1964).

⁴⁹⁵ References to the relevant provisions of human rights law are included in Section III.C and Table 5. Although the Court’s decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), treats the right to appointed counsel as a Sixth Amendment right, we classify that right (“state pays for counsel”) as an unenumerated right because it is not listed explicitly in the Sixth Amendment.

⁴⁹⁶ U.S. CONST. amend. II.

⁴⁹⁷ *Id.* amend. III.

grand jury clause,⁴⁹⁸ the Seventh Amendment right to a jury trial in civil cases,⁴⁹⁹ and the Eighth Amendment excessive fines clause.⁵⁰⁰ Under Black's total incorporation theory, all five provisions should be binding on the states. Therefore, the Court's refusal to incorporate those five provisions is inconsistent with the total incorporation theory. In contrast, the Court's refusal to incorporate the five unincorporated clauses suggests that the Court's operative conception of fundamental rights was consistent with the political morality of human rights because all five unincorporated clauses protect rights that are not included in either the UDHR or the ICCPR.⁵⁰¹

Between 1948 and 1976, the Court decided thirteen "express incorporation cases" and two "implied incorporation cases."⁵⁰² Those decisions, in total, made fifteen distinct rights in the Bill of Rights binding on the states. The two implied incorporation cases assumed that the Sixth Amendment right to an impartial jury⁵⁰³ and the Eighth Amendment prohibition of excessive bail⁵⁰⁴ bind the states. The Court held explicitly that the following Bill of Rights provisions bind the states under the Fourteenth Amendment: the First Amendment right to petition the government;⁵⁰⁵ the Fourth Amendment prohibition on unreasonable searches and seizures;⁵⁰⁶ the Fourth Amendment warrant requirement;⁵⁰⁷ the Fourth Amendment exclusionary rule;⁵⁰⁸ the Fifth Amendment self-incrimination clause;⁵⁰⁹ the Fifth Amendment double jeopardy clause;⁵¹⁰ and the Eighth Amendment cruel and unusual punishments clause.⁵¹¹ Additionally, the Court held expressly that six distinct provisions in the Sixth Amendment bind the states: the right to a public trial,⁵¹² the right to a speedy trial,⁵¹³ the right to confront adverse

⁴⁹⁸ *Id.* amend. V.

⁴⁹⁹ *Id.* amend. VII.

⁵⁰⁰ *Id.* amend. VIII.

⁵⁰¹ The Supreme Court decided in the nineteenth century that the Second Amendment, the Fifth Amendment grand jury clause, and the Seventh Amendment do not bind the states. *See* *Presser v. Illinois*, 116 U.S. 252, 253, 261 (1886) (Second Amendment); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (grand jury clause); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) (Seventh Amendment). The Court has never ruled explicitly on the Third Amendment or the excessive fines clause. It did not issue specific decisions regarding incorporation of any of these clauses between 1948 and 1976. Regardless, given the intense controversy over incorporation during that period, the absence of any decision incorporating the clauses signals an implicit view that the rights at issue are not "fundamental rights."

⁵⁰² *See infra* notes 503–17 and accompanying text.

⁵⁰³ *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961).

⁵⁰⁴ *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

⁵⁰⁵ *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963).

⁵⁰⁶ *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

⁵⁰⁷ *Aguilar v. Texas*, 378 U.S. 108, 110 (1964).

⁵⁰⁸ *Mapp v. Ohio*, 367 U.S. 643, 662 (1961).

⁵⁰⁹ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

⁵¹⁰ *Benton v. Maryland*, 395 U.S. 784, 795–96 (1969).

⁵¹¹ *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

⁵¹² *In re Oliver*, 333 U.S. 257, 271–73 (1948).

