University of St. Thomas Law Journal

Volume 17
Issue 3 *Sovereignty in a Globalizing, Fragmenting World Symposium*

Article 4

November 2021

Sovereignty and National Constitutions

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ARTICLE

SOVEREIGNTY AND NATIONAL CONSTITUTIONS

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In his dissenting opinion in *Atkins v. Virginia*,[1] Justice Scalia said: "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[2] I will refer to Justice Scalia's view as the sovereigntist model of constitutional law. According to the sovereigntist model, the constitution of any particular country is an expression of that country's national identity. Constitutions are created through acts of popular sovereignty, in which "we the people" of a particular nation join together to adopt a document that embodies the nation's sovereignty. Under this view, France's Constitution is an expression of French national identity, Chile's constitution is an expression of Chilean national identity, and so on.

In this brief essay, I hope to persuade readers that the sovereigntist model of constitutional law is descriptively inaccurate. In fact, the national constitutions of most countries in the world bear striking similarities to each other.[3] As explained in Part I, the main reason why we observe similarities among national constitutions throughout the world is that those constitutions are products of transnational forces that shape the processes of writing and interpreting constitutions. When a nation adopts a new constitution, the drafting process does not occur in an isolation tank. The drafters borrow liberally from existing templates by copying and pasting text from other national constitutions and from international human rights instruments.[4] Similarly, constitutional interpretation does not occur in isolation. When

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1. Atkins v. Virginia, 536 U.S. 304 (2002).

2. *Id.* at 348 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J. dissenting)).

3. *See, e.g.*, Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 61–62 (2013).

4. *See infra* Part I.

judges interpret constitutional provisions that protect individual rights, they frequently consult judicial decisions from other countries that have similar rights provisions in their constitutions. Sovereigntists may object to the practice of judicial borrowing. However, they cannot block the dissemination of ideas across national borders any more than they can block the transmission of a virus across national borders. Any attempt to do so is doomed to fail.

The remainder of this essay is divided into two parts. Part I discusses the transnational forces that affect constitution drafting. Part II analyzes the transnational forces that affect constitutional interpretation. Part II contends that US constitutional culture developed a "human rights taboo" in the early 1950s. As a result, US courts rarely cite international human rights law. However, despite the taboo, international human rights norms exerted tremendous, but largely unacknowledged, influence over the development of constitutional law in the United States between 1948 and 1976.

I. Constitution-Making as a Transnational Enterprise

In a recent book, *Constitution-Making and Transnational Legal Order*, Professors Shaffer, Ginsburg, and Halliday debunk what they call the "nationalist myth" of constitution-making.[5] The nationalist myth envisions "constitution-making as the work of a small group of national authors debating first principles."[6] The coauthors contend that "this common way of conceiving of constitution-making . . . is simply wrong. . . . When one examines the actual processes by which constitutional documents are made, one sees an array of transnational influences, actors, and ideas that provide the very grammar for the project."[7]

Modern constitution making is heavily influenced by a group of institutions that, in the words of Harold Koh, act as transnational norm entrepreneurs.[8] Leading institutional players involved in advising states with respect to constitution making include:

- intergovernmental organizations, such as the United Nations, the International Development Law Organization,[9] and the International Institute for Democracy and Electoral Assistance;[10]

5. Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Introduction* to Constitution-Making and Transnational Legal Order 1, 3–6 (Tom Ginsburg, Terence C. Halliday & Gregory Shaffer eds., 2019).

6. *Id.* at 4.

7. *Id.* at 1.

8. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 647 (1998).

9. *See About IDLO*, Int'l Dev. L. Org., https://www.idlo.int/about-idlo/about-idlo (last visited Feb. 19, 2021).

10. *See International IDEA About Us*, Int'l Inst. for Democracy & Electoral Assistance, https://www.idea.int/about-us (last visited Feb. 19, 2021).

- organizations affiliated with particular national governments, such as the US Institute of Peace (funded by the US government)[11] and the Max Planck Institute for Comparative Public Law and International Law (funded primarily by the German government);[12]
- organizations affiliated with national political parties, including the National Democratic Institute[13] and the International Republican Institute;[14]
- the Venice Commission, which is an organ of the Council of Europe;[15] and
- independent nongovernmental organizations (NGOs), such as the Public International Law and Policy Group (PILPG), based in Washington, DC.[16]

In the modern era, when a country decides to adopt a new national constitution, it is likely to be bombarded with outside advice from several of these transnational norm entrepreneurs. For example, when the newly independent state of South Sudan first adopted an interim constitution, and then a transitional constitution, it received outside assistance from "the National Democratic Institute, . . . the Max Planck Institute for Comparative Public Law and International Law," the US Institute of Peace, the International Development Law Organization, and the PILPG.[17] Outside advisors have played a role in constitution drafting at least since the late eighteenth century, when Jean-Jacques Rousseau was called upon to advise the governments of Corsica and Poland.[18] However, according to Professor Ginsburg, "the pace and intensity of transnational involvement in constitution-making has intensified since 1990."[19]

11. *See Democracy and Governance*, U.S. INST. PEACE, https://www.usip.org/issue-areas/democracy-governance (last visited Feb. 19, 2021).

