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# Human Rights Originalism

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# HUMAN RIGHTS ORIGINALISM

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*Are human rights to be found in living instruments and practices that adapt to changing circumstances, or must they be interpreted according to their original meaning? That question, so heavily debated in the context of the rights of the U.S. Constitution, was never seriously on the table until 2020. But when former Secretary of State Mike Pompeo called for "fresh thinking" about human rights, and its connection with "our nation's founding principles," he brokered a return to two landmark instruments of human rights—the Declaration of Independence of 1776 and the Universal Declaration of Human Rights of 1948. His Commission on Unalienable Rights obliged, presenting the familiar tropes of fixed sources, venerated authorship, and national identity, in order to accomplish a drastically different presentation of the meaning of human rights. The end result is an act of fusion—the powerful political and cultural valence of America's constitutional originalism, applied to the human rights of American foreign policy.*

*This Article identifies this innovation as "human rights originalism." Although the Report of the Commission on Unalienable Rights has, at least for now, been shelved, human rights originalism may be one of the most enduring legacies of the Trump Administration. As an interpretive theory, human rights originalism promises many of the same benefits as its constitutional counterpart—simplicity, popular reach, and control of rights' unruliness and proliferation—this time wrested from unaccountable United Nations institutions and experts rather than courts. As a substantive departure from contemporary human rights, human rights originalism elevates the importance of religious freedom and property rights, and*

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*provides a selective diminishment of women's rights, LGBTQ+ rights, and racial equality, mirroring and further cementing current trends in originalist constitutional doctrine. The four standard epistemic communities that supply "meaning" to human rights—in the international, comparative, transnational, and philosophical domains—are all rejected by originalism, just as those domains are themselves inimical to it.*

*This homegrown form of human rights argument is significant for human rights law and foreign policy, but so too is it significant for originalism itself. In propelling originalism into the uncompromisingly global domain of human rights, originalism's proponents expose the nationalism and exceptionalism that are perhaps its most unsettling features. At the same time, originalism's own malleability is highlighted in its adaptiveness to the modern administrative state and the promises of the postwar period.*

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## INTRODUCTION

Originalism and human rights each present a separate framework for law and political practice. It is unprecedented to see them merged. Yet this is precisely what occurred after former Secretary of State Mike Pompeo called for "fresh thinking" about human rights within the United States.[1] His Commission on Unalienable Rights was instructed to provide advice for America's foreign policy "grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights."[2] The result, issued in August 2020,[3] is a novel creation: a recasting of international human rights within the parameters of two texts with signature American importance, the 1776 Declaration of Independence and the Universal Declaration of Human Rights. The end result—which I term human rights originalism—is now part of the eclectic legacy of the Trump Administration. Despite the shelving of the Report of the Commission on Unalienable Rights by the Biden Administration,[4] this approach to the interpretation of human rights is not easily erased. The distinctive, conservative, and nationalist consensus that it forges marks a shift in the political culture of human rights, mobilizing new constituencies here and abroad.

This Article develops the concept of human rights originalism to explain both the ideological attraction and the epistemic idiosyncrasy of this approach. Its main focus is the Report of the Commission on Unalienable Rights (the Report), although broader attempts to reinterpret the legacy of 1776 and America's unalienable rights traditions are coextensive with it.[5]

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[1] U.S. Dep't of State Comm'n on Unalienable Rts., 84 Fed. Reg. 25,109 (May 30, 2019).

[2] Mike Pompeo, U.S. Sec'y of State, Unalienable Rights and the Securing of Freedom (July 16, 2020) (transcript available at https://va.usembassy.gov/secretary-pompeo-on-unalienable-rights-and-the-securing-of-freedom/ [https://perma.cc/ANT2-8HLH]).

[3] COMM'N ON UNALIENABLE RTS., REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020), https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf [https://perma.cc/ST5K-F4PB].

[4] *See Nomination of Hon. Antony J. Blinken to be U.S. Secretary of State— Part I: Hearing before the S. Comm. on Foreign Rels.*, 117th Cong. 59 (2021) (question of Sen. Edward J. Markey, Member, S. Comm. on Foreign Rels.) https://www.foreign.senate.gov/imo/media/doc/01%2019%202021%20Nominations%20--%20Blinken%20Part%201.pdf [https://perma.cc/X8AA-5EQK].

[5] *See* THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT (2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf (last accessed Aug. 4, 2021)

Indeed, the establishment of the Commission on Unalienable Rights (the Commission) is the most sophisticated and well-planned version of human rights originalism, in both lifting originalism from its application to the U.S. Constitution and in displacing the conventional international sources from human rights analysis. The overall effect may look like plain old American exceptionalism toward human rights, and criticisms of double standards and unilateralism remain relevant.[6] But human rights originalism goes further. Notable matters of contemporary international human rights law and advocacy, such as the rights to equality of women, racial minorities, persons with disabilities, children, indigenous peoples, and LGBTQ+ communities, are sidelined in the approach, while religious liberty and private property are elevated. Even a right to bear arms is proposed as worthy of serious human rights consideration.[7] Human rights originalism's focus on a hierarchy of rights, at the same time as the repeated assertion of the indivisibility of human rights, is also a notable, if contradictory, feature.

Of course, now a year into the Biden Administration, the Commission and its Report may seem forgettable and forgotten. Both are undoubtedly associated with the human rights positions taken by the Trump "America First" Administration, including its reported tolerance of human rights violations, both in the U.S. and abroad, and the human rights-jeopardizing rhetoric and practices of the former President.[8] The Commission and its Report were met with vehement rejection by hundreds of NGOs, former officials, and individuals,[9] on the grounds of both the substantive positions taken with respect to human rights in the Report and for the Commission's relatively non-representative procedures. But human rights originalism may be here to stay. On one hitherto overlooked front, it may help create a revival of "unalienable rights" in American constitutional doctrine by judges sympathetic to originalist jurisprudence, particularly in contests over religion, property, and abortion.[10] On another front, human rights originalism gives form to a broader shift in human rights advocacy, in which an already instrumental approach to human rights interpretation becomes further weaponized within partisan debates and polarized politics. This portends a return to a selective, and outlier, version of human rights in the foreign policy

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[https://perma.cc/L8QR-DKPL].

[6] *See infra* Section I.A.

[7] *See infra* Section III.A.3.

[8] *See infra* Section I.C.

[9] *See infra* note 33 and accompanying text.

[10] *See infra* Section III.A.3.

of future Republican Party administrations, and a constructed partisanship of the treatment of former shared human rights landmarks—namely, the Declaration of Independence and the Universal Declaration of Human Rights. It becomes necessary both to understand human rights originalism and to acknowledge and address the radicalism of its epistemic departure.

Just as understanding this homegrown form of human rights argument is significant for human rights law and foreign policy, so too is it significant for originalism itself. Indeed, the demarcation of human rights originalism foregrounds aspects of the originalist methodology that otherwise recede in its usual American constitutional home. Although the undoubted politicization and polarization of constitutional originalism has fuelled a heated debate on central constitutionalist themes—such as fidelity to constitutional text, the appropriate site and deployment of conservative or traditional values, and the counter-majoritarian difficulty of judicial review—the implications of originalism in mobilizing nationalist politics often go unremarked.[11] When they do, these implications are prefigured through these abovementioned debates, such as when questioning the appropriateness of judicial recourse to foreign law in U.S. constitutional interpretation.[12] Tracking the adoption of originalism as a human rights methodology places the inclinations of originalism in an uncompromisingly global setting. With that backdrop, originalism becomes more clearly a strategy for U.S. nationalist movements, whose fortunes have risen alongside growing nationalism in many other parts of the world.

In Part I, this Article seeks to describe the concept of human rights originalism by marking its similarities to, and differences from, constitutional originalism. While the latter is not a monolithic approach, this Article emphasizes the collection of interpretive and justificatory "originalist" tropes that seek to fix the meaning of a text to that understood at the time of its framing and thereby constrain that text's subsequent interpreters from broader inquiries.[13] Assessing the treatment of two landmark human rights texts by the Commission, this Part suggests that this primarily judicial philosophy becomes a broader interpretive guide, in restricting sources, conferring authorship on historical figures, and resurrecting a nationalist,

[11] *See infra* Section I.C.

[12] The terms of these debates, which convey originalism at their center, have been fundamentally rebalanced since *Roper v. Simmons*. 543 U.S. 551, 627 (2005) (Scalia, J., dissenting); *see* Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 519 (2005); *infra* note 144.

[13] *See infra* notes xx-17.

exceptionalist narrative for America's rights traditions. In Part II, this Article describes the epistemic strangeness of originalism as a modality of human rights argument and examines the grounds for its rejection by human rights lawyers, scholars, and movements, in the U.S. and elsewhere. This requires engagement with four standard approaches within contemporary human rights practice, which it identifies as international human rights law, comparative human rights law, transnational social movements, and philosophical approaches. Finally, in Part III, this Article turns to diagnose the weaponization of human rights in contemporary political settings. This requires an assessment of both the market for human rights originalism in local and foreign constituencies, and its promised simplicity, popular reach, and purported control of the "unruliness" of human rights recognition and claims-making within contemporary human rights practice. This Part also explores the constitutionalist reference points opened up by unalienable rights with respect to the doctrinal understandings of religion, property, women's rights, and LGBTQ+ rights. These, this Part argues, ironically reintroduce human rights originalism into the judicial sphere in which it purports to remain outside. The Article ends with a gesture to American antidotes to human rights originalism by recovering the "living" contributions to human rights made within the United States, which thrive in legal advocacy and social movement settings here and abroad.

## I. ORIGINALISM IN A NEW KEY?

For all its promise of fixedness and constraint,[14] originalism is America's constitutional dynamo. Although debates about its core ideas continue to fuel a large literature, it is claimed now, as for the last quarter century, to be "the prevailing approach to constitutional interpretation."[15] It predominates in

[14] *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467 (2013) (seeking fixation and constraint as two features which unite the "family of originalist theories").

[15] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–600 (2004) (likewise introducing a "new originalism" which moved beyond the earlier approach of Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)). The role played by Justice Scalia in originalism's ascension is unmistakable. *See* Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J.L. HIST. 198, 199 (2017) (giving credit to "originalism's most visible and perhaps most effective proponent"). *See generally* EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON (2020). These claims to predominance are still contested. *See, e.g.,* DAVID A. STRAUSS, THE LIVING CONSTITUTION 35–36 (2010) (refuting the claims of originalism to predominance – at least in 2010).

constitutional jurisprudence, where a majority of Supreme Court Justices have endorsed a form of originalism,[16] and similarly abounds in political and cultural practice, where it rouses passionate defenders who fear "modern mores" and a Constitution construed by a court to compel social change.[17] Even as its focus—the written Constitution—becomes more blurred with every closer inspection,[18] originalist commitments have become ripe for expansion into other "small-*c*" constitutional texts, traditions, and practices.[19] Indeed, a signature identification of America's small-*c* constitutionalism—

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[16] *See* Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996) (Justice Thomas describing how "judges should seek the original understanding of the provision's text"); Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 Yale L.J. Forum 164, 166 (2016) (Justice Alito describing himself as a "practical originalist"); *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (then-nominee Kagan stating "we are all originalists"); Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019) https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ [https://perma.cc/M66Y-NK3S]; *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 196 (2018), (then-nominee Judge Kavanaugh responding to Senator Michael S. Lee that he is an originalist); *Confirmation Hearing on the Nomination of Amy Coney Barrett to the U.S. Supreme Court Before the S. Comm. on the Judiciary*, 116th Cong. 5 (2020) (questions from Sen. Sheldon Whitehouse) (emphasizing the diversity of approaches to originalism) https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/2XHD-J76E]. These approaches range from "practical originalism" to "original public meaning," for which a wide net is needed. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015) (offering an "inclusive" originalism to account for positive law).

[17] *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 572 (2006) (noting the "politics of restoration" that fuses "political concern and constitutional narrative"); Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79, 80 (2010) ("[T]he deeper power of originalist argument sounds in the romance of national identity.").

[18] For recent challenge to the "writtenness" of the constitutional text, see JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Maeve Glass, *Fixing America's Founding*, 118 MICH. L. REV. 949, 950 (2020) ("[T]he very thing that we might think of as the U.S. Constitution simply did not yet exist in that storied moment when ink met parchment and we the people said aye.").

[19] What belongs in the "small-*c*" constitution is itself debated. *See, e.g.*, STRAUSS, *supra* note 15, at 35 (providing a "living" view of a common law "small-*c*" constitution of doctrines and precedents); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 700 (2011) (assessing the "constitution in practice" (quoting ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 38–47)).

the juridical practices, landmark statutes, and cultural practices that function alongside the "Capital-C" Constitution[20]—may be the attempt to apply originalism to any texts they represent.[21]

Hence, the application of originalism to the discourse of human rights is both novel and noteworthy. It is suggestive of both new American audiences for the human rights discourse, and the exportability of the originalist premise. Unlike the usual fodder of constitutional originalism—the text of the U.S. Constitution, the canonical U.S. constitutional cases, the celebrated field of judicial endorsers, and prominent scholarly celebration and critique[22]—human rights originalism is promoted in an adjacent field of practice. This includes a Secretary of State, acting independently from the State Department, and his commissioned short-term, ad hoc, group of experts. This Commission was established by Secretary Pompeo in July 2019, who gave it a mandate to provide "advice and recommendations concerning international human rights matters" and "fresh thinking . . . where such discourse has departed from our nation's founding principles of natural law and natural rights"[23] to inform U.S. foreign policy and human rights. The Commission now represents the clearest contours of human rights originalism, in form and method if not with express approval, which may inspire subsequent imitators.

The relevance of human rights has of course been a formal aspect of U.S. foreign policy since the 1970s.[24] Secretary Pompeo selected eleven experts

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[20] Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV 1375, 1379–83 (2016).

[21] Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 552 (2006) (seeking to "square fidelity to the founding era with fidelity to its common law jurisprudence" and emphasizing attributes of flexibility and inclusivity in that tradition).

[22] The connection between these different provenances has become a more elaborate signature of the originalist tradition. *See* Baude, *supra* note 16; Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1329 (2017) (noting the payoff apparently produced by seeing law as "primarily, if not exclusively, a matter of positive, empirical fact").

[23] U.S. Dep't of State, *supra* note 1.

[24] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 44; *see, e.g.*, 22 U.S.C. § 2304 ("a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries"); David Weissbrodt, *United States Foreign Policy and Human Rights: An Overview*, 7 WHITTIER L. REV. 697, 697 (1985) (interrogating the early import and determination of human rights in foreign policy); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 294 (2002) (observing international human rights promotion as the

in human rights, and chaired the Commission with Professor Mary Ann Glendon of Harvard Law School, the author of a celebrated history of the Universal Declaration of Human Rights.[25] The Commission went on to host several public meetings at the State Department (but without representatives of the State Department's Bureau of Democracy, Human Rights, and Labor) with invited experts.[26] The Commission's draft report was issued in July 2020, and after a brief comment period, the final report was issued, relatively unchanged, three months before the presidential election.[27] During that period, the Trump Administration sent the Report to U.S. embassies around the world, presented it at an event at the United Nations General Assembly, and translated it into several languages.[28] With the change of administration in January 2021, Secretary of State Antony Blinken elected to set aside the Report.[29]

The Commission was controversial from the beginning.[30] Several human rights organizations filed suit against the Commission, which they argued

"rhetorical cornerstone of [U.S.] foreign policy"). For the distortions created by the 1970s highpoint of U.S. activity, see generally SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[25] MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

[26] These experts included those primarily from academia, such as Michael W. McConnell, Wilfred M. McClay, Cass Sunstein, Orlando Patterson, Diane Orentlicher, and Martha Minow, and from practice, such as Miles Yu (a U.S. government official), Michael Abramowitz, Kenneth Roth, and Thor Halvorssen (from NGOs). These speakers' videos and/or prepared testimony are available at U.S. Dep't of State, Archived Content, https://2017-2021.state.gov/commission-on-unalienable-rights/index.html.

[27] *See* COMM'N ON UNALIENABLE RTS., DRAFT REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020), https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf [https://perma.cc/8TQ9-GWUL]; COMM'N ON UNALIENABLE RTS., *supra* note 3.

[28] The Report's public comment period lasted two weeks; the report itself was translated into Arabic, Chinese, Farsi, French, German, Indonesian, Russian and Spanish: *see* U.S. Dep't of State, Archived Content, https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html. *See further* U.S. Dep't of State, Secretary Michael R. Pompeo's Remarks at the United Nations General Assembly (Sep. 23, 2020) (available at https://2017-2021.state.gov/promoting-and- protecting-human-rights-a-re-dedication-to-the-universal-declaration-of-human-rights/index.html [https://perma.cc/E99L-6D7D]).