⁵¹³ *Klopfer v. North Carolina*, 386 U.S. 213, 225–26 (1967).

witnesses,⁵¹⁴ the right to compulsory process,⁵¹⁵ the right to appointed counsel,⁵¹⁶ and the right to a jury trial in criminal cases.⁵¹⁷

The cases cited in the previous paragraph provide additional evidence that the Court's operative conception of fundamental rights was broadly consistent with the political morality of human rights because twelve of the fifteen rights that the Court held to be "fundamental" are included in the UDHR and/or the ICCPR. The Fourth Amendment warrant requirement and the prohibition on unreasonable searches and seizures correspond to Articles 9 and 12 of the UDHR and Articles 9(1) and 17(1) of the ICCPR. The Fifth Amendment self-incrimination clause corresponds to Article 14(3)(g) of the ICCPR; the double jeopardy clause corresponds to Article 14(7) of the ICCPR. The Sixth Amendment rights to an impartial jury and a public trial are included in Article 10 of the UDHR and Article 14(1) of the ICCPR. The Sixth Amendment right to a speedy trial is protected by Articles 9(3) and 14(3)(c) of the ICCPR. The Sixth Amendment rights to compulsory process and to confront adverse witnesses are protected by Article 14(3)(e) of the ICCPR.⁵¹⁸ The Sixth Amendment right to appointed counsel is protected by Article 14(3)(d) of the ICCPR. The Eighth Amendment prohibition on excessive bail corresponds to Article 9(3) of the ICCPR,⁵¹⁹ the prohibition on cruel and unusual punishments corresponds to Article 5 of the UDHR and Article 7 of the ICCPR.

The Supreme Court decided three incorporation cases in the 1960s that are inconsistent with the human rights theory. *Edwards v. South Carolina*⁵²⁰ incorporated the First Amendment right to petition the government.⁵²¹ *Mapp v. Ohio*⁵²² incorporated the Fourth Amendment exclusionary rule.⁵²³ *Duncan v. Louisiana* incorporated the Sixth Amendment right to a jury trial.⁵²⁴ All three cases are inconsistent with the human rights theory because, in each case, the Court made rights binding on the states that are not protected under either the UDHR or the ICCPR.⁵²⁵ Nevertheless, if one

⁵¹⁴ *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

⁵¹⁵ *Washington v. Texas*, 388 U.S. 14, 18–19 (1967).

⁵¹⁶ *Gideon v. Wainwright*, 372 U.S. 335, 345–46 (1963).

⁵¹⁷ *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968).

⁵¹⁸ The right to compulsory process is not included in our list of sixty-eight rights because it is not included in the CCP database.

⁵¹⁹ The prohibition on excessive bail is not included in our list of sixty-eight rights because it does not appear in the UDHR.

⁵²⁰ 372 U.S. 229 (1963).

⁵²¹ *Id.*

⁵²² 367 U.S. 643 (1961).

⁵²³ *Id.*

⁵²⁴ 391 U.S. 145, 157–58 (1968).

⁵²⁵ The First Amendment right to petition the government is similar to the right of peaceful assembly in Article 21 of the ICCPR. However, we treat the rights of petition and assembly as distinct rights because they appear separately in the First Amendment and they are listed as separate rights in the CCP codebook.

views the Court's incorporation decisions as a whole—including the five unincorporated clauses,⁵²⁶ the two implied incorporation cases, and the thirteen express incorporation cases—the human rights theory fits more closely with the actual pattern of Supreme Court decisions than Justice Black's total incorporation theory. Black's theory is consistent with only fifteen of the twenty decisions because his theory is inconsistent with all five unincorporated clauses. In contrast, the human rights theory is consistent with seventeen of the twenty decisions, including all five unincorporated clauses, both implied incorporation cases, and ten of thirteen express incorporation cases.