12. *See Background and Current Profile*, MAX PLANCK INST. FOR COMPAR. PUB. L. & INT'L L., https://www.mpil.de/en/pub/institute/the-institute/background.cfm (last visited Feb. 19, 2021).

13. *See What We Do*, NAT'L DEMOCRATIC INST., https://www.ndi.org/what-we-do?gclid=EAIaIQobChMIvIj5-ZLN6gIVVx6tBh0SbQGeEAAYASACEgIS7vD_BwE (last visited Feb. 19, 2021).

14. *See What We Do*, INT'L REPUBLICAN INST., https://www.iri.org/what-we-do (last visited Feb. 19, 2021).

15. *See* Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 5, at 156.

16. *See A Global Pro Bono Law Firm*, PUB. INT'L L. & POL'Y GRP., https://www.publicinternationallawandpolicygroup.org (last visited Feb. 19, 2021).

17. Tom Ginsburg, *Constitutional Advice and Transnational Legal Order, in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 5, at 26, 41.

18. *Id.* at 29.

19. *Id.* at 40.

In 2009, the UN Secretary General issued guidance on UN assistance to constitution-making processes.[20] That document manifests the inherent tension involved in the role of outside advisors. On one hand, the guidance directs UN personnel to "promote compliance of constitutions with international human rights and other norms and standards . . . [including] the rights that have been established under international law for groups that may be subjected to marginalization and discrimination . . . , including women, children, minorities, indigenous peoples, [and others]."[21] On the other hand, the guidance states explicitly that constitution making is "a sovereign national process, which, to be legitimate and successful, must be nationally owned and led."[22] Of course, political leaders in many countries may resist the idea of codifying equal rights for women and minorities in their national constitutions. Thus, as Professor Ginsburg notes, "There is an irony that an international organization which is itself involved in imposing certain ideas is also the body that urges local participation in the process, and safeguards participation as a key process value."[23]

Notwithstanding any normative commitment to local control,[24] quantitative empirical analysis of constitutional texts demonstrates that national constitutions are the product of transnational forces. Professor David Law analyzed "a corpus of 615 constitutional texts, drawn from a variety of sources and encompassing roughly two-thirds of all new or interim constitutions ever produced."[25] His analysis utilizes a type of automated content analysis known as *topic modeling*, which "breaks down a text corpus into its component topics by identifying patterns of word frequency and word co-occurrence."[26] In the context of topic modeling, the word *topic* "is a term of art that refers simply to a set of words that have a particular probability of appearing in conjunction with each other."[27] Professor Law's central conclusion is striking: "constitution-writing is more a barometer of geopolitical hegemony and . . . influence than a technical, apolitical exercise in institutional design."[28] His analysis suggests that most constitutions in the world fit into one of four categories: Commonwealth constitutions

20. *See* U.N. Secretary-General, *Guidance Note of the Secretary General: United Nations Assistance to Constitution-Making Processes* 1 (Apr. 2009), https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf.

21. *Id*. at 4.

22. *Id*. at 2.

23. Ginsburg, *supra* note 17, at 43.

24. *See* Abrak Saati, *Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 5, at 283 (discussing local participation and local control).

25. David S. Law, *Constitutional Dialects: The Language of Transnational Legal Orders*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 5, at 110, 116.

26. *Id.* at 114.

27. *Id.* at 122.

28. *Id.* at 123.

that arise from British colonialism; Latin American constitutions that derive from Spanish colonialism; Francophonie constitutions that arise from French colonialism; and socialist constitutions that are the byproduct of the diffusion of socialist ideology.[29] Law concludes that the use of topic modeling to analyze constitutional texts "captures the rise and fall of empires" by exposing "the linguistic markers of competing transnational legal orders."[30]

A different type of quantitative analysis demonstrates that, over time, international human rights norms have become more entrenched in the texts of national constitutions. Professor Colin Beck and his coauthors completed a detailed empirical study that presents a quantitative measurement of the incorporation of international human rights norms into national constitutions.[31] They identified a list of 65 specific rights that are included in both the Universal Declaration of Human Rights (UDHR) and the Comparative Constitutions Project database.[32] As of 1925, the average constitution protected only about 15 of those 65 rights. By 1950, the average constitution protected about 22 of those 65 rights. By 2013—the last year for which data were available—the average constitution protected 35 of those 65 rights.[33] The authors of the study conclude: "[I]t is clear that the number of UDHR provisions present in a constitution tracks time rather closely. More recent constitutions tend to have higher scores on the human rights index."[34] They performed regression analyses to control for numerous variables in an effort to explain why the number of UDHR rights protected by national constitutions increases over time. They conclude: "[M]ultivariate analyses confirm that constitutional law and language is affected by the transnational context at the time of its adoption. . . . In short, constitutions should be considered global-transnational documents as much as national ones."[35]