[29] Secretary Antony J. Blinken, Dep't of State, Remarks to the Press (Mar. 30, 2021) (transcript available at https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-country-reports-on-human-rights-practices/ [https://perma.cc/E99L-6D7D]).

[30]

jeopardized norms of transparency and public accountability under federal law.[31] Ken Roth of Human Rights Watch argued, for example, that the Commission's Chair was more prominent for her concerted opposition to abortion and same-sex marriage,[32] rather than her historical and comparative work on constitutional rights and human rights. Upon the release of the draft report, hundreds of human rights organizations and others issued a joint letter to "object strenuously" to the Commission.[33] Theirs and other public responses noted substantive objections, such as the lack of due consideration of women's and LGBTQ+ rights, the rights of persons with disabilities or indigenous peoples, the hierarchy established between different rights, and the demotion of economic, social, and cultural rights.[34] Many responses also criticized the Commission for its procedure, including the brief timeline for comments, the limited meetings, and the changes to foreign policy that were finalized before the publication of the official report.[35] This controversy was

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For commentary in the months before and after the release of the Report, see Jayne Huckerby & Sarah Knuckey, *Pompeo's "Rights Commission" is Worse Than Feared: Part I*, Just Sec. (March 13, 2020) https://www.justsecurity.org/69150/pompeos-rights-commission-is-worse-than-feared-part-i/ [https://perma.cc/7BEQ-S5YG]; Jane Stromseth, *Reclaiming Human Rights from the Pompeo Commission – Part 1*, JUST SEC. (Sept. 22, 2020), https://www.justsecurity.org/72530/reclaiming-human-rights-from-the-pompeo-commission-part-1/ [https://perma.cc/K8VP-K6AD] (noting that the Report was sent to embassies and translated into multiple languages).

[31] Plaintiffs' Memorandum in Opposition to Defendants' Supplemental Motion to Dismiss for Mootness at 1, Robert F. Kennedy Ctr. for Justice and Hum. Rts. v. Blinken, No. 20-cv-2002-JGK (S.D.N.Y. Jan. 29, 2021).

[32] Kenneth Roth, *Beware the Trump Administration's Plans for 'Fresh Thinking' on Human Rights*, WASH. POST (July 11, 2019), https://www.washingtonpost.com/opinions/2019/07/11/beware-trump-administrations-plans-fresh-thinking-human-rights/.

[33] News Release, The Ctr. Just. & Accountability, United States: Human Rights Coalition Rejects Report Issued by State Department's Commission on Unalienable Rights (Jul. 30, 2020), https://cja.org/united-states-human-rights-coalition-rejects-report-issued-by-state-departments-commission-on-unalienable-rights/ [https://perma.cc/UH6J-FVG7] (a joint letter of 111 human rights, civil rights, social justice, and faith-based organizations and 119 individuals, writing "to object strenuously to the work product that has emerged from this fundamentally flawed and unnecessary undertaking").

[34] For summary of criticisms, see, e.g., Aya Fujimura-Fanselow, Jayne Huckerby & Sarah Knuckey, *An Exercise in Doublespeak: Pompeo's Flawed "Unalienable Rights" Commission*, JUST SEC. (July 29, 2020), https://www.justsecurity.org/71705/an-exercise-in-doublespeak-pompeos-flawed-unalienable-rights-commission/ [https://perma.cc/TY95-6RS7]. The extensive public comments are archived at the following site: U.S. Dept of State, Archived Content, https://2017-2021.state.gov/draft-report-of-the-commission-on-unalienable-rights-public-comment/index.html

undoubtedly amplified by the anti-human rights rhetoric and policy of Trump's "America First" administration, and the challenge of separating President Trump and Secretary Pompeo's agenda from the work of the Commission itself.[36]

Now, over a year after the Report's release, many of its recommendations—including, prominently, the removal of State Department reporting about reproductive freedom around the world and the withdrawal of U.S. support for members of the LGBTQ+ community abroad—have been reversed.[37] Upon his appointment, Secretary Blinken emphasized that "[t]here is no hierarchy that makes some rights more important than others."[38] He also promised to release an addendum to the State Department's 2020 *Country Reports on Human Rights Practices*, to include the information about women's sexual and reproductive health care that had been excised from reporting practices.[39] These recommendations, which conform more closely to contemporary human rights developments,[40] are highly significant, not least due to the critical documentation and norm development provided by the U.S. country reports. [41] But as notable as these reversals are, this Article argues that the import of the Report lies elsewhere. In giving official imprimatur to human rights originalism, the Commission introduced a very different methodology for human rights argumentation within the United States. Four innovations—which insert radically new practices around

[35] *Id.*

[36] *See* Jayne Huckerby & Sarah Knuckey, *An Appropriation Playbook?: The Trump Administration's Attempt to Re-define Human Rights* (unpublished manuscript) (on file with author). Even defenders of the Commission posited the question whether its Report was "only an alibi for the Trump administration [or a] campaign brochure for Pompeo." Ruth Starkman, *Making Human Rights Readable: The Report of the Commission on Unalienable Rights*, 192 TELOS 158, 161 (2020).

[37] *See* Nahal Toosi, *Blinken Rejects Pompeo's Human Rights Rankings in Rollout of Global Report*, POLITICO (Mar. 30, 2021), https://www.politico.com/news/2021/03/30/blinken-pompeo-global-report-478513 [https://perma.cc/ML49-AXZ2]

[38] *Id.* (quoting Secretary Blinken).

[39] *Id*.

[40] *See infra* Section III.C.

[41] For an examination of the influence of such reports, *see* Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance,* 59 COLUM. J. TRANSNAT'L L. 364, 366 (2021) (centering such reporting mandates "as a central driver of U.S. engagement with and interpretation of the protections of international human rights law").

sources, authorship, nationalism, and American exceptionalism—reveal the profoundly novel approach to human rights that originalism introduces. Human rights originalism may be a legacy of the Trump Administration that helps to instigate a more sustained political and cultural shift in human rights law and policy, both domestically and abroad.

### A. SOURCES AND MEANING

First, the sources of human rights originalism are distinctive, even as its methods are so familiar in the field of U.S. constitutional law. As in that setting, originalism purports to offer a methodology for interpretative restraint, in which the meaning of a text is constrained to that understood at the time of its enactment.[42] In the United States, originalism has largely been reserved for constitutional interpretation, and hence the written Constitution is its much-studied home.[43] But nothing in principle restricts originalism from its application to other landmark texts, or to its application outside of the judicial sphere.[44] Under human rights originalism, certain documents which seek to declare and entrench human rights are converted into the singular and originating sources for the meaning of human rights today.[45] Originalism is

[42] *See* Solum, *supra* note xx at 456. Of course, there is a great deal of space within this central proposition, from the restrictive approach to "original methods" to the expansive commitment to a "living originalism." *Compare* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 142–43 (2013) *with* JACK M. BALKIN, LIVING ORIGINALISM (2011).

[43] *But see, e.g.*, Meyler, *supra* note 21 (surveying common law sources); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 7–8 (2009) (noting a preference amongst evangelical Christians for methods of textualism and original meaning for Biblical sources).

[44] Post & Siegel, *supra* note 17 (noting parallel tracks in jurisprudence and political practice, and drawing attention to the latter); *see also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 27–28 (2009) (noting the tracks "inside and outside the courts" are unlikely to remain apart). Originalist interpretation likewise appeals to the practices of the Executive Branch and Congress; nonetheless, commentators have pointed to the grounds that make it less relevant for their application to foreign affairs provisions. Ingrid Wuerth, *An Originalism for Foreign Affairs*?, 53 ST. LOUIS U. L.J. 5, 6 (2008) (querying why "the political branches themselves are bound by original meaning and how interpretation by the political branches is related to interpretation by judges"); *see also* Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 780–81 (2013) (noting new originalism "fails to grapple with the fact that many foreign affairs provisions of the Constitution were written hastily, sloppily, and incompletely, and were not interpreted by many members of the founding generation in a modern, strictly textualist manner").

[45] *See, e.g.*, Ambassador Kelly Craft, Permanent Representative, U.S. Mission to the United Nations, Remarks Introducing Secretary of State Mike Pompeo During a Virtual Panel Discussion on the Universal Declaration of Human Rights (via VTC) (Sept. 23, 2020), https://usun.usmission.gov/remarks-introducing-secretary-of-state-mike-pompeo-during-a-

then given a new role for national actors seeking to interpret human rights, and a central conceit of originalism—of constraining, disciplining, and legitimating the meaning of fundamental rights[46]—is carried into a new political arena.

In its application within the human rights setting, the sources are therefore different from constitutional originalism, although the interpretive strategy remains the same. Thus, like constitutional originalism, human rights originalism favors a "fixed meaning" of rights by recourse to an original, historical understanding of a set of foundational texts.[47] Putting to one side the ephemerality of this enterprise,[48] originalism gives presumptive fidelity to a historical text, and, when that text is not dispositive, by reference to its "historical understanding and practice" and longstanding tradition.[49] Unlike constitutional originalism, the text for human rights originalism is not the U.S. Constitution but two other sources—the Declaration of Independence and the Universal Declaration of Human Rights—which bookend certain privileged (past) periods of human rights elaboration (hence 1776 and 1948). These texts provide a lengthier period for exploration than the constitutional originalist canon and draw the interpretive enterprise into engagement with the twentieth century developments that have occurred far more recently than most U.S. constitutional amendments. In the hands of the Commission, human rights originalism must contend, for example, with the endowment of "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness [and] [t]hat to secure these rights, Governments are

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virtual-panel-discussion-on-the-universal-declaration-of-human-rights-via-vtc/ [https://perma.cc/4K2Z-4PZZ] ("[I]t has never been more important for the responsible nations of the world to return to their commitments made through the Universal Declaration, and give renewed emphasis to human rights in everything the UN does.").

[46] Whether this constraint is of judges or of rights is explored *infra* Part III.A.2. For the former, see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) ("Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—*its raison d'être*" (footnote omitted)).

[47] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); *see also* Solum, *supra* note xx at 456 (describing the "Constraint Principal"); Baude, *supra* note 16 (offering an "inclusive" originalism to account for positive law).

[48] *See generally* GIENAPP, *supra* note 18 (challenging the "writtenness" of the constitutional text); Berman, *supra* note 44 (noting divergent interpretations of the "original character" of the Constitution); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (an early critique of earlier versions of constitutional originalism, trained on the limits of text and language).

[49] Printz v. United States, 521 U.S. 898, 905, 918 (1997).

instituted."[50] But it must also integrate the more expansive elaboration from the Universal Declaration of Human Rights that all human beings are "born free and equal in dignity and rights"[51] in the framework of postwar peace and security established alongside the United Nations. The Universal Declaration of Human Rights necessarily adds a very different dimension to the understanding of unalienable rights as human rights, as the Commission (if not apparently Secretary Pompeo) understood.

Even as its sources are more extensive than its constitutional counterpart, human rights originalism misses an almost unfathomable degree of development in contemporary international human rights law and political struggle. Further landmarks of human rights exegesis, such as the treaties of the so-called International Bill of Rights (the International Covenant on Civil and Political Rights[52] and the International Covenant on Economic, Social and Cultural Rights[53]), are simply excised from the analysis. Other human rights treaties are sidelined, including others to which the United States is a party, such as the International Convention on the Elimination of All Forms of Racial Discrimination[54] or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[55] In addition, treaties which the United States was active in negotiating but has declined to ratify, like the Convention on the Elimination of All Forms of Discrimination against Women,[56] and the Convention on the Rights of Persons with Disabilities,[57] are ignored. Notable human rights findings of the treaty bodies formed under these instruments, as well as the broader work of the UN Security Council, the UN General Assembly, and the UN Human Rights Council and its Special Procedures, such as the Special Rapporteurs that produce findings on select human rights, are also disregarded. So too are the landmark international conferences held to address vital issues, such as

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[50] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[51] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (also reciting the "inalienable" rather than "unalienable" designation).

[52] 999 U.N.T.S. 171.

[53] 993 U.N.T.S. 3.

[54] 660 U.N.T.S. 195.

[55] 1465 U.N.T.S. 85.

[56] 1249 U.N.T.S. 13.

[57] 2515 U.N.T.S. 3.

women's rights, or human rights and the environment, as though these expressive acts of international commitment lack the pedigree for contemporary assessment.[58] By simply isolating these aspects from the search for original meaning, human rights originalism refuses to engage with the substance, compromises, and global interconnectedness of these examinations and applications of human rights. The implications of these restricted sources are further elaborated below.

### B. AUTHORSHIP AND HISTORY

Second, like constitutional originalism, human rights originalism allows the protagonists and participants of previous periods greater authority over the present, but allays the anxiety of a controlling "dead hand" by recognizing the extraordinary period in which they were called to act, and the heroic efforts that met with success.[59] In both cases, a focus on original heroism obscures the controversies and disagreements of the period, as well as the ambiguities in the positions of the main protagonists. Obscurities aside, these controversies are distinctive with respect to human rights originalism, given the focus on both different authors and different historical crises, and the long time span between the Declaration of Independence and the Universal Declaration of Human Rights.

To be clear, just as constitutional originalism elevates the founding generation as privileged interpreters of the U.S. Constitution, human rights originalism celebrates and prescribes "authorship" status to periods preexisting and postdating that document: the Declaration of Independence and the Universal Declaration of Human Rights.[60] Prominent within the focus of human rights originalism is the efforts of the drafters themselves, such as

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[58] These sources are surveyed *infra* Section II.A. The immense obstacles—and opportunities—that occur under the processes of these international agreements are analyzed in a wide literature on international law. *See, e.g.,* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed. 2012); *cf.* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (presenting the realist account that views such processes as peripheral to power).

[59] *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 204 (2008) (speculating that "some of the popularity of originalism stems from the fact that many interpreters enjoy the feeling of communion with famous constitution-making heroes"); *see also* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1803 (1997) (noting tropes of ancestral and heroic originalism).

[60] The iconography of these periods is produced in the visuals of the Report of the Commission on Unalienable Rights with the portraits and photographs of the favored drafters. COMM'N ON UNALIENABLE RTS., *supra* note 3.

Thomas Jefferson for the Declaration of Independence and Eleanor Roosevelt for the Universal Declaration of Human Rights.[61] Yet there is little inquiry as to whether such authors have earned that status, or whether a more suitable methodology of interpretation might give space for revision (of flawed views) and correction (of mythologies). For the former, for example, the authorship of human rights within the Declaration of Independence is reduced to the "distinctive American rights tradition."[62] The aspirations—that "all men are created equal" and endowed "with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness"[63]—are rousing indeed, but human rights originalism seeks to recreate, from this language, a celebration of the principles of Lockean property rights and religious obligation circulating at the time.[64] This is both inaccurate, in missing the principled basis of other prominent rights as well as the omission of the language of property,[65] and undesirable, in failing to address the spectacular hypocrisies of the period.[66] Despite his denunciation of slavery, for example, principal drafter Thomas Jefferson's relationship to the institution was "maddeningly complex" and it is a matter of record that he continued to hold slaves.[67] These contradictory views were hardly uncommon at the time, of course, but show how problematic it is to elevate the meaning of human rights to these draftsmen, or to this period.[68]

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[61] Human rights originalism therefore invites engagement with drafters' intent, although the Report does not openly engage any theoretical discussion of the point. For a comparison between "old" and "new" originalism in the U.S. constitutional context, see *infra* fn 97. For the argument that the Report follows a conservative approach, without necessarily committing to originalism, see *infra* fn [232]-[235].

[62] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 8.

[63] THE DECLARATION of INDEPENDENCE para. 2 (U.S. 1776).

[64] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 13-14.

[65] Indeed, the only visible change from the draft report to the final report was the description that such rights are "[p]rominent among" the unalienable rights of America's political tradition, and not "[f]oremost" among them. *Id.* at 13; COMM'N ON UNALIENABLE RTS., DRAFT REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 13 (2020), https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf [https://perma.cc/8TQ9-GWUL]; *see infra* Section III.B. 2.

[66] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 9 (noting Jefferson's acknowledgement that slavery's cruelty and indefensibility was made obvious by the recognition of unalienable rights).

[67] DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 73, 159 (2014) *See further* ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY (2009).