In addition to being consistent with Supreme Court precedent, the human rights theory also provides an explanation for the selective incorporation doctrine. To appreciate this point, recall that the incorporation doctrine constituted a radical departure from traditional principles of constitutional federalism. Justice Harlan made this point eloquently in several dissenting opinions. For example, in *Malloy v. Hogan*, he criticized the majority for creating a rule of “compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved . . . by encroachment on the States' sovereign powers. . . .”⁵²⁷ Similarly, in *Mapp v. Ohio*, Justice Harlan criticized the majority for upsetting the “proper balance between state and federal responsibility in the administration of criminal justice”⁵²⁸ He argued that “this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.”⁵²⁹

The Court never developed a fully satisfactory response to Justice Harlan's concerns about encroachment on state sovereignty. However, one strand of the Court's response emphasized the human rights principles of universality and inalienability (without citing international sources to support those principles). For example, the issue in *Malloy v. Hogan* was whether the Fifth Amendment “privilege against self-incrimination is . . . safeguarded against state action by the Fourteenth Amendment.”⁵³⁰ The Court had previously held in both *Adamson* and *Twining v. New Jersey*⁵³¹ that the Fourteenth Amendment does not incorporate the self-incrimination clause.⁵³² *Malloy* overruled both *Adamson* and *Twining*.⁵³³ Justice Brennan, writing for the majority, distinguished between two approaches to the privilege against self-incrimination.⁵³⁴ One approach, which he associated with *Twining*, views the privilege as “a mere rule

⁵²⁶ As noted above, the Court did not issue express decisions about the five unincorporated clauses between 1948 and 1976. Nevertheless, we count each unincorporated clause as a “decision” not to incorporate that particular clause.

⁵²⁷ 378 U.S. 1, 16–17 (1964) (Harlan, J., dissenting). See also *id.* at 27–33.

⁵²⁸ 367 U.S. 643, 680 (1961) (Harlan, J., dissenting).

⁵²⁹ *Id.* at 681.

⁵³⁰ *Malloy v. Hogan*, 378 U.S. 1, 2 (1964).

⁵³¹ 211 U.S. 78 (1908).

⁵³² See *Adamson v. California*, 332 U.S. 46, 53–54 (1947); *Twining*, 211 U.S. at 107.

⁵³³ *Malloy*, 378 U.S. at 6, 17.

⁵³⁴ *Id.* at 9.

of evidence . . . proved by experience to be expedient.”⁵³⁵ The competing approach, which he endorsed, views the privilege as “an unchangeable principle of universal justice.”⁵³⁶ Under the *Twining* view, which was rooted in traditional principles of constitutional federalism, it makes sense to allow individual states to apply the rule against self-incrimination in different ways. Under Justice Brennan’s view, though, the Court will not tolerate a diversity of approaches in different states because federal courts must not allow the states to offend “an unchangeable principle of universal justice.”⁵³⁷ In short, Justice Brennan invoked the political morality of human rights to justify application of a uniform standard in state and federal courts.⁵³⁸

Reasonable people may disagree with Justice Brennan’s moral intuitions about universal justice. Regardless, the Court’s selective incorporation decisions suggest that a majority of Justices in the 1960s shared Justice Brennan’s moral intuitions. Not coincidentally, those moral intuitions aligned closely with the political morality of human rights, which was gradually gaining acceptance throughout the world at that time. The fact that several Justices shared a commitment to the global morality of human rights helps explain why the Court was prepared to override traditional principles of state sovereignty and impose a new rule of “compelled uniformity.”⁵³⁹

D. Response to Objections

We have argued that the diffusion of human rights as a global political morality was a significant causal factor that contributed to the federalization of human rights in the United States between 1948 and 1976. Since this claim is quite novel, we consider four potential objections.

First, one could argue that the federalization of human rights resulted from the natural evolution of the internal logic of American constitutionalism. In support of this view, one could cite language from the Declaration of Independence to show that the Declaration itself contained the seeds of the political morality of human rights. One could also argue that the Fourteenth Amendment was specifically intended to transfer control over the protection of individual rights from the states to the federal government.⁵⁴⁰

These arguments are not without merit. Nevertheless, a purely domestic, evolutionary explanation for the federalization of human rights is unpersuasive. Consider, first, the proposition that constitutional change in the United States was driven entirely by domestic factors, without any influence from transnational factors. That proposition

⁵³⁵ *Id.*

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *See id.* at 11 (“[T]he same standards must determine whether an accused’s silence in either a federal or state proceeding is justified.”).