In sum, rigorous empirical analysis of constitutional texts demonstrates that transnational forces have a significant impact on the texts of national constitutions. Therefore, the sovereigntist model of constitution making, which conceives of each nation's constitution as an expression of its unique national identity, is descriptively inaccurate.

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29. *See id.* at 128–40.

30. *Id.* at 149.

31. Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 5, at 85.

32. *See id*. at 90–95. The Comparative Constitutions Project is an important scholarly effort to produce "comprehensive data about the world's constitutions . . . in order to answer a set of research questions about the origins and consequences of constitutional choices." *About the CCP*, COMPAR. CONSTS. PROJECT, https://comparativeconstitutionsproject.org/about-ccp (last visited Feb. 19, 2021).

33. Beck et al., *supra* note 31, at 95 fig.4.1, 97 tbl.4.2.

34. *Id.* at 99.

35. *Id.* at 104.

II. Constitutional Construction and Judicial Borrowing

In a series of cases at the beginning of this century—notably *Atkins v. Virginia*,[36] *Lawrence v. Texas*,[37] and *Roper v. Simmons*[38]—the Supreme Court cited international and foreign sources to support majority decisions based on the Eighth and/or Fourteenth Amendments.[39] Citations to international and foreign sources provoked sharp dissents from Justice Scalia, who condemned the citation to international and foreign sources as illegitimate.[40] Those decisions also prompted a vigorous scholarly debate about the merits of so-called transnational judicial dialogue, or what I will call simply "judicial borrowing."[41]

Rather than revisiting those debates, this part explores the reasons why some judges engage in judicial borrowing, whereas others condemn the practice. The analysis is divided into two sections. The first section addresses judicial borrowing by courts in other countries. I suggest that there are three primary reasons for judicial borrowing. First, constitutional texts are similar in many national constitutions, especially the provisions on individual rights. Second, litigants ask courts to apply those texts in factual circumstances where the text itself does not provide a definitive answer. Third, transnational norm entrepreneurs engaged in constitutional litigation encourage courts to consider relevant decisions by foreign and international tribunals.

The final section discusses the opposition to judicial borrowing by US courts. I show that the roots of that opposition can be traced to the Bricker Amendment controversy in the early 1950s, which gave rise to a "human rights taboo" in US constitutional culture. That taboo inhibits US courts from citing international human rights documents. Nevertheless, between 1948 and 1976, the United States incorporated many international human rights norms into federal law through a process of "silent incorporation."[42]

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36. Atkins v. Virginia, 536 U.S. 304 (2002).

37. Lawrence v. Texas, 539 U.S. 558 (2003).

38. Roper v. Simmons, 543 U.S. 551 (2005).

39. *See Atkins*, 536 U.S. at 316 n.21; *Lawrence*, 539 U.S. at 572–73, 576–77; *Roper*, 543 U.S. at 575–78.

40. *See Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting).

41. *See, e.g.*, Mark Tushnet, *International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity*, *in* International Law in the U.S. Supreme Court: Continuity and Change 507–17 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011); Roger P. Alford, *Why Constitutional Comparativism Is Different: A Response to Professor Tushnet*, *in* International Law in the U.S. Supreme Court: Continuity and Change, *supra*, at 518–22; Melissa A. Waters, *Judicial Dialogue in Roper: Signaling the Court's Emergence as a Transnational Legal Actor?*, *in* International Law in the U.S. Supreme Court: Continuity and Change, *supra*, at 523–29.

42. *See* David L. Sloss & Michael P. Van Alstine, *International Law in Domestic Court*, *in* Handbook on the Politics of International Law 104–05 (Wayne Sandholtz & Christopher Whytock eds., 2017) (discussing silent incorporation).

By practicing silent incorporation, US courts incorporate international norms into constitutional law without explicitly citing international sources.