Such hypocrisy is no stranger to modern human rights, to be sure, and yet it is worth noting how the conferral of a special authority to these historical periods invests a certain political currency into human rights debates. These moves recreate America's so-called culture wars as human rights history wars, and do much to explain Secretary Pompeo's curious launching of the Commission on Unalienable Rights draft report in July 2020.[69] At the time, Secretary Pompeo railed against the re-centering of the role of slavery in the United States in the *New York Times's* 1619 Project[70]—a journalist accounting that begins with the year in which the first slaves were transported to America.[71] Many human rights advocates registered their bewilderment at Secretary Pompeo's rhetoric;[72] some went so far as to juxtapose his dismissive attitude toward the product of press freedoms with the press vulnerabilities that are commonly the subject of human rights concern.[73] State Department officials described it "as a domestic political stump speech aimed at rallying President Donald Trump's base ahead of the November election."[74] These concerns were compounded after the release of the Report of the Commission on Unalienable Rights when the Trump Administration

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[68] For responses to the parallel critique for constitutional originalism, see generally James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675 (2016) (arguing that attempts to address the exclusion of minorities and women within originalism are inadequate).

[69] Michael R. Pompeo, *Opinion: American Diplomacy Must Again Ground Itself in the Nation's Founding Principles*, Washington Post (July 16, 2020), https://www.washingtonpost.com/opinions/20
20/07/16/pompeo-oped-commission-unalienable-rights/.

[70] *Id.*

[71] *See* Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.n
ytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

[72] *See* Fujimura-Fanselow et al., *supra* note 34.

[73] Daniel W. Drezner, *Let's Grade the Commission on Unalienable Rights!*, WASH. POST (July 20, 2020), https://www.washingtonpost.com/outlook/2020/07/20/lets-grade-commission-unalienable-rights/.

[74] Robbie Gramer, *Pompeo's Attack on '1619 Project' Draws Fire from His Own Diplomats*, FOREIGN POL'Y (July 17, 2020), https://foreignpolicy.com/2020/07/17/pomepo-human-rights-commission-trump-racial-injustice-alienates-diplomats-attack-1619-project/ [https://perma.cc/8FT7-PCEE].

created the 1776 Commission[75] and promulgated the idea of "patriotic education."[76] Discredited by a swathe of professional historians,[77] and rapidly disbanded by the Biden Administration, the 1776 Commission Report was a homage to the Declaration of Independence, with little reflection on the experience of indigenous peoples, enslaved Americans, and women at the founding.[78] Human rights originalism, as a project reliant on America's own heroism with respect to human rights, sits uncomfortably with a critical accounting.

Just as striking in the characterization of authorship of human rights is the treatment of the Universal Declaration of Human Rights. Under human rights originalism, this landmark document is restricted to a selective—albeit celebrated—history of American influence. After World War II, America became highly involved in the drafting of the Universal Declaration through its representative Eleanor Roosevelt, Chair of the United Nations Commission on Human Rights and Franklin D. Roosevelt's widow.[79] Her involvement—particularly in ensuring the hortatory, non-binding status of the Universal Declaration of Human Rights and in assisting with the expansive introduction of economic, social, and cultural rights, such as rights to medical care and education, alongside civil and political rights—is well-documented, not least by the Commission's Chair, Mary Ann Glendon.[80] Indeed, applying human rights originalism to the Universal Declaration

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[75] THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 5. This Commission was disbanded in January 2021. For commentary, see *infra* Section I.C.

[76] *President Donald J. Trump Is Protecting America's Founding Ideals by Promoting Patriotic Education*, TRUMP WHITE HOUSE ARCHIVES (Nov. 2, 2020), https://trumpwhitehouse.archives.gov/bri
efings-statements/president-donald-j-trump-protecting-americas-founding-ideals-promoting-patriotic-education/ [https://perma.cc/4EJV-3NQR].

[77] The American Historical Association collected a statement of forty-seven historical organizations taking issue with the omissions and indoctrination-potential of the 1776 Report. *AHA Condemns Report of the Advisory 1776 Commission*, AM. HIST. ASS'N (Jan. 20, 2021), https://www.historians.org/news-and-advocacy/aha-advocacy/aha-statement-condemning-report-of-advisory-1776-commission-(january-2021) [https://perma.cc/TBV6-QSXG].

[78] *See* THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 5.

[79] GLENDON, *supra* note 25, at xvi.

[80] GLENDON, *supra* note 25, at 24; *see also* Sally-Anne Way, *The "Myth" and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 "United States Suggestions for Articles to be Incorporated in an International Bill of Rights,"* 36 HUM. RTS. Q. 869 (2014) (documenting U.S. drafting efforts).

encompasses more than the ethos of limited government and negative rights that (arguably)[81] lies at the core of constitutional originalism.[82] The Universal Declaration of Human Rights embraces a vision of human rights that responds to the legacy of the Great Depression and World War II. It includes Franklin D. Roosevelt's vision of "freedom from fear and want" that informed both the New Deal and the Atlantic Charter.[83] This more expansive vision of human rights was advanced in the U.S. civil rights movement which also emphasized a broader rights-securing role for government.[84]

Notwithstanding the credence given to the New Deal contribution to the human rights project, the Report is not altogether coherent in this respect, extolling both limited government and a "pre-political" protection of religious liberty alongside the "four freedoms"[85] deemed essential in securing both American and international peace and security.[86] These visions, if

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[81] The question of which versions of constitutional originalism support the administrative state is not purely theoretical. *See Confirmation Hearing on the Nomination of Amy Coney Barrett to the U.S. Supreme Court Before the S. Comm. on the Judiciary*, 116th Cong. 5 (2020) (questions from Sen. Diane Feinstein) https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/2XHD-J76E]; Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PENN. J. CONST. L. 1, 1–2 (2016) ("Adherence to originalism arguably requires, for example, dismantling the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Education*.")

[82] For the clearest identification of this ethos, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

[83] ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS 48 (2005).

[84] *See* COMM'N ON UNALIENABLE RTS., *supra* note 3, at 22–25; *see also* SYLVIE LAURENT, KING AND THE OTHER AMERICA: THE POOR PEOPLE'S CAMPAIGN AND THE QUEST FOR ECONOMIC EQUALITY 255 (2018) (describing the attempt by Martin Luther King Jr., to resuscitate the New Deal and disentangle its racial exclusions).

[85] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 18, 30; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (affirming the enjoyment for human beings of "freedom of speech and belief and freedom from fear and want").

[86] Franklin D. Roosevelt, Annual Message to the Congress (Jan. 6, 1941), *in* DEVELOPMENT OF UNITED STATES FOREIGN POLICY: ADDRESSES AND MESSAGES OF FRANKLIN D. ROOSEVELT 81, 86 (1942) (affirming freedom of speech, freedom of worship, freedom from want, and freedom from fear); *see also* Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 MD. J. INT'L L. 182, 184–188 (2009) (noting the efforts to translate these ideas for American audiences, including through Norman Rockwell's popular series of paintings of the "four freedoms"). For contemporary

reconciled, would point to a broader scope for freedom and rights, including more positive, action-forcing requirements of government. Nonetheless, the Report's observations read as a plurality judicial opinion might, although missing the discipline of having to arrive at an order.[87] Such inconsistencies make human rights originalism susceptible to cherry-picking, as arguably practiced by Secretary Pompeo during the Report's launch, when he extolled a more narrow view of the Report's findings.[88] This disjointedness is compounded by the Commission's overall "pick and choose" approach that invokes "unalienable rights" according to a selective conception of original understanding.[89] The latter quality is not unlike the frequent criticisms made of its constitutional counterpart, as a broad literature has charged.[90] For both the challenges of access to historical truth and to any single-meaning in language and text, originalism is often unable to carry the weight that its adherents wish to give it. This is especially the case when it stands in for the defense of conservative values, whether pragmatic or principled.[91]

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applications, see *infra* discussion accompanying note 354.

[87] This increases the problem of selective citations of the Report. For originalism's own contradictory stances, see *infra* text accompanying note 286 (discussing "old" and "new" versions and "semantic" and "living" originalist perspectives)

[88] Michael R. Pompeo, Sec'y of State, Unalienable Rights and the Securing of Freedom, Speech at the National Constitution Center (July 16, 2020) (transcript available at https://it.usembassy.gov/secretary-pompeo-speech-at-the-national-constitution-center-july-16-2020/) [https://perma.cc/V2JF-EYFX] ("As you'll see when you get a chance to read this report, the report emphasizes foremost among these rights are property rights and religious liberty. No one can enjoy the pursuit of happiness if you cannot own the fruits of your own labor, and no society—no society can retain its legitimacy or a virtuous character without religious freedom.").

[89] Jane Stromseth, *Reclaiming the Universal Declaration of Human Rights from the Pompeo Commission – Part 2*, JUST SEC. (Sept. 23, 2020), https://www.justsecurity.org/72536/reclaiming-the-universal-declaration-of-human-rights-from-the-pompeo-commission-part-2/ [https://perma.cc/42NN-K9X4]. For a pithy early diagnosis of this approach, *see* Duncan Hosie, Mike Pompeo's Originalist Foreign Policy, (July 23, 2020) available at https://publicseminar.org/essays/mike-pompeos-originalist-foreign-policy/

[90] For a recent and highly comprehensive summary, see PURCELL, JR., *supra* note 15; *see also* Berman, *supra* note 44; Post & Siegel, *supra* note 17, at 563.

[91] Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?,* 34 HARV. J.L. & PUB. POL'Y 5, 5–6 (2011) ("[T]he more that practitioners of those theories exercise their discretionary judgment to justify substantively conservative conclusions, the better the charge that originalist theories are 'rationalization[s] for conservatism' appears to fit." (alteration in original) (quoting the title of a panel at the Twenty-Ninth Annual National Federalist Society Student Symposium, held

Putting these unsurprising contradictions to one side, the incorporation of original authorship within the Universal Declaration of Human Rights presents perhaps an even greater challenge for human rights originalism. Insofar as this expansion gives voice to transnational perspectives, the protagonists are limited to a period in which United Nations membership numbered 56 states (compared with 193 today), with 48 voting to approve the Universal Declaration in the General Assembly, and 8 abstaining.[92] The precise contributions of different state representatives, although part of the UN Commission on Human Rights' record, are not mentioned in the Report.[93] Prominent omissions include the Drafting Committee members from China, Lebanon, Australia, Chile, France, the Soviet Union, United Kingdom, and Canada, and prominent interlocutors in the General Assembly, including the Philippines and India.[94] This selective version of human rights originalism is thus distinctive from the versions of constitutional originalism that seek out the original public meaning of the U.S. Constitution. In limiting the understanding of the Universal Declaration of Human Rights only to that endorsed by the United States, this version of originalism is even narrower than the endorsement of the Framers' "original subjective intent."[95] Applying this approach to the U.S. Constitution would consider only the views of the representatives of Massachusetts, for example, instead of all thirteen original states, in determining the meaning of the constitutional text.[96] Indeed, human

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at the University of Pennsylvania Law School)).

[92] *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 21, 36 (1999) (describing votes and abstentions, and noting "grossly underrepresented" regions of Asia and Africa);

UNITED NATIONS, ABOUT US, https://www.un.org/en/about-us [https://perma.cc/2HVK-RCPQ] (last visited Dec. 19, 2021) (noting the growth of the United Nations from 51 original members to 193 members today). General Assembly resolution 217 A (III) was approved on 10 December 1948, by a vote of 48–0–8. Continuation of the Discussion on the Draft Universal Declaration of Human Rights, Rep. of the Third Comm., U.N. Doc. A/777, at 933 (1948). To compare efforts that took off after this moment, despite the Cold War's shadow, see generally STEVEN L.B. JENSEN, THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES (2016).

[93] COMM'N ON UNALIENABLE RTS., *supra* note 3.

[94] For analysis, see GLENDON, *supra* note 25, at 32.

[95] This version of human rights originalism has, in this respect, closer antecedents to Robert Bork's "intent" than to Justice Scalia's "public meaning." *See* PURCELL, JR., *supra* note 15, at 12–13; *see also* Barnett, *supra* note 15, at 648 (identifying the shift from "subjective originalism" to "objective originalism").

[96] This dilemma is also compounded by the problem of "the moving wall of ratification", that subsequent states such as Hawaii (in 1959) were admitted on a different understanding

rights originalism appears to adopt something closer to original public meaning for 1776, and original intent, albeit restricted to one participant (the United States), for the Universal Declaration of 1948. This discrepancy is best explained as a nationalist strategy of human rights originalism, which elevates American views of the original Universal Declaration over other countries. Hence, the Report highlights the Universal Declaration of Human Rights for its "[e]choes of U.S. founding principles"[97] and other aspects which "resonate deeply with other sources of America's law and political culture, including U.S. Supreme Court jurisprudence," and "basic social legislation dating back to the New Deal."[98] The provenance of non-U.S. efforts in the Universal Declaration's drafting is overlooked, such as the representative of India's insistence that the word "men" be replaced with "human beings"; that the criteria for non-discrimination include "colour" and "political opinion"; and that the right to work include "just and favourable conditions of work" (and there are many other examples).[99]

More notably, the originalist zeal for the Universal Declaration misses the contributions of the feminist, decolonization, and other movements that have since altered our understanding of equality, self-determination, and human rights.[100] The official American delegation to the United Nations' initial conference in San Francisco had marginalized the African-American representatives and their concerns about racial inequality.[101] Movements for

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of the Constitution: a problem not adequately addressed in originalist theory: *see* Mary Sarah Bilder, *The Emerging Genre of the Constitution: Kent Newmyer and the Heroic Age*, 52 CONN. L. REV. 1263, 1275 (2021).With thanks to Gerry Neuman for pressing this point.

[97] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 30.

[98] *Id*.

[99] Miloon Kothari, *Remembering India's Contributions to the Universal Declaration of Human Rights,* THE WIRE (Dec. 20, 2018), https://thewire.in/rights/indias-important-contributions-to-the-universal-declaration-of-human-rights [https://perma.cc/JF4J-WXDA]. A broad literature spotlights the non-U.S. contributors to the United Nations formation process. For one of the many examples, see MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS (2010).

[100] For greater elaboration of the milestone event of the Universal Declaration of Human Rights, as well as what was missed, see Young, *supra* note 86. *See generally* ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008) (examining the history and development of international human rights at the United Nations).

[101] *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, 41 (2003); *see also* Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 14-15 (2019). (noting Dr.

the equal rights of women and citizens of colonized states and the "Third World" were seeking emancipation even as the Universal Declaration was drafted, but did not gain a greater foothold for self-determination and equality until afterwards (in what remains a continuing struggle).[102] Indeed, many newly independent states have integrated both the Declaration of Independence and the Universal Declaration of Human Rights in their constitutions, wresting new meaning and insight from the earlier innovations.[103] As the empires that remained in power during the UN Charter dissolved, these insights fed into new treaties which came into effect with respect to human rights. This elevation of a selective period of original authorship overlooks these periods, as well as other periods of extraordinary human rights crisis and institutional reinvigorations that have occurred since World War II.

### C. NATIONAL IDENTITY AND NATIONAL SOVEREIGNTY

The originalist reinvention of human rights sources and authorship is inexplicable without its third component: national identity. As is well known, originalism is a notably homegrown approach to constitutional interpretation in the United States.[104] With limited exceptions, originalism is not viewed as a particularly compelling methodology for constitutional interpretation abroad.[105] Of course, themes of fidelity to text and respect for origins remain

W. E. B. Du Bois's leadership of "the National Association for the Advancement of Colored People ('NAACP') delegation to the San Francisco conference").

[102] *See* KATHERINE M. MARINO, FEMINISM FOR THE AMERICAS: THE MAKING OF AN INTERNATIONAL HUMAN RIGHTS MOVEMENT 223–24 (2019); Fionnuala Ní Aoláin, *Gendering the Declaration*, 24 MD. J. INT'L L. 335, 335 (2009); NORMAND & ZAIDI, *supra* note [108] ch. 8. For further discussion, see *infra* Section III.B.4.

[103] *See, e.g.*, DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 3 (2007); Zachary Elkins, Tom Ginsburg & James Melton, *The Universal Declaration of Human Rights as a Constitutional Model*, *in* HUMAN RIGHTS OF, BY, AND FOR THE PEOPLE: HOW TO CRITIQUE AND CHANGE THE U.S. CONSTITUTION 174 (Keri E. Iyall Smith et al. eds., 2017).

[104] *See* Baude, *supra* note 16, at 2352 (defending the version of originalism espoused within positive sources of U.S. law); Greene, *supra* note 43, 1 (comparing U.S., Canadian, and Australian uses); Kim Lane Scheppele, *Jack Balkin Is an American*, 25 YALE J.L. & HUMAN. 23, 23 (2013) (highlighting originalism as "distinctively *American*").