⁵³⁹ *Id.* at 16 (Harlan, J., dissenting).

⁵⁴⁰ *See, e.g.,* AMAR, *supra* note 18.

is difficult to reconcile with the large body of evidence—summarized in Part II and in other scholarship referenced in Part II—demonstrating that the diffusion of human rights as a global political morality had a significant influence on constitutional change in most other countries on this planet. Those who favor a purely domestic account of constitutional change must defend the claim that the United States was immune from global forces that affected most other countries in the world. That claim, on its face, seems quite implausible.

Moreover, the domestic, evolutionary explanation fails to account for the fact that the federalization of human rights was not merely a minor evolutionary development; it was a revolutionary change in American constitutional law. The American Bar Association (“ABA”) argued vehemently in the years after World War II that federalization of human rights posed a substantial threat to American federalism.⁵⁴¹ Moreover, the ABA was not alone. In the early 1950s, a majority of Senators supported a constitutional amendment (the Bricker Amendment) designed to protect the United States from the perceived threat that international human rights law posed to the U.S. federal system.⁵⁴² The ABA and numerous senators objected to the federalization of human rights because they recognized, quite correctly, that the transfer of authority over human rights from the states to the national government constituted a revolutionary change in the federal structure of our constitutional system.⁵⁴³ Even after the Court’s decision in *Brown v. Board of Education*, Southern states continued to resist the national government’s efforts to impose school desegregation on white citizens who believed that segregation was morally justified.⁵⁴⁴ The Southerners who resisted desegregation could cite decades of constitutional practice and precedent supporting their view that federally mandated desegregation violated constitutional protections for states’ rights.

One additional factor also casts doubt on the domestic, evolutionary account of federalization. The prohibition on racial discrimination is one of the core principles of international human rights law. The antidiscrimination principle is the only substantive human rights principle included in the U.N. Charter.⁵⁴⁵ The antidiscrimination principle also features prominently in the Universal Declaration. However, that principle was not included in either the original Constitution or the Bill of Rights. Granted, the antidiscrimination principle became a formal part of the U.S. Constitution with adoption of the Fourteenth Amendment.⁵⁴⁶ However, Supreme Court decisions in

⁵⁴¹ See generally NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990).

⁵⁴² See DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER’S POLITICAL LEADERSHIP (1988).

⁵⁴³ *Id.*

⁵⁴⁴ See, e.g., ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS (2009).

⁵⁴⁵ See U.N. Charter, art. 55 (promising respect for human rights “without distinction as to race, sex, language, or religion”).

⁵⁴⁶ U.S. CONST. amend. XIV, § 1.

cases such as *The Civil Rights Cases*⁵⁴⁷ and *Plessy v. Ferguson*⁵⁴⁸ largely eviscerated the Fourteenth Amendment. The uncomfortable fact, which Americans are reluctant to acknowledge, is that white supremacy was the dominant political morality in the South from the end of Reconstruction until the 1950s or 1960s, and the national commitment to constitutional protection for states' rights shielded Jim Crow from federal interference. Of course, many individual citizens expressed strong moral opposition to racial discrimination long before the Court decided *Brown v. Board of Education*.⁵⁴⁹ However, their moral opposition had very little practical impact on federal constitutional law until after the moral condemnation of racial discrimination was codified in the U.N. Charter and the Universal Declaration. In short, the political morality of human rights, with its emphasis on the antidiscrimination principle, was largely absent from American constitutional law before 1948.⁵⁵⁰ Thus, the constitutional commitment to racial equality manifested in *Brown* and its progeny was not merely a minor evolutionary change in the development of U.S. constitutional law; it was a dramatic, revolutionary change in fundamental constitutional principles.