A. Judicial Borrowing in Foreign Courts

Constitutional scholars in the United States distinguish between "constitutional interpretation" and "constitutional construction."[43] "Interpretation is the activity of identifying the semantic meaning of a particular use of language in context. Construction is the activity of applying that meaning to particular factual circumstances."[44] The vast majority of constitutional controversies presented for decision by national courts cannot be resolved by interpretation alone because most constitutional texts are sufficiently vague that reasonable people can disagree about how particular textual provisions should be applied in specific factual circumstances. Therefore, to decide concrete cases, courts must move beyond constitutional interpretation to constitutional construction. When they engage in constitutional construction, they sometimes consider the decisions of international and foreign tribunals that have construed textually similar provisions in factually similar circumstances. Indeed, judges in supreme courts and constitutional courts throughout the world routinely engage in the practice of judicial borrowing when they construe their national constitutions.[45]

The decision by the Constitutional Court of Zimbabwe in *Makoni v. Commissioner of Prisons*[46] illustrates the practice of judicial borrowing and the reasons why courts engage in the practice. Makoni was serving a sentence of life imprisonment without the possibility of parole (LWOP) for a murder he committed in the 1990s. He argued that the LWOP sentence violated his rights under Sections 51 and 53 of the Zimbabwe Constitution.[47] Section 51 states: "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected."[48] Section 53 states: "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."[49] No matter how carefully one analyzes the precise wording of the constitutional text, the words themselves do not answer the question whether an LWOP sentence is unconstitutional. Constitutional construction is necessary to an-

43. *See generally* Keith E. Whittington, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999).

44. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011).

45. *See, e.g.*, JUDICIAL DIALOGUE AND HUMAN RIGHTS (Amrei Müller & Hege Elisabeth Kjos eds., 2017); Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT'L L. 423, 424 (2013).

46. Makoni v. Commissioner of Prisons, Const. App. No. CCZ 48/15, Judgment No. CCZ 8/16 1 (2016) (Const. Ct. of Zim.).

47. *Id.* at 1–2.

48. Const. of Zimbabwe (2013) § 51.

49. *Id.* § 53.

swer that question. As in most cases where courts are asked to engage in constitutional construction, the Constitutional Court of Zimbabwe had to decide how a constitutional principle phrased in general terms should be applied in concrete, factual circumstances.

When the Zimbabwe court considered the issue of LWOP sentences in *Makoni*, the applicant's brief contained extensive citations to international and foreign jurisprudence.[50] The applicant received assistance from "the London-based Death Penalty Project, which has coordinated constitutional . . . challenges in the Caribbean, East Africa, and South and Southeast Asia,"[51] and which "maintains links to the barristers at Doughty Street Chambers and an extensive network of local partners and British NGOs."[52] Thus, like the transnational norm entrepreneurs who advise states on constitution making, NGOs engaged in transnational human rights litigation encourage domestic courts to take account of international human rights norms when they apply domestic constitutional law to concrete cases. In *Makoni*, the efforts of transnational norm entrepreneurs paid off: the Constitutional Court held that LWOP sentences are unconstitutional, and it cited many of the foreign and international legal authorities referenced in the applicant's brief.[53]

The court's decision in *Makoni* cited decisions by the Namibian Supreme Court[54] and the South African Constitutional Court,[55] as well as a decision by the Judicial Committee of the Privy Council in a case from Mauritius.[56] (The Judicial Committee of the Privy Council, which sits in the United Kingdom, is the highest appellate body for certain British Commonwealth countries, including Mauritius.) Courts in all three cases held that LWOP sentences violated the constitutions of Namibia, South Africa, and Mauritius, respectively. The national constitutions of Namibia, South Africa, and Mauritius all include specific provisions that are textually similar to Section 53 of Zimbabwe's Constitution.[57] Largely as a result of the trans-

50. *See* Andrew Novak, *The Role of Legal Advocates in Transnational Judicial Dialogue: The Abolition of the Mandatory Death Penalty and the Evolution of International Law*, 25 CARDOZO J. INT'L & COMP. L. 179, 198 (2017) (citing Applicant's Heads of Argument at 12, 42, Makoni v. Commissioner of Prisons (2016) (Zim.)).

51. *Id.* at 199.

52. *Id.*

53. *See id*. at 198; Makoni v. Commissioner of Prisons, Const. App. No. CCZ 48/15, Judgment No. CCZ 8/16 1 (2016) (Const. Ct. of Zim.).

54. *Makoni*, Const. App. No. CCZ 48/15, Judgment No. CCZ 8/16 at 6 (citing State v. Tcoeib (1996) 7 BCLR 996 (NASC)).

55. State v. Bull and Another, 2002 (1) SA 535 (SCA).

56. De Boucherville v. The State of Mauritius, [2008] UKPC 37.

57. MAURITIUS [CONSTITUTION] 1968 (rev. 2016), art. 7, para. 1 ("No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."); NAMIBIA [CONSTITUTION] 1990 (rev. 2014), art. 8, para. 2(b) ("No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."); SOUTH AFRICA [CONSTITUTION] 1996 (rev. 2012), art. 12, para. 1 ("Everyone has the right to freedom and security of the person, which includes the right . . . not to be tortured in any way; and not to be treated or punished in a cruel,

national forces that shape constitutional drafting (discussed in Part I of this essay), all four constitutional provisions are similar to Article 5 of the UDHR, which prohibits torture and "cruel, inhuman or degrading treatment or punishment."[58] Thus, when the Constitutional Court of Zimbabwe was presented with a question of constitutional construction involving LWOP sentences, and the specific textual provisions at issue did not provide a definitive answer to that question, the court did what many other domestic courts have done in similar circumstances: it relied (partly) on decisions by appellate courts in other jurisdictions that had applied textually similar provisions of their own constitutions in factually similar circumstances.