[105] Greene, *supra* note 43, at 3; *see also* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 784 (2014) (noting originalism's presence in Malaysia and Singapore, but conceding its distinctive form); *cf.* Thio Li-ann, *"It Is A Little Known Legal Fact": Originalism, Customary Human Rights Law and Constitutional Interpretation*, SING. J. LEG. STUD. 558, 558 (2010) (describing evaluation of comparative constitutional cases in Singapore courts); Ozan O. Varol, *The Origins and Limits of Originalism: A*

central to contemporary constitutions elsewhere, but they more often work as a complement to, rather than substitute for, rights interpretation.[106] Indeed, even the more moderate originalism practiced is less remarkable abroad, given that the rest of the world's constitutions are younger, more detailed, and more amendable than their American counterpart,[107] and hence a constitution's original meaning abroad is likely to offer a less obvious departure from its contemporary understanding.[108] The very celebration of human rights originalism is thus a celebration of the contemporary idiosyncrasies of American constitutional and political culture.

But constitutional originalism offers broader connections to American national identity, beyond simply its global outlier status. Within the United States, its nationalist character has become prominent when the U.S. constitution has come into contact with foreign law—through the Supreme Court's rejection, for example, of the contemporary relevance of international or comparative law to constitutional interpretation.[109] And even outside of

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*Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1239 (2011) (presenting variants in the Turkish Constitutional Court); Sujit Choudhry, Living Originalism *in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMANS. 1, 3 (2013) (assessing the Indian Supreme Court's combination of living originalism with comparative reasoning); Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 2 & n.3, 11–12 (presenting the "living force" view of the Australian Constitution, and comparing the approaches of Australian Mason, C.J., along with Binnie, J., of New Zealand, and Scalia, J. (quoting ANDREW INGLIS CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW 21 (1997 ed.))); Peter W. Hogg, *Canada: Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 55, 83 (Jeffrey Goldsworthy ed., 2006) ("Originalism has never enjoyed any significant support in Canada.").

[106] David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 189, 192, 197–98 (2010). For further evidence of outlier status, see David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 769 (2012).

[107] *See, e.g.*, Tom Ginsburg & Rosalind Dixon, *Introduction*, in COMPARATIVE CONSTITUTIONAL LAW 1, 6 (Tom Ginsburg & Rosalind Dixon eds., 2011) (noting the amendability and relative youth of most contemporary constitutions); *cf.* Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295 (2008) (highlighting that for the U.S. Constitution, in 2008, "the predicted age of a randomly selected word in this text reached 178 years").

[108] *See e.g.*, *Constitutional Law Across Borders: At the Launch of NYU Law's New Guarini Institute for Global Legal Studies, Justice Sonia Sotomayor Talks with Former South African Constitutional Court Justice Albie Sachs*, NYU LAW NEWS (Apr. 10, 2018), https://www.law.nyu.edu/news/Sonia-Sotomayor-Albie-Sachs-Guarini-Institute-for-Global-Legal-Studies-Supreme-Court-precedent [https://perma.cc/PJ6Z-UXEJ] (commenting on the role of originalism).

this deeply invested doctrinal argument, originalism is a nationalist idea in other ways. Most pertinently, it offers a connection with independence-affirming revolution.[110] As Jack Balkin has written, the popular imagining that the American nation, people, and Constitution "were born virtually at the same time . . . through act of political revolution . . . [which] was a *self-creation*" is distinctive from the founding stories of other political cultures.[111] For Balkin, this national mythology has been used by progressive and conservative movements alike, providing resounding and often radical critiques to the status quo.

This treatment of plural originalisms notwithstanding, these elements of national identity are perhaps unremarkable in American constitutional argument. When connected with the human rights discourse, they reveal their more overt connections, not simply with national identity, but with the project of nationalism. The first connection is by association. As a signature legacy of the Trump Administration and Secretary of State Mike Pompeo, the rhetoric and policies of national sovereignty were never far from foreign policy during the work of the Commission on Unalienable Rights. In particular, the invocation of the Declaration of Independence coincided with

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[109] *See* Dorsen, *supra* note 12, at 521. Compare the contemporary originalist-based rejection with the widespread American endorsement of the relevance of international and comparative law, normatively and historically. For primarily normative grounds, see, e.g., David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 543 (2001); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2001 (2003); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1228 (1999). For historical grounds, see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004) (arguing that U.S. law developed within a larger framework of a transatlantic constitution connected to the laws of England); David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project in International Law*, 89 FORDHAM L. REV. 1841, 1842 (2021) (noting deep intertwinement of the law of nations and early U.S. constitutional history, including in the project of nation building).

[110] Primus, *supra* note 17, at 79–80 ("Whether originalist arguments have purchase depends [mostly] . . . on whether their audiences recognize themselves, or perhaps their idealized selves, in the portrait of American origins that is on offer."); Berman, *supra* note 44, at 27 (noting the power originalism exerts in "helping shape political-legal debate and even national identity"). This focus on national identity complicates the historical truth claims of originalism. *See* Daniel Farber, *Historical Versus Iconic Meaning: The Declaration, the Constitution, and the Interpreter's Dilemma*, 89 S. CAL. L. REV. 457, 459 (2016) ("The tension between past and present meaning may well be inescapable when a historic document has become constitutive of present national identity.").

[111] Jack M., Balkin, *Why Are Americans Originalist?*, *in* LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 315 (David Schiff & Richard Nobles eds., 2015).

President Trump and Secretary Pompeo's "America First" and sovereignty-focused foreign policy agenda, as well as a new commitment to "patriotic education" that sought to downplay the injustices of the American founding.[112] Even disentangled from these policies, the Report suggests that the United States should be cautious with respect to the compromise to sovereignty required by human rights multilateralism—a caution which it elevates to a "matter of principle."[113] Just as it acknowledges that the United States' past reluctance to engage multilaterally was due to a refusal to hold the nation's own racial injustice to international account (including attempts to shield U.S. practices of segregation and voter suppression from international scrutiny),[114] the Report does not contemplate that attracting accountability for present racial injustice may similarly demand multilateral engagement. These moves exaggerate the nationalism latent in American exceptionalism, as described below.

The second connection between human rights originalism and nationalism lies in the aforementioned delimiting of the Universal Declaration of Human Rights from subsequent international developments. To understand the significance of this move, it is important to note the context in which the Universal Declaration of Human Rights, alongside the UN Charter, broke with the liberal nationalism of the early twentieth century that had in part led to World War II. This break with nationalist forces was based on a compromise. National sovereignty would be respected, but pressed into the service of respect for fundamental human rights.[115]. It is no secret that the containment of nationalism within the post-World War II human rights regime has exerted considerable pressure on human rights realization and

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[112] *Compare President Donald J. Trump Is Protecting America's Founding Ideals by Promoting Patriotic Education*, WHITE HOUSE ARCHIVES (Nov. 2, 2020), https://trumpwhitehouse.archives.gov/b

riefings-statements/president-donald-j-trump-protecting-americas-founding-ideals-promoting-patriotic-education/ [https://perma.cc/4EJV-3NQR], *with* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1 (1987) (withholding celebration, from "not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation").

[113] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 48 ("By binding itself to international agreements and submitting to the authority of international institutions, the United States can put at risk the sovereignty of its people and the nation's responsibility to determine what courses of action best secure rights at home and ensure a free and open international order.").

[114] *Id*.

[115] Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMANS. 351, 365 (1992); NORMAND & ZAIDI, *supra* note [xx], 96-97.

advocacy, particularly as individuals and organizations have sought accountability for nation-states within the organizations of the UN.[116] One prism in which to assess the success of this containment lies in the international human rights agreements that post-date the Universal Declaration of Human Rights. In refusing to engage with the reciprocity and multilateralism of these agreements—the very succesors intended by those resolving to adopt the Universal Declaration—human rights originalism thus sides with nationalism.

The third connection of originalism to nationalism is exemplified in the viewpoints of members of the Commission on Unalienable Rights. When writing separately from the Report, commissioners have demonstrated a dangerous combination of skepticism of multilateralism and naivete about the self-triggering wisdom of national traditions.[117] As the Commission's Executive Secretary Peter Berkowitz has conceded, "it is true that a preference for one's own national traditions can be used as an excuse for majorities to oppress minorities—as it can for large nation-states to bully small nation-states. . . . But just as hard cases make bad law, focusing on the excesses to which principles can be taken distorts policy."[118] Instead, Berkowitz would see "Biblical faith, classical political thought, and the modern tradition of freedom"[119] as a better grounding for human rights in the United States, just as he would invite China to resurrect its own national traditions.[120] This is a particularly selective account of the ideas informing America's own political culture, just as it is credulous about how the offered versions of national traditions may not simply be those that are least threatening to those in power. For example, the challenges of extolling "Asian values"—as expressed by powerful governments rather than movements from below—looms large in the accommodation of difference in human rights discourse around the world.[121] Such selective expressions can give cover to anti-democratic leaders who seek the suppression of the very

[116] *See, e.g.*, James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLES' RIGHTS 7, 58 (Philip Alston ed., 2001). For a more thorough critique of this imbalance within the UN system, see MOYN, *supra* note 24; MAZOWER, *supra* note 99.

[117] *See* Peter Berkowitz, *The United States, National Traditions, and Human Rights*, 192 TELOS 153 (2020).

[118] *Id.*

[119] *Id.*

[120] *See id.* at 155–56.

[121] *See, e.g.*, Amartya Sen, *Democracy as a Universal Value*. J. DEMOCRACY., July 1999, at 3, 12–16; Fareed Zakaria, *A Culture is Destiny: A Conversation with Lee Kwan Yew*, FOREIGN AFFS., Mar. /Apr. 1994, at 109, 114– 15, 119.

rights that might challenge their rule. They also ignore the more nuanced inquiries that can be launched when the social, cultural, and religious traditions that are more distanced from power are invited into the creation of human rights meaning.[122]

In contrast to human rights originalism, the contemporary reference point for historical sources of human rights are non-nationalist in character. Viewed on their own terms, both the Declaration of Independence and the Universal Declaration of Human Rights are profoundly global in ambition, even as they excluded many people and populations from their protection. The Declaration of Independence, for example, articulated comprehensive ideals about human equality and rights that were also meant for audiences outside America, even as it was restricted from women and African-American men. Even Thomas Jefferson saw the document as global in character: for all his blind spots, he viewed it as "an instrument, pregnant with our own and the fate of the world."[123] And even more comprehensively, the Universal Declaration of Human Rights supplied a "common standard of achievement for all peoples and all nations"[124] without privileging any single vision or foundation. In an attempt to register this profound commonality between different philosophical, cultural, and social traditions, Universal Declaration commentator Jacques Maritain famously insisted that the cross-national agreement rested on the "condition that no one asks us why."[125] He

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[122] *See, e.g.*, Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?* 12 J. POL. PHIL. 190, 193–94, 201–10 (2004) (discussing human rights inquiry from viewpoints of Catholic social thought, Confucianism and Islam).

[123] ARMITAGE, *supra* note 103, at 1, 17 (quoting Letter from Jefferson to Roger C. Weightman (June 24, 1826), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 181–82 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904))). As Armitage notes, nowhere in its text is made mention of "Americans" or the word "nation." He goes on to reference the contradiction of solicitude for liberty abroad, and the acceptance of slavery at home, made poignantly by Frederick Douglass, *What to the Slave is the Fourth of July?: An Address Delivered in Rochester, New York, on 5 July* 1852: *Id.* 97-100.

[124] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

[125] Jacques Maritain, *Introduction*, *in* HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 9, 9 (UNESCO ed., 1949); *see also* Jacques Maritain, *The Grounds for an International Declaration of Human Rights (1947)*, *in* THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES AND DOCUMENTS FROM ANCIENT TIMES TO THE PRESENT 2, 2 (Micheline R. Ishay ed., 2d ed. 2007). Maritain had designed a questionnaire on behalf of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1947, to survey Chinese, Islamic, Hindu, customary and socialist bloc perspectives, as well as American and European scholars; GLENDON, supra note xx, 76-66.

was acknowledging a deliberative compromise among nations (at least those represented in 1948) and the outcome of a moment in which national self-interest was put to one side.[126] Perhaps no scholar has acknowledged this feat better than the Commission on Unalienable Rights Chairperson, Mary Ann Glendon,[127] herself a former United States Ambassador to the Holy See (as fellow Catholic thinker Jacques Maritain had been for France from 1945–1948) and a long-time critic of the individualist and legalist by-products of "Rights Talk."[128] In her terms, it is faith and community, rather than self-interest, that should inform the human rights project.[129] To further account for this curious turn, it is necessary to examine a last, connected—and perhaps least surprising—feature of human rights originalism: American exceptionalism.

### D. AMERICAN EXCEPTIONALISM AS EXEMPTIONALISM

The reference to truncated sources and selective authorship may seem novel for the human rights of American foreign policy, but American exceptionalism is itself far from new. Indeed, human rights originalism regenerates one of the familiar tropes of American exceptionalism: that the American encounter with rights is unique and superior in comparison with other nation states.[130] The Declaration of Independence has been a key source for this claim, given its soaring moral ambitions and revolutionary origins (its long constitutional shadow notwithstanding).[131] So too is the influence of

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[126] MORSINK, *supra* note [XX] 36-9.

[127] *E.g.*, GLENDON, *supra* note 25.

[128] *E.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[129] For endorsement of these criticisms, see Samuel Moyn, *Why Do Americans Have So Few Rights*, NEW REPUBLIC (Mar. 9, 2021), https://newrepublic.com/article/161561/americans-rights-jamal-greene-book-review [https://perma.cc/45S4-7G4Q] (reviewing JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) in connection with Glendon's own ideas).

[130] *See generally* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005) (collecting the varied meanings of American exceptionalism with respect to human rights).

[131] *See* GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 3–5 (2011) (noting evolutions in historiography that allowed the colonial-Revolutionary period and the early national historical period to be brought together); *see also* Glass, *supra* note 18, at 960 (describing the signing of the Declaration of Independence in

Eleanor Roosevelt, who was hardly narrow in understanding the role of the Commission on Human Rights in promoting a common standard for the world.[132] But it is worth noting how human rights originalism massages the exemptionalism of American exceptionalism, seeking to insulate the United States from international scrutiny over and above the tropes of nationalism and sovereignty described above. In this respect, American exceptionalism trots alongside nationalism but is given a special originalist defense: American exceptionalism in moral rather than realist terms.

Of course, the originalist focus on the language and historical experiences of the Declaration of Independence is not without precedent in America's engagement with the international community, although this reference is more familiar in acknowledging a common source of human rights rather than in exempting the United States from international human rights scrutiny. Such acknowledgement is a vital aspect of the human rights canon: alongside ancient documents,[133] or the legal contributions of the Magna Carta of 1215, the English Bill of Rights of 1689, the French Declaration of the Rights of Man and Citizen of 1789 (as merely some historic examples), the U.S. Declaration of Independence remains central.[134] The latter exemptionalist approach, on the other hand, has been more selectively employed when the United States has sought special exemption from international scrutiny. A good example is offered by then-U.S. Ambassador to the UN Nikki Haley's report to the UN Human Rights Council, a year before announcing the U.S. withdrawal from that body. In noting the special import of the United States, she described the "unique beginning" of America's Founding as a moment shared with human rights.[135] The veneration of this history allows these

1776 as "the pregame show").

[132] GLENDON, A WORLD MADE NEW, *supra* note 25. For the complexity of Eleanor Roosevelt's position, including with respect to both race and equal rights, see, e.g., MARINO, *supra* note [110], 223. For a recent account, *see generally* PATRICIA BELL-SCOTT, THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE (2016) (documenting the exchanges between Eleanor Roosevelt and Pauli Murray, who would later influence the constitutional arguments made by Ruth Bader Ginsburg). For the Report's recognition of Eleanor Roosevelt's influence, see COMM'N ON UNALIENABLE RTS., *supra* note 3, at 7-8, 27-9 (citing Eleanor Roosevelt's emphasis on racial justice at home as well as human rights, and the common standard of the Universal Declaration of Human Rights).

[133] *See generally* THE HUMAN RIGHTS READER, *supra* note 125 (collecting, for example, texts from the Code of Hammurabi the writings of Confucius and Asoka, the Hebrew Bible, New Testament, and the Qurʾān).

[134] *Id.*

[135] Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks at the

shared origins, rather than the special military or economic influence of the United States, to justify the exemption of the United States from international human rights scrutiny.[136] In this way, human rights originalism banks on the moral justification—not realist explanation—for American exceptionalism.