A second potential objection to our account can be summarized as follows. In the decades after World War II, the United States exerted substantial influence over the development of new international human rights norms.⁵⁵¹ Hence, Professor Henkin has described international human rights law as an American "export."⁵⁵² After we exported human rights norms to other countries, a "boomerang pattern" exerted pressure on the United States to align domestic law with international human rights norms.⁵⁵³ Therefore, assuming that international norms had a causal influence on the federalization of human rights law in the United States, that causal explanation reduces to a claim that American values influenced the federalization of human rights law both directly (through legislation and judicial decisions) and indirectly, through the medium of international norms and institutions.

We agree that human rights norms had a boomerang effect on U.S. constitutional law. However, with due respect for Professor Henkin, the description of international human rights law as an American "export" is misleading. During negotiations leading to adoption of the U.N. Charter, the United States strongly resisted inclusion of human

⁵⁴⁷ See generally 109 U.S. 3 (1883).

⁵⁴⁸ See generally 163 U.S. 537 (1896).

⁵⁴⁹ 347 U.S. 483 (1954).

⁵⁵⁰ One could cite *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), as counter-examples. Granted, the Court did endorse the anti-discrimination principle in both cases. Nevertheless, in the history of the United States from Reconstruction until *Brown*, *Yick Wo* and *Wong Kim Ark* are small islands of human rights morality in a vast sea of racial discrimination.

⁵⁵¹ See, e.g., MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

⁵⁵² Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979).

⁵⁵³ KECK & SIKKINK, *supra* note 395, at 12–13.

rights language in the Charter.⁵⁵⁴ Edward Stettinius, speaking on behalf of the U.S. government, told other delegates: “[U]nder no circumstances would America support an explicit reference to racial equality.”⁵⁵⁵ Ultimately, the United States reluctantly accepted Charter text on racial equality, but only after John Foster Dulles persuaded other nations to accept language that barred the United Nations from intervening “in matters which are essentially within the domestic jurisdiction of any state.”⁵⁵⁶ Dulles’s domestic jurisdiction clause shielded countries from coercive action by the United Nations, but that clause could not protect Jim Crow from the onslaught of the global morality of human rights.

Scholars agree that Eleanor Roosevelt—acting as the U.S. representative and the chairperson of the Human Rights Commission—played a critical role in drafting the Universal Declaration.⁵⁵⁷ However, Charles Malik (from Lebanon), Peng-chun Chang (from China) and René Cassin (from France) were also highly influential in shaping the final text of the Universal Declaration.⁵⁵⁸ Moreover, like every internationally agreed instrument, the text of the UDHR was the product of negotiation and compromise. The diverse countries that participated in drafting the UDHR drew on their own constitutions as sources of rights that could go into the Declaration. As Elkins, Ginsburg, and Simmons note, “U.N. negotiators drew from not only salient historical documents such as the French Declaration of the Rights of Man, but also from the constitutions of the home countries of the negotiators.”⁵⁵⁹ Thus, the range of influences that shaped the UDHR was broad, not simply mimicking the “constitutions of the most powerful states.”⁵⁶⁰ In fact, the “UDHR only weakly resembled the U.S. Constitution’s Bill of Rights,” despite “the hegemonic position of the United States.”⁵⁶¹ The analysis of Elkins, Ginsburg, and Simmons finds that the U.S. Constitution as of 1948 “ranks in the bottom fifth in terms of similarity to the UDHR.”⁵⁶² The constitutions most similar to the UDHR in rights content include Haiti’s constitution of 1946 and Iceland’s of 1944.⁵⁶³ Our analysis of national constitutions, employing a different approach than that of Elkins, Ginsburg, and Simmons, finds that as of 1947—on the eve of adoption of the UDHR—fifteen countries had national constitutions with more UDHR rights than the U.S. Constitution (which was tied with the Constitution of Honduras). Morsink identifies affinities between the UDHR and the contemporary constitutions of Uruguay, Syria, Turkey, Iceland, Denmark, Lebanon, Belgium, Cuba, Portugal,

⁵⁵⁴ ANDERSON, *supra* note 38, at 37.