In addition to citing cases from other African courts and the Privy Council, the court in *Makoni* also cited two decisions from the European Court of Human Rights that applied Article 3 of the European Convention on Human Rights (ECHR).[59] Article 3 of the ECHR, like Article 5 of the UDHR and Section 53 of the Zimbabwean Constitution, prohibits both torture and "inhuman or degrading treatment or punishment."[60] The court also cited a "General Comment" from the UN Human Rights Committee,[61] a committee of experts charged with overseeing implementation of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR, like the other constitutional and international documents cited above, prohibits torture and "cruel, inhuman or degrading treatment or punishment."[62]

In sum, contrary to the sovereigntist model, the prohibition on "cruel, inhuman or degrading treatment or punishment" in Section 53 is not a unique feature of Zimbabwe's Constitution based on a distinctive Zimbabwean national identity. To the contrary, it is a central element of the "global political morality of human rights"[63] that is codified in numerous national constitutions and international human rights instruments. The choice by the Constitutional Court of Zimbabwe in *Makoni* to rely on decisions by foreign and international tribunals manifests an implicit judicial recognition that Section 53 is best understood as an expression of the global political morality of human rights.

It is noteworthy that Section 46(1) of the Constitution of Zimbabwe provides that courts in Zimbabwe—when applying provisions of the Decla-

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inhuman or degrading way."). The texts of all three constitutions are taken from the Comparative Constitutions Project database, available at https://www.constituteproject.org/search?lang=en.

58. G.A. Res. (III) A/810, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948).

59. Dickson v. United Kingdom (2007) ECHR (44362/04); Vinter v. United Kingdom (2013) ECHR (66069/09, 130/10, 3896/10).

60. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

61. Human Rights Committee, General Comment No. 21 (Apr. 10, 1992), available at http://hrlibrary.umn.edu/gencomm/hrcom21.htm.

62. International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

63. *See* MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM (2017).

ration of Rights (which includes Sections 51 and 53)—"must take into account international law and all treaties and conventions to which Zimbabwe is a party" and "may consider relevant foreign law."[64] This provision appears to be modeled on Article 39 of the South African Constitution, which specifies that courts in South Africa "must consider international law" and "may consider foreign law" when interpreting the Bill of Rights.[65] It is not surprising that domestic courts in countries with these types of constitutional provisions are very receptive to judicial borrowing.

However, courts in other countries that lack these types of constitutional provisions are also very receptive to judicial borrowing. The Supreme Court of India is one example.[66] In countries like India, where the constitutional text does not specifically instruct courts to apply international or foreign law, courts engage in judicial borrowing for several reasons: they have a practical need to construe indeterminate textual provisions; those provisions are often similar to provisions in other national constitutional texts and international human rights instruments (thanks to transnational influences on constitution drafting); there is an available body of jurisprudence from international and foreign tribunals construing those textually similar provisions; and NGOs engaged in transnational human rights litigation encourage domestic courts to take account of that body of jurisprudence.

B. The Resistance to Judicial Borrowing in US Courts

In contrast to courts in many other countries, US courts rarely cite international or foreign authorities when they engage in constitutional construction. The dearth of such citations in modern constitutional jurisprudence can be explained partly by the age of the United States Constitution. US courts have less need to rely on international and foreign law because they have developed a substantial body of jurisprudence in the 230 years of US constitutional history. In a previous article, I demonstrated that the Supreme Court applied international law in more than 40 percent of public law cases between 1801 and 1864, but it applied international law in fewer than 5 percent of public law cases in the twentieth century.[67] One possible explanation for decreasing reliance on international law is that US courts had less need to consult foreign and international sources after they developed a substantial body of domestic jurisprudence.