These exemption-justifying features coalesce around longstanding exceptionalism with respect to the relationship between American constitutional law and international law.[137] Indeed, it is no surprise that those deploying perceptive critiques of originalism have also surveyed American constitutional law from a comparative perspective.[138] It is worth recalling that Justice Scalia's rejection of foreign law was made in signature originalist terms: the capacity of foreign domestic courts or international tribunals to hold even the most basic relevance for the interpretation of the U.S. Constitution (including its explicit invitation to reference "evolving standards of decency")[139] were, for him, restricted to the moment of founding—hence,

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Graduate Institute of Geneva (June 6, 2017), https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-remarks-at-the-graduate-institute-of-geneva/ [https://perma.cc/44A9-PDHE]; *see also* Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks on the UN Human Rights Council (June 19, 2018) (withdrawing the United States from the Human Rights Council) https://geneva.usmission.gov/2018/06/21/remarks-on-the-un-human-rights-council/ [https://perma.cc/CB65-WRKH]. For endorsement of this view, see COMM'N ON UNALIENABLE RTS., *supra* note 3, at 49 (noting the 2018 withdrawal from the Human Rights Council "does not reflect a rejection of human rights and fundamental freedoms, but rather a determination to find better means of effectively securing them").

[136] This exemptionalism is not new, occurring, for example, during the U.S. response to 9/11. *See* John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS *supra* note 130, at 330–38; Harold Hongju Koh, *On American Exceptionalism,* 55 STAN. L. REV. 1479, 1486 (2003).

[137] *See* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1984–91 (2004) (seeking to account for the divergence between American and European attitudes toward international law).

[138] *See* Greene*, supra* note 43, at 18–20.

[139] Roper v. Simmons, 543 U.S. 551, 608, 624–28 (2005) (Scalia, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 100– 01 (1958) (plurality opinion)) (opposing reliance on foreign and international law in construing whether the Eighth and Fourteenth Amendments barred capital punishment for juvenile offenders as per the prohibition on "cruel and unusual punishments"). As the majority in *Roper* outlined, the UN Convention on the Rights of the Child—then ratified by every country in the world apart from the United States and Somalia, and now, in 2021, ratified by *all* except the United States—expressly prohibits the death penalty for crimes committed by juveniles under eighteen. *Id.* at 576 (majority opinion); *see* Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* UNICEF, FREQUENTLY ASKED QUESTIONS ON THE CONVENTION ON THE RIGHTS OF THE

restricted to eighteenth century English legal sources.[140]

This claimed moral high ground was harder to sustain alongside the Trump Administration's "America First" agenda. President Trump's nationalist tropes were often expressly hostile to both human rights and international law;[141] his exceptionalism was tied, in his own policies, to raw American military and economic power.[142] His populist and transactional rhetoric put heavy emphasis on a "founding principle of sovereignty" above human rights accountability.[143] Domestically, Trump's immigration policies were brazenly nationalist, xenophobic, and dismissive of human rights, exemplified early by the infamous Muslim travel ban and the separation of

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CHILD, https://www.unicef.org/child-rights-convention/frequently-asked-questions [https://perma.cc/7MMX-VWN4] (last visited Dec. 20, 2021) (noting that only the United States has not ratified the Convention on the Rights of the Child). The majority acknowledged this and other aspects of the "overwhelming weight of international opinion." *Roper*, 543 U.S. at 578; *see also* Graham v. Florida, 560 U.S. 48, 74, 80 (2010) (considering international law "not irrelevant" in holding life without parole for juvenile nonhomicide offenders to constitute cruel and unusual punishment (quoting Enmund v. Florida, 458 U.S. 782, 796, n.22)). By 2021, any reference to international human rights law in juvenile life sentencing had ceased. *See, e.g.*, Jones v. Mississippi, 141 S. Ct. 1307, 1313, 1318–19, 1322 (2021) (holding that the Eighth Amendment does not require a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole).

[140] That said, Justice Scalia's preference for desisting from international authority was not always consistent: he was willing to cite foreign law when it helped him, for instance, to defend executive power from Congress or courts, or to adopt other substantive results. *See* PURCELL, JR., *supra* note 15, at 131, n.191 (comparing Justice Scalia's *Roper* dissent with his dissent in *Webster v. Doe*, which relied on international law to support expanding foreign affairs powers of president). This selectivity was pointed out, as Purcell notes, by the late Justice Ruth Ginsburg, who had adopted a more extensive justification for the relevance of international and comparative law. *Id.* at 131–32 (citing RUTH BADER GINSBURG, MY OWN WORDS 254 (2016)).

[141] Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283, 1294 (2020) (emphasizing, not Trump's foreign policy's disobedience or lack of interest to global affairs, but the Administration's "hostility to the overall project of international law").

[142] Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 291 (2018) (noting, amongst other inversions, that President Trump "refuses to recognize a qualitative or ethical distinction between American and Russian politics"). Bâli and Rana present American constitutionalism in terms that I view as close to American originalism, and less embracing of its broader rights traditions. *See infra* Section III.C.

[143] Kurt Mills & Rodger A. Payne, *America First and the Human Rights Regime*, 19 J. OF HUM. RTS. 399, 401 (2020); *see* Huckerby & Knuckey, *supra* note 36, at 11–12.

immigrant families, including children, at the border.[144] Internationally, the Trump Administration withdrew from multiple agreements, censured the Inter-American Commission on Human Rights for encroaching on domestic affairs, and also reportedly instructed State Department officials to excise the language of "international law" from their memos.[145] Other examples include the presidential pardon of American service members who had been convicted of war crimes, Trump's apparent embrace of torture as a technique of interrogation, and his professed admiration for autocrats and tyrannical regimes.[146] Secretary of State Mike Pompeo, too, courted a strong-man reputation, by explicitly threatening two ICC officials and their families, for example.[147] In the final months of the administration, President Trump asserted, before the national election, that any voting result that did not see him return to power should be rendered null.[148] This attempt to incapacitate civil and political rights led up to moves to prevent the certification of the

[144] For an account of these extremes within America's own traditions of constitutionalism, see Michael J. Klarman, *The Supreme Court 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 123, 222, 261 (2020). A number of UN human rights bodies expressed their alarm at U.S. border detention practices. *See, e.g.*, Comments of High Commissioner for Human Rights Michelle Bachelet, *UN Rights Chief 'Appalled' by U.S. Border Detention Conditions, Says Holding Migrant Children May Violate International Law*, UNITED NATIONS NEWS (July 8, 2019), https://news.un.org/en/story/2019/07/1041991 [https://perma.cc/43EK-4VWF].

[145] Hakimi, *supra* note 141, at 1295–96. Notable agreements with long-term effects on human rights include the Iran nuclear deal and the Paris Agreement on Climate Change. *Id.*

[146] *See* Mills & Payne, *supra* note 143, at 403–04, 408; Klarman, *supra* note 144, 40; Krishnadev Calamur, *Nine Notorious Dictators, Nine Shout-Outs from Donald Trump*, THE ATLANTIC (March 4, 2018), https://www.theatlantic.com/international/archive/2018/03/trump-xi-jinping-dictators/554810/ (collecting President Trump's comments indicating apparent endorsement of authoritarian leaders). These endorsements extended from rhetoric to personnel decisions. *See, e.g., Groups Express Serious Concern Regarding Billingslea Nomination to State Department Role*, HUM. RTS. WATCH (Nov. 28, 2018, 5:00 PM), https://www.hrw.org/news/2018/11/28/groups-express-serious-concern-regarding-billingslea-nomination-state-department [https://perma.cc/D74N-26KQ] (reproducing a letter recording the objections of over 20 human rights and civil rights NGOs to the nomination of Marshall Billingslea).

[147]Michael R. Pompeo, Secretary of State, Remarks to the Press (Mar. 17, 2020), https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/ [https://perma.cc/CPF9-UEHD].

[148] Allan Smith, *Trump on Peaceful Transition if He Loses: 'Get Rid of the Ballots' and 'There Won't Be a Transfer,'* NBC NEWS (Sept. 23, 2020) https://www.nbcnews.com/politics/2020-election/trump-peaceful-transition-if-he-loses-get-rid-ballots-there-n1240896 [https://perma.cc/7EBC-QW5S].

vote, apparently endorsed by Secretary Pompeo,[149] and ended with the infamous siege of the Capitol on January 6, 2021.[150] The veneration of the claimed moral vision of exceptionalism and originalism has therefore been accompanied by significant contemporary stressors on human rights—and significant contradictions.

## II. THE NON-ORIGINALIST ETHOS OF HUMAN RIGHTS

Originalism may be a familiar, if nevertheless contested, approach to American constitutional law. Up until 2020, it was fundamentally unfamiliar to the interpretation of human rights. And at least for now, human rights originalism is fringe—an "off-the-wall" proposition[151]—within the accepted canon of human rights construction—as held among different communities of human rights interpreters.[152] This is not to say that the texts and history elevated by this version of originalism are not central to contemporary human rights. Both the Declaration of Independence and the Universal Declaration

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[149] Humeyra Pamuk, *Pompeo Voices Confidence for 'Second Trump Administration,' then Softens Tone on Post-Election Transition*, REUTERS (Nov. 10, 2020) https://www.reuters.com/article/us-usa-election-pompeo/pompeo-voices-confidence-for-second-trump-administration-then-softens-tone-on-post-electio
n-transition-idUSKBN27Q2YH.

[150] Marisa Peñaloza, *Trump Supporters Storm U.S. Capitol, Clash with Police*, NPR (Jan. 6, 2021, 3:08 PM) https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/953616207/diehard-trump-supporters-gather-in-the-nations-capital-to-protest-election-resul [https://perma.cc/CUU6-KDG6]. For a present cataloguing of the findings of the investigation into Jan. 6, 2021, alongside the current state of reporting, see Quinta Jurecic, *Why the January 6 Investigation Is Weirdly Static*, THE ATLANTIC (Dec. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/12/january-6-committee-investigation/620973/

[151] This description, applied by Balkin to the parameters of constitutional thinking, is also applicable to human rights, although the community of interpreters is different: *see* JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 61 (2011) (noting boundaries between what is considered reasonable and unreasonable are a product of social life). The related concept of the "Overton Window," which encloses the unthinkable and the thinkable in terms of political possibility, has increasingly entered the public discourse. For original description, along a linear axis of government regulation and control, *see* Joseph G. Lehman, An Introduction to the Overton Window of Political Possibility, MACKINAC CTR. FOR PUB. POL'Y, https://www.mackinac.org/OvertonWindow.

[152] This issue, as will be seen below, is far broader than the community of international legal interpreters, even as that represents a rich array of technical and specialist knowledge, and norm entrepreneurship and advocacy. *See, e.g.*, Andrea Bianchi, *Epistemic Communities*, *in* CONCEPTS FOR INTERNATIONAL LAW 251, 258 (Jean d'Aspremont & Sahib Singh eds., 2019); Oscar Schachter, *The Invisible College of International Lawyers*, 72 Nw. U. L. Rev. 217, 217 (1977). For the many plural human rights communities, see *infra* Sections II.A–D.

of Human Rights are understood as landmarks in the evolution of modern human rights, representing the ambitions to dispel an authoritarian monarchy, on the one hand, and the horrors of fascist government, on the other. And yet these texts are situated, in contemporary human rights understanding (as arguably they were by each instruments' drafters and their publics), as milestones, to be furthered and updated by subsequent developments.[153] The history of human rights is therefore viewed as both longer and more geographically diverse than the two are able to represent, as well as more open to competing interpretations about the precise meaning of these moments. Indeed, influential human rights histories have directed attention, not merely to the complex legacy of the French or American revolutions,[154] but to the role of quite different movements or technologies—the abolition of slavery,[155] for example, or the invention of the novel.[156] Human rights originalism is highly truncated in comparison.

Of course, locating what is fringe and what is mainstream to human rights is a highly contested proposition. Efforts to establish central "canons" within the global human rights project, and within projects of constitutionalism and democracy, are fraught by the tensions of who, and what ideas, are to be included and excluded, and by the question of which communities may make such judgments.[157] Nonetheless, the search for higher norms are core to both

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[153] For noting the now-classic argument that the "original" meaning of the US Constitution was that it should be an evolving (i.e. non-originalist) instrument, see Berman, *supra* note 44, 7. The argument applies forcefully to the Universal Declaration of Human Rights, as Part II.A. *infra* makes clear.

[154] *See, e.g.*, THE HUMAN RIGHTS READER, *supra* note 125, at 3; WOOD, *supra* note 131; ARMITAGE, *supra* note 103.

[155] *See, e.g.*, JENNIFER MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012); *see also* Philip Alston, *Book Review: Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043 (observing, in a review of Martinez's book, how one's conception of human rights—whether as idea, regime, or other concept—alters one's understanding of causal origins).

[156] *See, e.g.*, LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007). For U.S. emphasis, see Harlan Grant Cohen, *Historical American Perspectives on International Law*, 15 ILSA J. INT'L & COMPAR. L. 485, 488–89 (2009) (summarizing discussions of "American mission and Manifest Destiny, anti-slave trade movements, immigrant anti-colonialism, the international peace movement, Jacksonian isolationism, and the development of various American foreign policies from the Monroe Doctrine to Wilsonianism to Containment" (citations omitted)).

[157] *See* Kim Lane Scheppele, *"Looking over the Crowd and Picking Your Friends:" The Social World of Legal Cases, in* MARYLAND CONSTITUTIONAL LAW SCHMOOZE ON THE GLOBAL CONSTITUTIONAL CANON (Feb. 24, 2012), https://digitalcommons.law.umaryland.edu/schmooze_papers/144/ (attempting a description

human rights and constitutional law. As I have noted elsewhere, arguments made on the basis of legal reason, authority, and epistemic acceptance help to establish the central texts of a canon in both fields.[158] In debates for conferring a small-c constitutional status on landmark statutes or particular governmental practices or moments in constitutional law, or in the formal tests for conferring the status of customary law (or jus cogens status) or that of a general principle of law, these criteria are in constant reference.[159] Yet human rights originalism does not satisfy these tests, given both the unsettled acceptance of originalism as a constitutional methodology outside of the United States,[160] as well as the recognized problems of using national tradition as an orienting guide for human rights.[161]

As for the epistemic strangeness of this approach more broadly, it is helpful, in this respect, to chart four approaches for assigning meaning to human rights that each reveal the profound distance between human rights originalism and their contemporary understanding. This distance may be reflective of the political partisanship of the intended audience of the Commission on Unalienable Rights and the idiosyncrasy of the exercise. These frameworks include (a) international human rights law, (b) comparative human rights law, (c) transnational social movements, and (d)

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of the culture of the transnational constitutionalist community); *see also* Aoláin, *supra* note 102, at 340 (noting how "women's interests are subsumed by national imperatives and underlying patriarchal interest"); Bradley, *supra* note [108] (discussing the sidelining of the Haitian Revolution of 1791–1804 that won both independence and the end of slavery).

[158] *See generally* Katharine G. Young, *The Canons of Social and Economic Rights, in* GLOBAL CANONS IN AN AGE OF UNCERTAINTY: DEBATING FOUNDATIONAL TEXTS OF CONSTITUTIONAL DEMOCRACY AND HUMAN RIGHTS (Sujit Choudhry, et al. eds., Oxford University Press, forthcoming 2021) (recommending a contender for canonical status in the global canon of constitutional democracy and human rights).

[159] It was notable for scholars that in 2015, the International Law Commission sought to examine the idea of peremptory norms, presenting a systemic approach to "the challenge of placing the legitimacy of international politics *beyond* the contractual power of the state": Claudio Corradetti & Mattias Kumm, *Why* Jus Cogens? *Why a New Journal?*, 1 JUS COGENS 1, 1 (2019). For the myriad connections between constitutional and human rights principles, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1864 (2003) (emphasizing elements of consensus and suprapositive law, with institutional aspects). For broader inquiries into the positive status of international law, *see* Sandra Raponi, *Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law*, 8 WASH. U. JUR. REV. 35, 38 (2015) (noting "reasons to focus more on increasing the perceived legitimacy of international law rather than on developing stronger sanctions").

[160] *See supra* references accompanying note 105.

[161] *See* Sen, *supra* note 121; *cf* Berkowitz, *supra* note 117, at 154.

philosophical approaches to human rights. While these four approaches are hardly uniform, and also blend with each other in ways that are both generative and destabilizing to each, they signal why human rights originalism is so radical, and why its implications for future human rights contests and struggles are so troubling.