⁵⁵⁵ *Id.*

⁵⁵⁶ *See id.* at 46–50. The quoted language is from the U.N. Charter, art. 2, ¶ 7.

⁵⁵⁷ *See generally* GLENDON, *supra* note 551.

⁵⁵⁸ *See id.*

⁵⁵⁹ *See* Elkins et al., *supra* note 48, at 74.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 75.

⁵⁶³ *Id.*

Spain, and Switzerland.⁵⁶⁴ More broadly, as prior research has shown, a number of small countries exercised significant influence at the UDHR negotiations.⁵⁶⁵

Consequently, the moral principles embodied in the Universal Declaration are not uniquely American principles. They are universal moral principles with roots in many cultures and many nations. Moreover, insofar as the Universal Declaration prioritized the antidiscrimination principle as a core principle of the political morality of human rights, there was an obvious tension between the moral framework of the UDHR and the dominant political morality that prevailed in the United States from the end of Reconstruction until World War II. Therefore, the human rights morality that had a “boomerang effect” on the United States was actually quite different from the political morality that shaped American constitutional law in the decades before World War II.

The third objection to our claim about the causal influence of the morality of human rights relies on Professor Dudziak’s work. She argues—quite convincingly, in our view—that the Cold War conflict between the United States and the Soviet Union was a critical factor that contributed to the civil rights revolution in the United States.⁵⁶⁶ Her account, like our account, emphasizes transnational factors that influenced domestic constitutional change in the United States.⁵⁶⁷ Even so, one could argue that our emphasis on the political morality of human rights is misplaced because the transnational factors that really mattered involved Cold War *realpolitik*, not the fuzzy morality of human rights.

It is impossible to quantify the relative importance of different factors that exerted causal influence over constitutional change in the United States in the period from 1948 to 1976. We claim only that the diffusion of human rights as a global political morality was one such factor, and that the influence of human rights morality was not insignificant. Indeed, from our perspective, the Cold War *realpolitik* story and the human rights morality story are inextricably intertwined. The Cold War created a compelling strategic imperative for the United States to persuade Asian, African, and Latin American countries that American democracy was a better political system than Soviet communism. To win the battle of ideas between democracy and communism, the United States had to make moral arguments that appealed to the Asian, African and Latin American audiences whom we wanted to persuade. For those audiences, the prohibition on racial discrimination—codified in the U.N. Charter and the UDHR—was an extremely important moral principle, and the failure of the U.S. constitutional system to conform to that moral principle was the most glaring defect of American

⁵⁶⁴ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 46, 257, 261 (1999).

⁵⁶⁵ *See id.* at xiv. *See generally* Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23 *THIRD WORLD Q.* 437 (2002); Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 *HUM. RTS. Q.* 44 (2001).

⁵⁶⁶ *See generally* DUDZIAK, *supra* note 2.

⁵⁶⁷ *Id.* at 14–17.

democracy. Therefore, the moral (human rights) argument for ending racial segregation and the strategic (Cold War) argument for ending segregation were mutually reinforcing. The United States had to incorporate the morality of human rights into constitutional doctrine to be able to make a convincing case that American democracy was better than Soviet communism.

The final objection emphasizes the fact that the key judicial decisions and legislative enactments that federalized human rights law in the United States rarely mentioned international human rights instruments. Moreover, citations to the U.N. Charter and the Universal Declaration largely disappeared from Supreme Court briefs after 1954. The lack of express reliance on international human rights instruments, one could argue, demonstrates that international human rights law had very little impact on federalization.