Although this explanation is reasonable, I believe it is incomplete. As illustrated by the *Makoni* case in Zimbabwe, courts in other countries fre-

64. ZIMBABWE [CONSTITUTION] 2013 (rev. 2017), sec. 46, https://www.constituteproject.org/search?lang=en.

65. SOUTH AFRICA [CONSTITUTION] 1996 (rev. 2012), art. 39, https://www.constituteproject.org/search?lang=en.

66. *See* Nihal Jayawickrama, *India*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

67. *See* David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 WASH. & LEE L. REV. 1757, 1785–89, app. tbl.2 (2014).

quently cite international and foreign authorities when they construe provisions of their national constitutions that are substantially similar to provisions in international human rights instruments. The United States Constitution also includes provisions that are substantially similar to provisions in international human rights instruments. The Eighth Amendment prohibition on "cruel and unusual punishments"[68] is like Article 5 of the UDHR, which prohibits "cruel, inhuman or degrading treatment or punishment."[69] The Fourteenth Amendment Equal Protection Clause, which guarantees "equal protection of the laws,"[70] is similar to Article 7 of the UDHR, which states: "All are equal before the law and are entitled without any discrimination to equal protection of the law."[71] One could list numerous other examples.

Despite the similarity between US constitutional text and the texts of various international human rights instruments, US constitutional culture developed a "human rights taboo" in the early 1950s. That taboo prevented the federal political branches from ratifying international human rights treaties for several decades after the United Nations adopted the UDHR in 1948.[72] It still inhibits US courts from engaging in the practice of judicial borrowing: when they do so, they are likely to provoke strident objections that have the effect of reinforcing the taboo.[73] Despite the human rights taboo, though, international human rights norms had a profound impact on the development of US constitutional law in the period from 1948 to 1976. During that time period, the United States effectively incorporated international human rights norms into federal law through a process of silent incorporation.[74] This section explains the historical origins of the human rights taboo and the process of silent incorporation.

The period from 1948 to 1954 was a fertile period for international human rights litigation in US courts. The Supreme Court decided five cases in 1948 in which litigants invoked the human rights provisions of the UN Charter to challenge racially discriminatory laws:[75] *Bob-Lo Excursion Co. v. Michigan*,[76] *Takahashi v. Fish & Game Comm'n*,[77] *Oyama v. Califor-*

68. U.S. CONST. amend. VIII.

69. U.D.H.R., *supra* note 58, art. 5.

70. U.S. CONST. amend. XIV.

71. U.D.H.R., *supra* note 58, art. 7.

72. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

73. *See supra* notes 36–40 and accompanying text (citing dissenting opinions by Justice Scalia in *Atkins*, *Lawrence*, and *Roper*).

74. I have developed this argument in greater detail in previous work. *See* David L. Sloss, *How International Human Rights Transformed the US Constitution*, 38 HUM. RTS. Q. 426 (2015); David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL RTS. J. 1183 (2019).

75. For detailed analysis of these cases, see DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 187–98 (2016).

76. Bob-Lo Excursion Co. v. People of State of Mich., 333 U.S. 28 (1948).

nia,[78] *Shelley v. Kraemer*,[79] and *Hurd v. Hodge*.[80] The Court decided three more cases in 1950 in which litigants raised arguments based upon the human rights provisions of the UN Charter:[81] *Henderson v. United States*,[82] *Sweatt v. Painter*,[83] and *McLaurin v. Oklahoma State Regents*.[84] Finally, in 1954, the Court decided *Brown v. Board of Education*[85] and *Bolling v. Sharpe*,[86] both of which involved claims based on the UN Charter's human rights provisions.[87] The Court rarely cited the UN Charter in its published decisions, preferring instead to base its decisions on the Equal Protection Clause.[88] However, the Court ruled in favor of human rights claimants in all ten cases.

During this period, international human rights law was developing a very strong antidiscrimination norm, as manifested in Articles 55 and 56 of the UN Charter,[89] Article 2 of the UDHR,[90] and the draft human rights treaties that were then being negotiated. That antidiscrimination norm had been a part of the "paper Constitution" in the United States since adoption of the Fourteenth Amendment Equal Protection Clause in 1868. Before the Supreme Court's landmark decision in *Brown v. Board of Education*,[91] though, laws codifying racial segregation and other racially discriminatory practices were routinely upheld as constitutionally valid. Therefore, the Equal Protection Clause had very little practical impact on US constitutional law before the United Nations adopted the UDHR in 1948. It was not until the Fourteenth Amendment was subjected to the pressure of human rights litigation in the years after World War II that the antidiscrimination norm was incorporated into the "living Constitution" in a meaningful way. In the ten cases cited in the preceding paragraph—where litigants raised

77. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

78. Oyama v. California, 332 U.S. 633 (1948).

79. Shelley v. Kraemer, 334 U.S. 1 (1948).

80. Hurd v. Hodge, 334 U.S. 24 (1948).

81. For detailed analysis, see SLOSS, *supra* note 75, at 225–29.

82. Henderson v. United States, 339 U.S. 816 (1950).

83. Sweatt v. Painter, 339 U.S. 629 (1950).

84. McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637 (1950).

85. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).