### A. INTERNATIONAL HUMAN RIGHTS LAW

First, human rights originalism rejects the traditional sources of international human rights law, even as it embraces the Universal Declaration of Human Rights. These approaches to international law's recognition and interpretation are outlined in art. 38(1) of the Statute of the International Court of Justice of 1945,[162] which shares the same constitutive moment as the Universal Declaration of Human Rights.[163] The sources of international law are premised on international cooperation and consent. They are listed as treaties, custom, and general principles of law, with subsidiary recourse to judicial decisions and the writings of jurists.[164] The realism with which such sources have long been dismissed, at the hands of successive U.S. administrations,[165] sits uneasily with the moral case for U.S. leadership in human rights. When the Commission on Unalienable Rights sidelines the human rights treaties ratified by the United States, such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination, and the International Convention Against Torture, it not only trivializes the recognized sources of human rights to which the United States is formally bound, it also represents a departure from the norms of international dispute resolution and cooperation established contemporaneously with its favored instrument, the Universal Declaration of Human Rights.

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[162] Statute of the International Court of Justice art. 38, ¶ 1.

[163] The ICJ Statute is annexed to U.N. Charter, which, in 1945, reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." U.N. Charter art. 92, pmbl. The U.N. Charter is arguably inseverable from the Universal Declaration of Human Rights of 1948.

[164] Statute of the International Court of Justice art. 38, ¶ 1. The current practice behind this theory of sources, particularly for international human rights law, is canvased by Christine Chinkin, *Sources, in* INTERNATIONAL HUMAN RIGHTS LAW 63, 64 (Daniel Moeckli et al. eds., 3d ed. 2018) (noting the "almost messianic zeal" with which proponents ground their claims within human rights language and "draw on material far beyond the formal sources" of Article 38(1)).

[165] Hakimi, *supra* note 141, at 1298–99 (querying the world "that realists pretend we already have, in which material interests and power are all that matter").

To be sure, the international human rights regime does not operate as envisioned in 1945, and has suffered from spectacular failures of vision and practice; there is a surfeit of insight from both friendly and hostile critics.[166] Nonetheless, in ignoring the traditional sources of international human rights law, human rights originalism departs radically from contemporary approaches to international law and appears to pick and choose from the legacy of the World War II moment. It is also an outlier in relation to the guidelines for international human rights treaty interpretation, in which a good faith interpretation follows the wording, context, object, and purpose of treaties,[167] and allows for subsequent practice in the application of the treaty to shed light on the agreement. This approach reflects the relative brevity of most treaty texts, alongside the difficulty of obtaining state agreement on detailed rules, the complexity of translation, and the challenges of amending what are in many cases relatively old instruments.[168] In addition, human rights originalism spurns the special interpretive methods reserved for human rights treaties. These contemporary approaches allow some evolution in meaning rather than fixedness and constraint. Due to the assessment of such instruments' "constitutional" character, interpretations that respond to their object and purpose—as well as to the effectiveness of the treaty, including in light of societal changes—are preferred.[169] Regional and international treaty bodies, for example, have approached their respective human rights treaties as "living instruments."[170] Human rights originalism ignores this approach to

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[166] Restricted to current U.S. scholarship, one might list critics SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018) and ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS (2014), as particularly prominent. For a helpful overview of current empirical critiques, alongside "a critical analysis of the critiques," see Malcolm Langford, *Critiques of Human Rights,* 14 ANN. REV. L. & SOC. SCI. 69, 70 (2018).

[167] Vienna Convention on the Law of Treaties arts. 31–33, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan 27. 1980). The approach gives primacy to "ordinary meaning"; the *travaux préparatoires* (or legislative history) may supplement, but that remains controversial. Detlev F. Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 EUR. J. INT'L L. 472, 478 (1993).

[168] Chinkin, *supra* note 164, at 68 n.22 (noting their treatment as "dynamic," "living," and "evolutive" instruments); see also ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 46-47 (2017) (observing the advantages and assumptions that accompany the official languages of international law).

[169] *See* John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 1–3 (2010); Malgosia Fitzmaurice, *Interpretation of Human Rights Treaties*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 739, 742 (Dinah Shelton ed. 2013).

[170] *See* Fitzmaurice, *supra* note 169*,* at 765–67 (noting that the practices of both the European Court of Human Rights and the Inter-American Court of Human Rights, as well

interpretation, along with the legal commentary and recommendations that have been formulated as a result.[171]

In its turn, the Universal Declaration of Human Rights, which is not a treaty, has long been treated as a source of customary international law, both within the United States (including under the Alien Tort Statute) and abroad.[172] This highly relevant indicator of its authoritativeness is simply ignored under human rights originalism. Indeed, the corpus of customary international law, which is robustly defended for certain human rights, including the jus cogens norms which recognize crimes against humanity, genocide, slavery, and torture as grave human rights abuses, is barely engaged by the Report of the Commission on Unalienable Rights.[173]

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as treaty bodies interpreting the ICCPR and ICERD, have also focused on the status of human rights treaties as "living instruments," and that the European Court of Human Rights notes the principle of "common values" or "commonly accepted standards"); Daniel Moeckli & Nigel D. White, *Treaties as 'Living Instruments*,' *in* CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 136, 143–54 (Michael Bowman & Dino Kritsiotis eds., Cambridge University Press 2018).

[171] *See* Sarah Cleveland, *Human Rights Treaty Bodies in the Age of Connectivity*, *in* LE SYSTÈME DE PROTECTION DES DROITS DE L'HOMME DES NATIONS UNIES: PRÉSENT ET AVENIR 79, 82 (University of Paris Panthéon-Assas, 2017) 79, 82 (noting "treaty bodies are a vital part of a broader universal human rights ecosystem").

[172] The Universal Declaration of Human Rights' path within the United States has changed through the jurisprudence of the Alien Tort Statute, 28 U.S.C. § 1350. *Compare* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 n.6 ("The Declaration has become the accepted general articulation of recognized rights."), *with* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) ("[T]he Declaration does not of its own force impose obligations as a matter of international law."), *and* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013) ("[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."). For further discussion, see Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 279–80 (2008) (noting that lower courts have differed in their application of *Sosa* and whether to refer to the Declaration as authoritative). The ATS is now accompanied by an explicit presumption against extraterritoriality. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404 (AM. L. INST. 2018); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 DUKE L.J. 1023, 1027 (2015) (contrasting realist versus moral visions of the ATS role).

[173] The Report notes the prohibition on genocide, alongside the prohibition on torture, are jus cogens and therefore a form of international law that no state can set aside; the question of determining customary international law (by state practice and *opinio juris*, for example) is not engaged. COMM'N ON UNALIENABLE RTS., *supra* note 3, at 56. For the opportunity presented by engagement with such questions, on principle, see Corradetti & Kumm, *supra* note 159; Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT'L L. 317, 330–32 (2017) (asserting that conflicts over status can help constitute the

Alongside relevant treaties and the bindingness of custom, the Report also eschews any engagement with the broader sources of international human rights law, particularly the U.N. Special Procedures. These include special rapporteurs and experts appointed by the UN Human Rights Council, which have been described as the "crown jewel" of the human rights system for their capacity to investigate human rights abuses in various countries,[174] as well as for their ability to defy the preferences of states to be immune from scrutiny. Other international institutions, which proceed "on the basis of a composite idea of codification and progressive development"[175] of international law, are similarly ignored. Moreover, the highpoints of global consensus on addressing such intractable problems as environmental degradation or the unequal status of women, often described as "soft law,"[176] are not given any consideration.[177] Instead, the Commission on Unalienable Rights criticizes the procedures that "frequently privilege the participation of self-appointed elites, lack widespread democratic support, and fail to benefit from the give-and-take of negotiated provisions among the nation-states that would be

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international community, and finding parallels with originalism's own quests).

[174] TED PICCONE, BROOKINGS INSTITUTION, CATALYSTS FOR RIGHTS: THE UNIQUE CONTRIBUTION OF THE U.N.'S INDEPENDENT EXPERTS ON HUMAN RIGHTS 1 (Oct. 2010) (noting former UN Secretary General Kofi Annan's description of the UN special procedures as "the crown jewel of the system"). *See generally* THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING (Philip Alston & Sarah Knuckey eds., 2016) (discussing the challenges and opportunities of human rights fact-finding).

[175] Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law*, 55 COLUM. J. TRANSNAT'L L. 343, 360–61 (2017) (quoting Int'l Law Comm'n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, ¶ 147(a) (2012)) (noting the International Law Commission's mandate and other attempts at "soft law"). "Progressive development" is a long-standing approach for international law, and is represented in the UN CHARTER, art. 13(1)(a), which requires the UN General Assembly to initiate studies and make recommendations for this purpose. *See generally* R.Y. Jennings, *The Progressive Development of International Law and Its Codification,* 24 BRIT. Y.B. INT'L L. 301, 301 (1947) (discussing the history of the codification of international law and its development by law-making treaties).

[176] Chinkin, *supra* note 164, at 81–83.

[177] For example, the *Stockholm Declaration and Action Plan for the Human Environment*, U.N. Doc. A/Conf.48/14/Rev.1 (June 5–16, 1972) and the *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26 (Aug 12, 1992) present examples of landmark attempts to grapple with the environment during United Nations Conferences. For further examples, see *Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf.157/23 (July 12, 1993) and *Beijing Report of the Fourth World Conference on Women*, U.N. Doc. A/Conf.177/20/Rev.1 (Sept. 4–15, 1995).

subject to them."[178]

### B. COMPARATIVE HUMAN RIGHTS KAW

A second approach to human rights law rejected by human rights originalism is the rich focus on comparative, rather than international, sources of human rights law.[179] These approaches have garnered interest due to their more regional or national, as well as contextual and arguably postcolonial, approaches to human rights. Scholars working within comparative human rights law deploy the methodologies of comparative law, rather than public international law, and seek similarities and even consensus between different understandings of human rights in domestic settings. Sometimes, the focus is on shared norms and best practices, suggesting universalism or at least harmony within a "common law of human rights"[180] or the outlines of the values of a global constitutionalism.[181] Other times, such comparative enterprises merely seek to unsettle or displace the hegemony of Global North understandings[182] to which the institutions of the United Nations themselves have a complicated relationship, or aim to circumvent the gridlock that prevents the enforcement of human rights under current arrangements.[183]

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[178] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 41. For the observation that the (expert-led) Commission is engaging in some hypocrisy on this front, see Drezner, *supra* note 73.

[179] *See, e.g.*, COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds., Oxford University Press, 2018); Samantha Besson, *Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 279 (Rowan Cruft et al. eds., 2015).

[180] Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 501 (2000).

[181] These outlines take shape through judicial or broader expressive engagement. *See, e.g.*, JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (2012); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

[182] *See* CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., Cambridge University Press 2013). For identification within international human rights, *see* JENSEN, *supra* note 92.

[183] Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 345–47 (2017) (citing the costs of enforcement, the presence of Chinese and Russian hostility to enforcement, and general political infeasibility of human rights enforcement in general, and suggesting that "today—after human rights treaties have been widely ratified—human rights can perhaps be enforced just as well through domestic and transnational legal work as they can through international law")

These comparative human rights approaches have become increasingly significant, in part, due to the "rights revolution" that has taken place in constitution-making across the world, first during decolonization (in which the rights of both the Declaration of Independence and the Universal Declaration of Human Rights were prominently adapted into new constitutional contexts)[184] and later after the end of the Cold War. A common starting point, which works to dislodge any single national approach, is the influence on different national settings of the so-called International Bill of Rights (which includes, not only the Universal Declaration of Human Rights, but the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).[185] The achievements of the European Convention on Human Rights and Fundamental Freedoms also feature heavily,[186] given the maturation of human rights doctrine in that region, as do other select regimes or institutions which represent significant constitutional and doctrinal advances for human rights. It is straightforward to acknowledge that domestic bills of rights, like international human rights instruments, may "perform the same basic function of stating limits on what governments may do to people within their jurisdictions."[187] Prominent among these reference points are the more transnationally informed instruments and courts, such as the Constitution and Constitutional Court of South Africa (and those of Colombia,India, Canada or Germany).[188]

Although comparative, such approaches are more transnational than national. This is because the jurisdictions that are often considered for comparison have adopted outward-looking constitutions, whereby courts are permitted (and sometimes even required) to deploy interpretive techniques that engage with international or comparative law when interpreting the

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[184] *See* ARMITAGE, *supra* note 103; Elkins et al., *supra* note 103.

[185] *See* SANDRA FREDMAN, COMPARATIVE HUMAN RIGHTS LAW 57–59 (2018).

[186] *See id.*; *see, e.g.*, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 218 (2000) (noting greater connections between human rights agreements and national systems under the European Convention on Human Rights and other agreements).

[187] Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EURO. J. INT'L L. 749, 750 (2008).

[188] *See generally* Bonilla Maldonado, *supra* note 182 (discussing the activist tribunals of India, South Africa, and Colombia); SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar García et al. eds., 2015) (examining Latin America, India, South Africa, and Canada); MICHAELA HAILBRONNER, TRADITIONS AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM (2015).

fundamental rights entrenched in domestic constitutions or other laws.[189] Their constitutions have often been created through moments of charged democratic contestation and compromise.[190] When such jurisdictions embark on legislative, rather than Constitutional, statements of human rights,[191] they continue to reach for significant public participation.[192] Moreover, the creation of national human rights institutions has become a significant innovation in connecting international and domestic human rights.[193] These comparative exercises contrast significantly with the more muted process established under the Commission on Unalienable Rights.

Such comparative human rights law has also undergoing rapid change, and may represent the highpoint of constitutionalism in the first decade of the millennium.[194] Now in 2022, there are growing revisionist discourses

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[189] *See* JACKSON, *supra* note 181. For criticism of the self-selectivity of these jurisdictions, see RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (2014).

[190] *E.g.*, HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (1998); Justin Blount, Zachary Elkins, Tom Ginsburg, *Does the Process of Constitution-Making Matter* 31, 42 (Tom Ginsburg, ed., COMPARATIVE CONSTITUTIONAL DESIGN (2012) (charting the involvement of different actors, degrees of public participation and speed and providing conjecture on outcomes). These heightened moments of constitutional participation around bills of rights do not compare favorably with the Commission on Unalienable Rights. Even during its public hearings, the Commission had low attendance and did not, in any substance, update its Final Report from its Draft Report, despite several hundred posted public comments. *See supra* Part I.

[191] GRÉGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER & FRANCISCO J. URBINA, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 2 (2018) (foregrounding the "vital legislative role" in protecting rights).

[192] *See, e.g.*, ATTORNEY GENERAL'S DEP'T, AUSTRALIA, NATIONAL HUMAN RIGHTS CONSULTATION: REPORT (2009) (report of Australian program to enact a human rights statute based on popular consultation); *see also* Lyn Carson & Ron Lubensky, *Raising Expectations of Democratic Participation: An Analysis of the National Human Rights Consultation*, 33 U.N.S.W. L.J. 34, 34 (2010) (assessing the participatory features of the attempt to involve the Australian people in the articulation of important human rights). *See generally* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013) (describing the new Commonwealth model for organizing institutional arrangements in Canada, New Zealand, the United Kingdom, and Australia).

[193] Katerina Linos & Thomas Pegram, *What Works in Human Rights Institutions?* 111 AM. J. INT'L L 628 (2017) (assessing the effectiveness of National Human Rights Institutions); see also Tarunabh Khaitan, Guarantor Institutions, ASIAN J. OF COMP. L. 1, 17-18 (2021) (emphasizing the broad and specific capacities of human rights commissions to guarantee human rights).

[194] *See, e.g.,* Zackary Elkins, *Is the Sky Falling? Constitutional Crisis in Historical*

occurring with respect to national engagements with human rights. Examples of national "human rights appropriation" can be observed in Brazil, India, Russia, Turkey, and elsewhere, which signal the stalling or reversal of previous human rights protections.[195] These appropriative trends, which go beyond the more familiar conservative interpretations of human rights, deploy originalist tropes when they seek to "freeze" the meaning of human rights to the Universal Declaration of Human Rights.[196] It is too early, however, to suggest that human rights originalism has gained a footing outside the United States.

### C. TRANSNATIONAL SOCIAL MOVEMENTS

A third approach also eschewed by human rights originalism is one we might label a social movement approach to human rights, which tracks the transnational human rights movements that "vernacularize" their claims in the language of human rights.[197] These claims are made on states, institutions, and other social agents (such as corporations), and they are often untethered to a methodology of legal sources or to any grievance or legal regime.[198] Eleanor Roosevelt, in drafting the Universal Declaration of Human Rights,

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*Perspective,* 49, 55-57 CONSTITUTIONAL DEMOCRACY IN CRISIS (Mark A. Graber et al. eds., 2018) (depicting a "counter wave" in the rise of support for rights).