Here, we note the distinction between human rights law and the political morality of human rights. We agree that international human rights law, as such, is largely absent from the legal reasoning presented in Supreme Court decisions. However, the actual texts of the Supreme Court decisions and legislative enactments that transferred regulatory authority over human rights from the states to the federal government provide almost no acknowledgment—much less a legal justification—that the federal government was appropriating power over human rights and displacing state regulatory authority in areas previously reserved to the states. Since federal judges and legislators generally failed to provide an explicit legal rationale to justify the dramatic change in constitutional structure associated with the human rights revolution, it is not surprising that they omitted citations to international human rights instruments. Accordingly, scholars must look beyond the text of judicial decisions and legislative enactments to gain deeper insight into the social, political, and intellectual forces that produced a fundamental change in the division of power between the states and the federal government. We hope we have persuaded skeptical readers that the political morality of human rights was the dominant idea that provided a largely unstated intellectual justification for the federalization of human rights in the United States between 1948 and 1976.

CONCLUSION

In a widely acclaimed book, Professor Samuel Moyn contends that human rights did not exert significant influence over socio-legal developments until the 1970s.⁵⁶⁸ This Article demonstrates that Moyn is wrong. Between 1948 and 1976, numerous countries revised their constitutions to incorporate rights from the Universal Declaration into their national constitutions. During the same period, lawyers, judges, and legislators in the United States dramatically altered the federal structure of the U.S.

⁵⁶⁸ SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 3 (2010) (stating that human rights “emerged in the 1970s seemingly from nowhere”).

Constitution by transferring power over human rights from the states to the federal government. Professor Moyn may well be correct to note that the institutional machinery for enforcement of human rights at the international level was not well developed as of 1976.⁵⁶⁹ However, his story overlooks the radical changes in domestic constitutions that took place between 1948 and 1976.

Supreme Court decisions in the first decade of this century provoked strong resistance to citation of foreign and international sources in U.S. judicial decisions.⁵⁷⁰ Our account of constitutional change in the decades after World War II suggests that the judges and legislators who want to insulate federal constitutional jurisprudence from foreign and international influence are acting about fifty years too late. They are trying to close the barn door long after the foreign horses entered. Indeed, the foreign horses are so thoroughly intermixed with the domestic horses that it is no longer meaningful to distinguish between “foreign” and “domestic” influences on federal constitutional law. Contemporary federal laws protecting fundamental rights are the product of judicial and legislative processes that incorporated global human rights norms into federal constitutional and statutory law.

Finally, our story has important lessons for U.S. citizens about the nature of American constitutional identity. Many Americans believe that our national identity is inextricably linked to the Constitution: our fealty to the Constitution is an important part of what binds us together as a nation. However, the “constitution” that commands the loyalty of most Americans is not the text adopted in the eighteenth century: a document that authorized slavery and denied women the right to vote. Rather, the “constitution” that commands our loyalty is the body of modern constitutional law that emerged from the human rights revolution in the decades after World War II. Twenty-first century Americans embrace the modern, human rights constitution because it—unlike the eighteenth-century Constitution—is consistent with contemporary American values. However, this Article suggests that the “American values” that shape modern constitutional law are not distinctively American. To the contrary, they are the universal values expressed in the Universal Declaration of Human Rights, which have been incorporated into national constitutions throughout the world in the past several decades. Therefore, genuine fealty to the twenty-first century constitution, properly understood, requires Americans to embrace their identity as global citizens.

⁵⁶⁹ *Id.* at 2.

⁵⁷⁰ In March 2004, the House Subcommittee on the Constitution approved House Resolution 568, which expresses the view “that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions.” H.R. Res. 568, 108th Cong. (2004). *See also* *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