86. Bolling v. Sharpe, 347 U.S. 497 (1954).

87. For detailed analysis of the human rights arguments in *Brown* and *Bolling*, see SLOSS, *supra* note 75, at 240–48.

88. The Court's most detailed discussion of the U.N. Charter's human rights provisions is in the concurring opinions of Justices Black and Murphy in *Oyama v. California*, 332 U.S. 633 (1948). *See id.* at 649–50 (Black, J., concurring); *id.* at 672–73 (Murphy, J., concurring).

89. *See* U.N. Charter art. 55 (promising "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); U.N. Charter art. 56 (obligating U.N. member states "to take joint and separate action" to achieve the goals set forth in article 55).

90. *See* U.D.H.R., *supra* note 58, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

91. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).

arguments based on the UN Charter's human rights provisions—the Supreme Court effectively incorporated the strong antidiscrimination norm from international human rights law into the living Constitution through a process of silent incorporation.[92]

Meanwhile, the combination of domestic human rights litigation in US courts and the contemporaneous negotiation of human rights treaties in international fora sparked a strong political backlash in the United States, leading to various proposals to amend the US Constitution.[93] Between 1950 and 1954, the American Bar Association, Senator John Bricker, several other senators, and the Eisenhower administration introduced different variants of a proposed constitutional amendment that came to be known as the "Bricker Amendment."[94] The politics of the Bricker Amendment were complicated, but Bricker's supporters generally sought to prevent international human rights treaties from having any impact on US domestic law. In part, they feared that ratification of human rights treaties would become a vehicle for altering the division of power between the states and the federal government in the United States.

Bricker's supporters also feared that US courts would apply international human rights law to invalidate state laws that had been upheld as constitutionally valid under the Fourteenth Amendment. Indeed, in the notorious *Fujii* case,[95] a California appellate court held that a state law that discriminated against Japanese Americans violated the human rights provisions of the UN Charter, even though it did not violate the Fourteenth Amendment Equal Protection Clause.[96] From the perspective of Senator Bricker and his supporters, the *Fujii* decision was simply intolerable because it implied that international human rights law provided stronger protection against discrimination than did the Equal Protection Clause. In fact, when *Fujii* was decided in 1950, human rights law *did provide stronger protection* than the Equal Protection Clause because that clause was still being construed to validate Jim Crow laws in the South. Regardless, *Fujii* was impossible to reconcile with the belief—widely shared by many Americans—that the US Constitution provides stronger protection for fundamental human rights than any other legal document in the world. A key goal of the Bricker Amendment was to ensure that no US court would ever again apply international human rights law in a way that conflicted with the widely shared faith in the inherent superiority of the US Constitution.

92. I develop this argument in greater detail in Sloss, *How International Human Rights Transformed the US Constitution, supra* note 74; SLOSS, THE DEATH OF TREATY SUPREMACY, *supra* note 75, at 187–98, 225–29, 240–48.

93. *See* SLOSS, *supra* note 75, at 198–200, 219–25, 248–56.

94. *See generally* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988).

95. Sei Fujii v. State, 217 P.2d 481 (Cal. Ct. App. 1950).

96. *See* SLOSS, *supra* note 75, at 208–18 (discussing *Fujii*).

Supporters of the Bricker Amendment succeeded in some ways and failed in other ways. The proposed amendment never secured the required two-thirds majority in the Senate, but one version fell just one vote short of gaining Senate approval in February 1954.[97] Although the proposed amendment never passed, the political forces behind the Bricker Amendment were sufficiently powerful to create an unspoken human rights taboo. That taboo blocked any serious attempt to persuade the United States to ratify major international human rights treaties for the next several decades.[98] The taboo also created an atmosphere in which international human rights law became so politically toxic that civil rights litigants chose to stop citing international human rights documents in their briefs and, as a result, US courts rarely cited international human rights instruments in their published opinions.

Even so, one should not confuse lack of citation for lack of influence. Despite the dearth of citations to international human rights instruments in legal briefs and judicial opinions, international human rights norms exerted a profound influence over the development of US law in the period from 1948 to 1976. To appreciate this point, it is helpful to recall the Declaration of Independence, which declared that "all [human beings] . . . are endowed by their Creator with certain unalienable Rights."[99] Although the Founders of the Constitution believed in inalienable rights, they created a constitutional structure in which the protection of those inalienable rights was primarily the responsibility of state governments, not the federal government. As noted previously, one of the key goals of the Bricker Amendment was to ensure that international human rights law would not alter the division of power between the states and the federal government. In that respect, Bricker and his supporters failed miserably. The United States effectively federalized human rights law between 1948 and 1976 by transferring responsibility for protection of inalienable human rights from the states to the federal government.[100]

A coauthor and I did an empirical study of the allocation of power over human rights between the states and the federal government.[101] We identified 68 discrete rights that are included in the UDHR. We examined the protection of those rights at three different points in US history: in 1930, 1948, and 1976. For each of those three points in time, we classified rights protection into four groups: exclusive state responsibility, exclusive federal responsibility, shared responsibility with state primacy, and shared responsibility with federal primacy. Table 1 presents the results of that analysis.