[195] *See* Gráinne de Búrca & Katharine G. Young, Introduction to the Symposium on the 'New' Appropriation of Human Rights (Dec. 23, 2021) (unpublished manuscript) (on file with author); Farrah Ahmed, Secularism and Human Rights as Subterfuge In Defence of a Hindu Nationalist Citizenship Regime (unpublished manuscript) (on file with author); Kristina Stoeckl, Traditional values, family, education: The role of Russia and the Russian Orthodox Church in transnational moral conservative networks and their efforts at reshaping human rights (unpublished manuscript) (on file with author). Başak Çalı & Esra Demir-Gürsel, Continuity and Change in Human Rights Appropriation: The Case of Turkey (unpublished manuscript) (on file with author); Marta R. de Assis Machado, Antiabortion Legal Mobilization in Brazil: Human Rights as a Field of Contention (unpublished manuscript) (on file with author); Huckerby & Knuckey, *supra* note 36; Kapya Kaoma, The Interaction of Human Rights, Religion and African Protective Homophobia (unpublished manuscript) (on file with author). *See generally infra* Section III.A.

[196] E.g., De Búrca & Young, *supra* note [201]; Stoeckl, *supra* note [201].

[197] SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 134 (2006). These practices were captured early on by the transnational advocacy networks mapped in MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12–13, 24 (1998) (introducing the influential "boomerang effect" of successful human rights advocacy).

[198] *See, e.g.*, KECK & SIKKINK, *supra* note 197, at 183–84; *see also* Varun Gauri & Daniel M. Brinks, *Human Rights as Demands for Communicative Action*, 20 J. POL. PHIL. 407, 407 (2012).

had envisaged a "grapevine" of human rights knowledge travelling around the world, assisting realization without legal enforcement; however, vernacular approaches typically work in the reverse direction, with the traffic of ideas emerging in different parts of the world and becoming cognizable through their "translation" into the idiom of human rights.[199] Anthropologists have studied these translations, leaving behind their infamous early opposition to human rights and observing human rights practices within different cultures and communities, both outside and inside the "West".).[200] These claims have given a more localized expression to formulations of respect for the values of dignity, freedom, and equality embedded within plural social, cultural, and religious traditions and expectations.

Whether expressing moral claims or political demands, these vernacular approaches are "from below,"[201] and are used by social movements or other organizations who seek to challenge structures of power and privilege using a terminology that translates across different global audiences.[202] Prominent contemporary examples include transnational networks of women's rights movements, which translate and localize a consciousness of rights in order to give voice to previously underrecognized harms and wrongs, such as to challenge the social relations that accept violence against women as natural and inevitable.[203] Other examples include economic and social rights campaigns, such as human rights to health care, housing, water, and sanitation (within and outside the United States).[204] Some campaigns have

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[199] For an update on these ambitions in direct reference to Roosevelt's "curious grapevine" metaphor, see Mark Goodale, *Toward a Critical Anthropology of Human Rights*, 47 CURRENT ANTHROPOLOGY 485 (2006); *cf.* Mark Goodale, *After International Law: Anthropology Beyond the "Age of Human Rights,"* 115 AJIL UNBOUND 289, 293 (2021) (predicting that anthropologists of human rights will entertain an ever-greater separation from legal institutions).

[200] *See generally* MERRY, *supra* note 197 (studying how local cultures appropriate and enact human rights law).

[201] Mark Goodale, *Human Rights* After *the Post-Cold War, in* HUMAN RIGHTS AT THE CROSSROADS 1, 9, 9 n.10 (Mark Goodale ed., 2013).

[202] *See, e.g.*, Jeremy Perelman, Katharine Young & Mahama Ayariga, *Freeing Mohammed Zakari: Rights as Footprints*, *in* STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman eds., 2011).

[203] *See generally* MERRY, *supra* note 197 (arguing that, since gender-based violence is rooted in social hierarchies, human rights law about gender violence will be effective only if framed in local terms).

[204] *See* Perelman, Young & Ayariga, *supra* note 202 (campaign on right to health against

become so prominent that they have succeeded in effecting changes to international law, such as through the Convention on the Rights of Persons with Disabilities of 2006 (drafted with U.S. assistance)[205] or through the Declaration on the Rights of Indigenous Peoples of 2007.[206] These institutional signposts of success sometimes have little payoff in particular countries.[207] It is not surprising, then, that social movement approaches often have little regard as to whether the UN human rights system is weakened or strengthened as a result of their campaigns.[208]

Some might argue that human rights originalism is itself propelled by a transnational social movement, this time with right-leaning rather than left-leaning ambitions for change.[209] There are certainly movement features. First,

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user fees in Ghana); JoAnn Kamuf Ward & Catherine Coleman Flowers, *How the Trump Administration's Efforts to Redefine Human Rights Threaten Economic, Social, and Racial Justice*, 4 HRLR ONLINE 1, 9 (2019) (relevance of campaigns on right to water and sanitation in United States); Martha F. Davis, *Introduction: Framing Economic, Social, and Cultural Rights*, 4 NE. U. L.J. 315, 317 (2012) (economic and social rights campaigns within the United States); *see also* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young ed., 2019) (economic and social rights campaigns outside the United States).

[205] 2515 U.N.T.S. 3; *see* Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. ON C.L. & C.R. 167, 173, 185 (2008) (noting a "fuller dimension of participatory justice . . . in realizing the right of persons with disabilities to live in the world").

[206] G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 173–74 (2014) (noting that "[i]ndigenous peoples are now using the laws and language of human rights, shaped by indigenous experiences"). For another example, discussing the connections between the Declaration of the Rights of Peasants and a transnational movement, see Priscilla Claeys, *The Rise of New Rights for Peasants: From Reliance on NGO Intermediaries to Direct Representation*, 9 TRANSNAT'L LEGAL THEORY 386 (2018); *see also* LA VIA CAMPESINA, DECLARATION OF RIGHTS OF PEASANTS: WOMEN AND MEN (2009), https://viacampesina.org/en/wp-content/uploads/site
s/2/2011/03/Declaration-of-rights-of-peasants-2009.pdf (calling for an international convention on the rights of peasants).

[207] For the broad outlines of debates on the effectiveness of human rights, and about conditions which support effectiveness, see, for example, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY (2017).

[208] *E.g.*, Goodale, *supra* note 201, at 4.

[209] For the observation that "rival actors, even those who glorify parochial cultures or national traditions" enjoy cross-border connections, moral motives, and grassroots support, as with their "progressive" counterparts, *see* CLIFFORD BOB, THE GLOBAL RIGHT WING AND

human rights originalism is similarly indifferent, even dismissive, of international institutions[210] and of the rights revolutions of contemporary constitutional reforms. The Commission's Report applies a principle of subsidiarity that encourages the articulation of human rights at the local level (however, it remains controversial, even under the vernacular approach, to resolve the responsibility for rights realization, instead of the articulation of claims, at that most local level).[211] Second, human rights originalism seeks to shift mainstream human rights understanding and practices—this time in the direction of religious freedom. This shift is instantiated through consciousness-raising, education, and even the drafting of a special instrument of support—the Geneva Consensus Declaration.[212] The affinity between this goal and certain social movements, within and outside of the United States, is described below. Yet there are other features quite unlike the transnational human rights movements described above. Unlike the grassroots movements for women, racial minorities, colonized peoples, and others made vulnerable by prevailing social or legal relations, it is difficult to view the nationalist vision and originalist approach as the rights recognition claims of those formerly left out.[213] In purporting to speak for "American" values and resurrect an original meaning of rights, this approach is itself distinctive. But, more importantly, its close links with the Trump

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THE CLASH OF WORLD POLITICS 11 (2012). For U.S. study, *see* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

[210] *E.g.*, COMM'N ON UNALIENABLE RTS., *supra* note 3, at 41.

[211] *Id.* at 33 (asserting the aim "to allocate the relative responsibilities for the realization of human rights, from the most local forms of community through states to international associations"); *see also id.* at 37, 55 (asserting "deference to the decisions of democratic majorities in other countries" and maintaining "decisions ought to be made at the level closest to the persons affected by them"). This assertion is also controversial in international human rights law, despite the application of a general principle of what has been called "social subsidiarity," with antecedents in Catholic social doctrine, and a territorial principle of subsidiarity, with roots in federalism, in different contexts, including European law. *See* Gerald L. Neuman, *Subsidiarity*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 360, 360 (Dinah Shelton ed., 2013).

[212] *See infra* note 386 and accompanying text (noting where support for the Geneva Consensus Declaration was reached).

[213] This is despite the Commission on Unalienable Rights' promise to do so: COMM'N ON UNALIENABLE RTS., supra note 3, at 57 ("The application of existing rights to persons from whom they have been wrongfully withheld is particularly to be welcomed."). For a recent attempt to confine social movements analysis to solidarity with left wing movements, see Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (presenting a method of research design). The ability of this method to spotlight the distinctiveness of progressive tactics is beyond the scope of this Article to assess.

Administration and a powerful faction of the Republican Party make it difficult to separate human rights originalism from partisan, as well as nationalist, contests.[214] Constitutional originalism is itself an integral part of the Republican Party agenda—political scientists tracing the term have found it referenced in every platform from 1992 to 2016 (apart from 2004) alongside the commitments of the Federalist Society, conservative academics, and the conservative bar.[215] To the extent that human rights originalism engages multilaterally, it departs from traditional human rights allies to create a new cohort of supporters.[216] These features, too, are discussed below.

### D. PHILOSOPHICAL FOUNDATIONS

The three approaches to human rights described above are all connected to features of positive law (in descending strength of commitment), insofar as that inquiry internalizes both facts and norms. And yet human rights originalism grasps for a more philosophical, rather than practical, justification. Indeed, it is in the fourth approach to human rights, which focuses on moral rights rather than legal rights, that we detect the radicalness of the Report. This fourth approach, which is itself distant from the legal–doctrinal or practical advocacy orientations described above, engages in reasoned elaboration of the values that purport to represent the rights of the human person. Under this approach, human rights are independent of the

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[214] Despite the diversity of viewpoints expressed within invited presentations, the public meetings of the Commission had drawn the ire of a large number of human rights organizations. *See, e.g.,* The Ctr. Just. & Accountability, *supra* note 33; *see also* Rob Berschinski & Reece Pelley, *Why We Oppose the Pompeo Commission on Unalienable Rights' Draft Report*, JUST SEC. (July 30, 2020), https://www.justsecurity.org/71750/why-we-oppose-the-pompeo-commission-on-unalienable-rights-draft-report/ [https://perma.cc/6L4T-EQPC] (noting Pompeo's reported dismissal of public comments, which is addressed in the coalition letter).

[215] Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021); Charles R. Kesler, *Thinking About Originalism*, 31 HARV. J.L. & PUB. POL'Y 1121, 1121 (2008) ("If the Federalist Society is associated with a single word, it is 'originalism.'").

[216] The parties to the *Geneva Consensus Declaration*, for example, disturb the ratcheting effect presupposed by the constructivist accounts of human rights, which point to acculturation with likeminded states. *See infra* note 386 and accompanying text; *cf.* RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013) (arguing that "acculturation is an overlooked, conceptually distinct social process through which state behavior is influenced").

prevailing positive laws (and moral conventions) of a society.[217] For many, this legal agnosticism is essential for human rights to function as critical standards, and while international human rights law has the benefit of standing outside a nation's domestic laws (which may be violative of human rights and which must then be a source of criticism), international law itself can be subject to the ethical critique.[218] Moreover, this approach stands above the political demands of any movement or constituency.

In some ways, due to the focus on "non-positive" rights and morality, human rights originalism comes closest to a philosophical approach to human rights, rather than the international, comparative, or transnational movement approaches to human rights surveyed above. Nevertheless, the portrayal of such universal human values as freedom, dignity, or equality as inherited by its originalist sources—rather than justified on their own terms—is an outlier within this large field. Philosophical approaches to human rights often debate different foundations, such as natural rights or consent,[219] or different methods of inquiry, such as transcendental or comparative reference points.[220] Human rights originalism paradoxically offers a naturalistic account of human rights (as innate, unalienable, and unrelinquishable) as gaining legitimacy based on their chosen national sources. This use of history invites misleading answers to the questions that ethical theories of human rights should illuminate: "about their grounds, their scope, and the manner in which valid claims of human right[s] should guide action."[221] The adoption of the two sources to which the United States can claim direct authorship—the Declaration of Independence and the Universal Declaration of Human Rights—is also philosophically parochial, in a way that the global philosophical discourse around human rights has been attempting to abandon since even before the Universal Declaration of Human Rights.[222] The attempt

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[217] For insistence on this separation, although acknowledging that moral rights can inform law, see AMARTYA SEN, THE IDEA OF JUSTICE (2009).

[218] This separation has been endorsed by those seeking to keep intact reasoned human rights elaboration from the doctrinal shortcomings of international human rights law. *See* John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167, 1167 (2019).

[219] For a demarcation of these and other approaches, see CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 49–96 (2009).

[220] SEN, *supra* note 217, at 15–18 (presenting the advantage of comparative accounts).

[221] BEITZ, *supra* note 219, at 51.

[222] *See, e.g.*, THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 59–76 (2d ed. 2008).

to proclaim a rigorously universal understanding of the human rights of anybody, anywhere was central to the Universal Declaration of Human Rights.

It is on the philosophical plane that the diagnosis of "human rights originalism" presented in this Article is most vulnerable to objection. Those challenging my linkage of unalienable rights to human rights via originalism may argue that the Commission achieved something else entirely different from human rights originalism—let's call it human rights conservatism, or anti-secular human rights. In this sense, the convergence of Pompeo's selective use of history with a conservative social agenda is proof of the power of American conservatism; originalism's apparent new home in human rights is merely the inevitable result of motivated reasoning.[223] But while the convergence seems obvious—and certainly compatible with the diminishment of progressive victories around gender equality, for example, and the elevation of property and religion under constitutional originalism,[224]—it does not address a larger question. That question is why the Commission pursued, not natural rights as first suggested by Pompeo's announcement,[225] but the human rights originalism described above.

Evidence that the efforts are less originalist than conservative lie in Mary Ann Glendon's own approach. When embarking on her own scholarly history of the Universal Declaration of Human Rights, she rejected such a method: at least in 2002, she sought to "'know' the Universal Declaration—not for the sake of 'originalism,' but because, in a world marked by homogenizing global forces on the one hand and rising ethnic assertiveness on the other, the need is greater than ever for clear standards that can serve as a basis for discussion across ideological and cultural divides."[226]

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[223] Fallon, Jr., *supra* note 91; *see also* Richard Primus, *Is Theocracy Our Politics?,* 116 COLUM. L. REV. ONLINE 44, 57 (2016) (suggesting "motivated reasoning" over "purposeful duplicity" to account for a certain convergence).

[224] *See infra* Section III.B.1–2.

[225] U.S. Dep't of State, *supra* note 1.

[226] GLENDON, A WORLD MADE NEW, *supra* note 25, at xix (quoting Eleanor Roosevelt, *The U.N. and the Welfare of the World*, 47 NAT'L PARENT-TEACHER, June 1953, at 14, 16) (endorsing Eleanor Roosevelt's view of the UN itself, as "a bridge upon which we can meet and talk"); *see also* Mary Ann Glendon, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95, 112 (Amy Gutmann ed., Princeton Univ. Press 1997) (comparing a certain "chaos" in the U.S. field of constitutional interpretation, as opposed to German civil law, on account of a predicted "selective deployment of textualism, structuralism, and originalism" alongside departures from text and

A good indication of the distance between Mary Ann Glendon's earlier project and that of Secretary Pompeo's Commission is her endorsement of the Universal Declaration as "a living document to be reappropriated by each generation" rather than "a monument to be venerated from a distance."[227] It is beyond the scope of this Article to explore whether human rights originalism, as akin to its constitutional counterpart, is a precursor to a distinctive conservative theory of rights.[228] At the very least, as Mattias Risse has argued, the candid application of a conservative social agenda to human rights—which includes the strengthening of religious liberties, and the disentangling of human rights from international oversight—is disciplined by the reciprocity requirements of human rights argument, namely public reason.[229] Such reciprocity allows human rights to operate as a bridge between conservative and progressive world views; yet originalism shortcuts the circuit. By cleaving contemporary and international human rights instruments from American human rights reasoning (which neither conservative nor most contemporary religious interpretations of human rights themselves warrant), originalism disavows the validity of contemporary views.