APPENDIX

UDHR article	Right	CCP variable number	CCP variable name	In Constitution?
1	Dignity	58	DIGNITY	N
2	Equality of nationality	553	EQUALGR_2	N
2	Equality of gender	553	EQUALGR_1	N
2	Equality of color	553	EQUALGR_10	14th Amend.
2	Equality of creed/beliefs	553	EQUALGR_11	N
2	Equality, property ownership	553	EQUALGR_13	N
2	Equality of parentage	553	EQUALGR_16	N
2	Equality of race	553	EQUALGR_4	14th Amend.
2	Equality of language	553	EQUALGR_5	N
2	Equality of religion	553	EQUALGR_6	N
3	Right to life	604	LIFE	14th Amend.
4	Prohibit slavery, servitude	605	SLAVE	13th Amend.
5	Cruel treatment	607	CRUELTY	8th Amend.
5	Torture	606	TORTURE	8th Amend.
7	Equal protection of law	552	EQUAL	14th Amend.
8	Right to a remedy	524, 349	FALSEIMP, ILLADMIN	N
9	Arbitrary arrest, detention	515	HABCORP	4th Amend.
10	Fair trial	525	FAIRTRI	5th, 6th Amend.
10	Public trial	527	PUBTRI	6th Amend.
11(1)	Right to counsel	534	COUNS	6th Amend.
11(1)	State pays for counsel	535	COUNSCOS	N
11(1)	Double jeopardy	532	DOUBJEP	5th Amend.
11(1)	Confront witnesses	522	EXAMWIT	6th Amend.
11(1)	Self-incrimination	533	MIRANDA	5th Amend.
11(1)	Presumption of innocence	528	PRESINOC	N
11(1)	Right to appeal	517	RGHTAPP	N
11(1)	Speedy trial	526	SPEEDTRI	6th Amend.
11(1)	Right to interpreter	529	TRILANG	N
11(2)	No ex post facto law	523	EXPOST	Art. I(10)
12	Home, correspondence	513	EVIDENCE	4th Amend.
12	Protect honor/reputation	561	LIBEL	N
12	Non-interfere privacy	608	PRIVACY	N
13	Free movement	609	FREEMOVE	Art. IV(2)

UDHR article	Right	CCP variable number	CCP variable name	In Constitution?
14	Right to seek asylum	623	ASYLUM	N
15	Deprive nationality	546	CITREV_4	N
16	Right to found family	596	FNDFAM	N
16	Right to marry	594	MARRIAGE	N
16	Equal rights in marriage	598	MATEQUAL	N
17(1)	Right to own property	587	PROPRGHT	N
17(2)	Deprive property	572	EXPLIM_4	5th Amend.
18	Freedom of thought, religion	564	FREEREL	1st Amend.
19	Freedom of expression	611	EXPRESS	1st Amend.
19	Freedom of opinion	610	OPINION	N
19	Freedom of press	615	PRESS	1st Amend.
20	Freedom of assembly	618	ASSEM	1st Amend.
20	Freedom of association	619	ASSOC	N
21(2)	Access to public service	475	CIVIL	N
21(3)	Universal adult suffrage	430	VOTEUN	Various
22	Free develop personality	621	DEVLPER	N
23(1)	Just and favorable conditions	591	SAFEWORK	N
23(1)	Free choice of employment	590	OCCUPATE	N
23(3)	Just remuneration	574	REMUNER	N
23(4)	Right to join trade unions	575	JOINTRDE	N
24	Holidays with pay	577	LEISURE	N
24	Limitation of working hours	577	LEISURE	N
25(1)	Right to social security	586	FINSUP_1	N
25(1)	Financial support unemployed	586	FINSUP_2	N
25(1)	Financial support disabled	586	FINSUP_3	N
25(1)	Health care	602	HEALTHR	N
25(1)	Housing	593	SHELTER	N
25(1)	Standard of living	578	STANDLIV	N
25(2)	Financial support children	586	FINSUP_4	N
26(1)	Equal access higher ed	665	ACHIGHED	N
26(1)	Compulsory education	660	EDCOMP	N
26(1)	Free education	662	EDFREE	N
27(1)	Right to participate in culture	502	CULTRGHT	N
27(1)	Scientific progress	589	SCIFREE	N
27(2)	Int'l prop gen'l	582	INTPROP_4	N