97. *See id.* at 248–56 (discussing the Bricker Amendment).

98. *See* Henkin, *supra* note 72.

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

100. Professor Sandholtz and I develop this argument in greater detail in Sloss & Sandholtz, *supra* note 74.

101. *Id.*

Table 1: Allocation of Responsibility for Protection of 68 Human Rights

	As of 1930	As of 1948	As of 1976
Exclusive State Control	35 rights (51%)	25 rights (37%)	9 rights (13%)
State Primacy	24 rights (35%)	23 rights (34%)	9 rights (13%)
Federal Primacy	6 rights (9%)	17 rights (25%)	47 rights (69%)
Exclusive Federal Control	3 rights (4%)	3 rights (4%)	3 rights (4%)

The data in table 1 show that, as of 1948, state governments exercised primary or exclusive regulatory authority for 71 percent of the rights under review (48 of 68), whereas the federal government exercised primary or exclusive regulatory authority for only 29 percent (20 of 68). 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 percent of the rights under review (50 of 68), and state governments exercised primary or exclusive regulatory authority for only 26 percent (18 of 68). We refer to the transfer of regulatory authority over human rights from the states to the federal government as the *federalization* of human rights.

The data show that the process of federalization began with the New Deal revolution in the 1930s.[102] However, the federalization process accelerated between 1948 and 1976. Three primary mechanisms drove the process of federalization during this period. First, the Supreme Court federalized ten distinct rights by "incorporating" ten different provisions in the Bill of Rights and making them binding on the states.[103] (Before these incorporation decisions, the rights at issue were binding on the federal government, but not the states.)[104] Second, the Court federalized nine other rights by issuing judicial decisions that established federal constitutional protection for unenumerated rights—i.e., rights not specifically enumerated in the Constitution's text.[105] Third, Congress federalized nine additional rights by enacting statutes that—at an earlier point in US constitutional history—would have been deemed unconstitutional because they exceeded the scope of Congress's enumerated powers and invaded the reserved powers of

102. *See id.* at 1211–16 (discussing the federalization of human rights between 1930 and 1947).

103. *See id.* at 1218–20.

104. *See* David Sloss, *Incorporation, Federalism, and International Human Rights*, *in* HUMAN RIGHTS AND LEGAL JUDGMENTS: AN AMERICAN STORY 76 (Austin Sarat ed., 2017).

105. *See* Sloss & Sandholtz, *supra* note 74, at 1220–24.

the states.[106] Finally, seven other rights were federalized through some combination of legislative action, judicial action, and constitutional amendments.[107] Four decades later, in 2020, the division of power over human rights between state and federal governments is virtually the same as it was in 1976.[108]

Our analysis demonstrates that the United States federalized human rights through a process of silent incorporation. Moreover, the global diffusion of international human rights norms was an important causal factor that contributed to the federalization of human rights in the United States. Today, many Americans point to the Bill of Rights as a source of national pride. However, they ignore the fact that, for most of US history, we relied primarily on state governments, not the federal government, to protect the rights codified in the Bill of Rights. It was not until the period after World War II, when the United States was subjected to the transnational influence of international human rights norms, that the Supreme Court decided to upend decades of settled jurisprudence regarding the division of authority between state and federal governments by establishing federal authority over human rights protections that had traditionally been vested in state governments. Although the key Supreme Court decisions that federalized human rights law in the United States rarely cited international or foreign sources, it is difficult to explain the federalization of human rights law except by reference to the global diffusion of international human rights norms. In short, modern US constitutional law is, to a large extent, the product of transnational legal forces.

Conclusion

The sovereigntist model of constitutional law holds that each nation's constitution is an expression of its unique national identity. In this essay, I have attempted to show that the sovereigntist model is descriptively inaccurate. When nations adopt new constitutions, they are heavily influenced by transnational forces; as a result, the national constitutions of most countries in the world bear striking similarities to each other. Moreover, when domestic courts interpret their national constitutions, they frequently engage in the practice of judicial borrowing, citing decisions by foreign and international tribunals that have construed textually similar provisions in other national constitutions or in international human rights documents. The resistance to judicial borrowing in US courts is largely a byproduct of the "human rights taboo" that developed in the United States in the 1950s in the context of debates about the proposed Bricker Amendment. Despite that human rights taboo, though, modern constitutional law in the United States has been heavily influenced by transnational legal forces.

106. *See id.* at 1224–28.
107. *See id.* at 1228–32.
108. *See id.* at 1234–36.