The four approaches to human rights recognition and interpretation—those of public international law, comparative human rights law, transnational social movements, and political philosophy—are of course not as neatly divided as I have presented them. Human rights enforcement paradigms often meld the first and second, for example, when seeking to interpret the international legal sources of human rights,[230] while NGO

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precedent).

[227] GLENDON, A WORLD MADE NEW, *supra* note 25, at xvii.

[228] Notable within these debates, but not addressed in this Article, is the staging thesis of Adrian Vermeule, *Integration from Within,* 2 AM. AFF. 202, 202 (2018) (suggesting a turn from the depoliticized governance of liberalism to a substantive politics of the good).

[229] *See* Mathias Risse, *On American Values, Unalienable Rights, and Human Rights: Some Reflections on the Pompeo Commission*, 34 ETHICS & INT'L AFF. 13, 19–20 (2020); *see also* Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 RATIO JURIS 63, 63 (2000) (arguing that the justification rests "on the condition that the regime's prevailing human-rights interpretations are made continuously available to effective, democratic critical re-examination").

[230] *See e.g.*, Neuman, *supra* note 159, at 1864–80 (distinguishing among three shared features of national constitutional rights and internationally protected human rights); Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart,* 21 EUR. J. INT'L L. 967, 981 (2010) (arguing for an analytical framework that asks whether the "international order comprises structures which effectively fulfill . . . *functions* which

advocacy, often pragmatically oriented toward successful outcomes, is alert to the strengths and weaknesses of these approaches in different contexts.[231] Human rights originalism, on the other hand, stands apart from the primarily "legal" approaches, and is distanced from what is usually understood as activist practice as well as the terms of philosophical debate. Perhaps human rights originalism, seen as a political practice, comes closest to transnational social movements—insofar as it is deployed by vibrant right-wing movements with transnational reach and strong partisan associations within the United States which have previously dismissed human rights.[232] Although there is significant disagreement within these constituencies, it is worth exploring how human rights originalism has weaponized rights, rewarding particular constituencies and seeking to defeat, rather than merely disagree with, others.

## III. THE WEAPONIZATION OF HUMAN RIGHTS

The very novelty and radicalism of human rights originalism calls to mind the instrumentalization—and indeed, weaponization—of human rights, that has become more pronounced in recent years. Rights have, of course, been "instruments, rallying cries, tools of persuasion . . . often weapons" since America's Founding.[233] Indeed, the prevalence of "rights talk" in American political culture was often seen more as a misadventure in individualism and litigiousness than as a pathway to dignity and equality.[234] Yet in recent years,

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overcome the defects of a primitive social system); Young, *supra* note 172, at 1110 (observing that human rights enforcement remains "sporadic and often ad hoc in the absence of a centralized legal system at the international level"). For models of domestic human rights implementation, see Linos & Pegram, *supra* note 193, at 639 (noting the importance of engagement with both civil society and international organizations).

[231] *See. e.g.*, Perelman et al., *supra* note 202 (presenting evidence of pragmatic and context-specific engagement with certain human rights principles and certain regimes).

[232] See BOB, *supra* note xx, For the documentation of links between religious and nationalist groups, from within and outside the United States, see KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM (2019). For a discussion of the growth of conservative legal networks blending into conservative *religious* legal networks, in the U.S. and abroad, in "catch-up" games with secular NGOs, see CHRISTOPHER MCCRUDDEN, LITIGATING RELIGIONS: AN ESSAY ON HUMAN RIGHTS, COURTS, AND BELIEFS 49–56 (2018).

[233] DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 10–11 (1987).

[234] *Compare* GLENDON, *supra* note 128 (criticizing American "rights talk" as overly simplistic to the detriment of solving complex, long-term problems), *with* Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, *in* LEGAL RIGHTS: HISTORICAL AND

this profoundly political approach to human rights has escalated into their use in pursuit of illiberal, and/or aggressive purposes, as tactics to "batter weaker groups, smash minority ideas . . . [or] hold on to power when previously marginalized or repressed groups assert different views on social, economic, and political relations."[235] As Clifford Bob has described, using a realist typology, the uses of human rights in political conflict have expanded, as organizations and movements have deployed them aggressively for various ends, such as to mobilize support, mask their motives, suppress and wedge political opponents, and overturn laws.[236] This perspective, which extends a longstanding domestic literature on the politics of rights,[237] opens up challenging questions that are frequently obscured from moral or legal defenses of human rights:

> "Which should triumph: Reproductive rights or the right to life? The right to property or the right to work? The rights of criminal suspects or the rights of victims? The contention and compromises surrounding these and numerous other issues underline their political aspects, despite their obvious moral content."[238]

Understanding the weaponization of rights forces a drastic about-face to traditional human rights approaches, which emphasize their abilities to transcend politics, promote progress and peaceful reform, and protect the vulnerable.[239] And yet the instrumental deployment of human rights has long been predicted by human rights critics, from Bentham to Marx.[240] For present purposes, a calibrated assessment of the weaponization of rights opens up a fruitful set of questions about human rights originalism that might otherwise be overlooked. In this Part, I map the plausible market for human rights

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PHILOSOPHICAL PERSPECTIVES 87 (Austin Sarat & Thomas R. Kearns eds., 1997) (comparing "rights talk" with "needs talk" to reject an abandonment of the former).

[235] CLIFFORD BOB, RIGHTS AS WEAPONS: INSTRUMENTS OF CONFLICT, TOOLS OF POWER 2, 14 (2019) (depicting, under a realist typology, the "rallying cries," "deployments" and "counters" of rights-based political conflicts).

[236] *Id.* at 14.

[237] *E.g.*, STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2004); RICHARD THOMPSON FORD, UNIVERSAL RIGHTS DOWN TO EARTH (2011); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997).

[238] BOB, *supra* note 235, at 24.

[239] *See, e.g.*, MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (Amy Gutmann ed., 2001); LOUIS HENKIN, THE AGE OF RIGHTS (1990).

[240] See the echoes of Bentham and Marx, respectively, in POSNER, *supra* note 166 and MOYN, *supra* note 166.

originalism, both here and abroad, as well as the substantial departures that are made from traditional human rights advocacy. In answering these questions, I do not mean to be exhaustive: the point is to map and detect the parallels between "original" originalism in U.S. constitutional law and its new application to human rights, and to outline the substantive changes to the meaning of human rights that it heralds.

### A. THE MARKET FOR HUMAN RIGHTS ORIGINALISM

The appeal of originalism within the U.S. constitutional setting has many features.[241] As a prolific literature documents, constitutional originalism in its variety of forms offers a substantive connection to the landmarks of U.S. history and a coded access point for conservative ideas, as well as a substantive methodology for constitutional adjudication.[242] Indeed, as Jamal Greene has described for U.S. constitutional theory, such appeals often become less explicable by careful scholarly unpacking and criticism, but more aptly captured by the metaphors of markets, advertising, and branding.[243] In the constitutional space, "originalism" is sold as a credential for public law decision-making that appeals to the public in predictable ways—which Greene identifies as simplicity and populism, alongside a nativism that coincides with the features of nationalism and exemptionalism described above.[244]

This market for originalist constitutional theory transfers to human rights in both obvious and non-obvious ways. First, originalism helps to simplify the human rights discourse by reducing it to two landmark texts, discounting the elaborate infrastructure of human rights that have since developed in the legal, practical, or philosophical settings described above. Second, human rights originalism depicts these contemporary human rights developments as unruly and incoherent, in ways that differ from constitutional rights and help introduce a distinctive justification for American control. And third, human rights originalism emphasizes, and yet paradoxically diminishes, the religious, classically liberal, and civic republican dimensions of America's constitutional and political traditions. All of these positions reward and

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[241] *See supra* Part I.

[242] As exemplary of a vibrant literature, see PURCELL, *supra* note 15; Berman, *supra* note 44; Post & Siegel, *supra* note 17; Sawyer *supra* note [16].

[243] Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659, 708 (2009) ("Notwithstanding its many academic critics, originalism continues to sell.").

[244] *See id.* at 708–14; *supra* Section I.C–I.D.

mobilize certain constituencies and dismiss others. It is helpful, before returning to the peculiar novelty of these interpretive positions within the human rights domain, to describe them in turn.

### 1. Simplicity and Populism

Both constitutional and human rights originalism are simplified and accessible modes of rights argumentation. Just as constitutional originalism is easy to explain to people outside of the legal academy, human rights originalism offers a framework for human rights which is digestible in layperson and non-expert terms. As one commentator has riffed, the Commission's great contribution lies in "making human rights readable";[245] that is, "a distinctly American document elaborating the American human rights tradition for all audiences."[246] Instead of the "intramural squabbles over definitions, terms, and dates" entertained "in universities and bureaucratic circles," "which has had minimal impact on human life,"[247] the American human rights tradition is offered as a simple portrayal of first principles, now pried opened for public consumption. This simplicity, according to this proponent, should take prominence over more complicated "minutiae" of human rights meaning, such as choice of terminology.[248]

For all of its appeal, simplicity often comes at the cost of nuance, and it is worth taking note when that cost is borne by groups vulnerable to discrimination in the enjoyment of their human rights. In pushing beyond this complexity, human rights originalism purports to bypass the careful psychological, cultural, and historical explorations given to the subject, such as why terminology matters in the U.S.[249] Moreover, the proffered simplicity disregards an even greater swathe of human rights complication: the matters of serious human rights concern expressed within the United Nations and regional human rights systems. The treaties and the special procedures of the

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[245] Starkman, *supra* note 36, at 158.

[246] *Id.*

[247] *Id.* at 158–59.

[248] *Id.* at 158 (noting a controversy over the why the Commission had not used the word "racist" instead of "racial" in describing the United States' past). Starkman goes on to casually misspell the name of Breonna Taylor, the victim of an arbitrary police shooting while asleep in her home, as "Breonna Tucker." *Id.* at 160. For further commentary on the implications of human rights originalism for race, see *infra* Section III.B.4.

[249] *See, e.g.*, Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (exploring the subtle and incessant offenses that occur within American racism).

United Nations system are set to one side, and an apparently clear return to historical moments of American pride and influence is put in its stead. As with constitutional originalism, the appearance of simplicity coincides with a populist rejection of the views of "experts" and "elites."[250] Just as constitutional originalism has appropriated the rhetoric of judicial restraint, so too does human rights originalism create an impression of popular decision-making by the people themselves: this time wrested, not from the nonelected, unaccountable, federal judiciary,[251] but from the nonelected, unaccountable, United Nations system. In other words, human rights as unalienable rights promises greater connections with American revolutionaries and post-World War II institution builders than with the United Nations bureaucrats and NGO advocates who revolve around the present system. Following the pathway of Justice Scalia's own rejection of the relevance of international and comparative law,[252] international authority and the weight of opinion and conscience it represents are removed from the analysis.

The connections between simplicity and populism are well-studied, if controversial: as political scientists Pippa Norris and Ronald Inglehart have defined it, populism lends itself to "a style of rhetoric reflecting first-order principles about who should rule, claiming that legitimate power rests with 'the people' not the elites. It remains silent about second-order principles concerning what should be done, what policies should be followed, what decisions should be made."[253] Such a mode of governance readily combines with authoritarian politics, which emphasize "boundaries between insider and outsider groups," and loyal obedience to leaders.[254] Hence, populism offers

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[250] *See* COMM'N ON UNALIENABLE RTS., *supra* note 3, at 41.

[251] *See* Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986) (originally delivered as a speech by U.S. Attorney General Meese to the American Bar Association on July 9, 1984); Thomas, *supra* note 16, at 7 ("[Originalism] places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean."); *see also* Greene, *supra* note 243, at 712 (discussing views of Justices Scalia and Thomas as a "rhetorical move [that] is ancient and effective"). For comparators, see, for example, Thio, *supra* note 105, at 560, 570 (applying borrowed rhetoric of juristocracy as grounds to endorse originalism in Singapore).

[252] *See* Dorsen, *supra* note 12.

[253] PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM 4 (2019).

[254] *Id.* at 72 (canvassing particularly Trump's America and Brexit, as well as Austria,

an exclusionary notion of "the pure people" (Americans in touch with American traditions) in contrast with "the corrupt elite"; populists thus claim to speak for the will of "the people," which should not be constrained.[255] By inviting a homespun version of originalism to replace international human rights engagement, this mode of discourse rejects pluralism (a rejection which is arguably most central to populism)[256] and invites the simplistic support for unalienable rights in its place.

One might object that a populism engaged with human rights discourse is preferable to one removed from it. Populists who distance themselves from human rights have often disparaged and disdained their protections, preferring to render human rights defenders as "outsiders" in the strong-man tropes described above.[257] And yet a populist appropriation of human rights—as American originalism—may also be dangerous. Such tropes can threaten the human rights of excluded or unpopular groups, such as women or immigrants, or racial, gender or religious minorities. And as Gerald Neuman has noted, populism can also pose danger for members of the political majority, as leaders entrench themselves in power and undermine checks and balances.[258] These internal dynamics have flow-on effects internationally, in the loss of support for the international human rights regime.[259]

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Italy, the Netherlands, Poland, and Switzerland).

[255] Cas Mudde, *Populism: An Ideational Approach*, *in* THE OXFORD HANDBOOK OF POPULISM 29 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

[256] *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016). For a broader approach, see MARK TUSHNET & BOJAN BUGARIČ, POWER TO THE PEOPLE: POPULISM IN AN AGE OF CONSTITUTIONALISM (2021) (disputing that a rejection of pluralism is inevitable under populism).

[257] *See* Mills & Payne, *supra* note 143, at 399, 412; Klarman, *supra* note 144, at 40; AMNESTY INT'L, MY JOB IS TO KILL: ONGOING HUMAN RIGHTS VIOLATIONS AND IMPUNITY IN THE PHILIPPINES, AI Index ASA 35/3085/2020 (2020), https://www.amnesty.org/en/documents/asa35/3085/2020/en/ [https://perma.cc/VZ5T-5M2T] (documenting the repeated incitements to violence articulated by populist President Duterte of the Philippines). *See generally* Philip Alston, *Human Rights under Siege: How to Respond to the Populist Threat Facing Human Rights*, 25 SUR INT'L J. ON HUM. RTS. 267 (2017) (suggesting a shift in focus for the human rights movement to respond to populism).

[258] Gerald L. Neuman, *Populist Threats to the International Human Rights System*, *in* HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES 1, 7 (Gerald L. Neuman ed., 2020).

[259] *See id.*

Indeed, these losses may quickly cascade as populists gain power in the very countries that had previously played key roles in the defense and maintenance of the international system.[260] These losses may create opportunities for certain transnationally connected groups, such as those organized to advance religious liberty or private property,[261] just as they may create challenges for others, such as those advocating for women's rights, LGBTQ+ rights, and racial justice, whether in the United States itself or in other jurisdictions. Trends that reflect a populist reappropriation of human rights extend to a backlash against the European Convention on Human Rights in the United Kingdom, Austria, Hungary, Italy, Poland, Russia, Switzerland, and Turkey, as well as to a backlash against international human rights agreements in India and parts of Africa.[262] Notwithstanding differences between them, many protagonists of backlash endorse a simplistic and nationalist version of human rights.

### 2. Proliferation and Control

Alongside the offer of simplicity and popular expression for human rights, another selling point for human rights originalism is the way it purports to answer a contemporary challenge for human rights, that comes with its success as an "ethical lingua franca" around the world.[263] This is the idea that what counts as human rights has become unruly to the point of meaninglessness, a perspective furthered by the Report of the Commission

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[260] *See id. See generally* CONSTITUTIONAL DEMOCRACY IN CRISIS, *supra* note [199] (depicting the rejection or hijacking of the institutions of human rights and constitutional democracy, on economic, cultural, religious, and nationalist grounds).

[261] There is of course a wide array of such networks, but examples are given in Stewart, *supra* note 232 (documenting religious nationalist movements); BOB, *supra* note 232 (describing a "global right wing"); and Stoeckl, *supra* note [199] (outlining the features of "transnational moral conservative networks").

[262] *See* De Búrca & Young, *supra* note 195, at 2. Such appropriations occur with acknowledged contradictions: Frédéric Mégret, *Human rights populism*, Open Global Rights (April 5, 2021) https://www.openglobalrights.org/human-rights-populism/ (contrasting, for example, a pro-gay rights agenda coexisting with a virulently anti-Muslim populism in the Netherlands, and a feminist appeal in France by the same party serving anti-immigrant populism). The *Independent Human Rights Act Review* in the United Kingdom offers a further national vision of "British the most recent https://www.gov.uk/guidance/independent-human-rights-act-review (December 2021).

[263] For the "lingua franca" diagnosis, see John Tasioulas, *The Moral Reality of Human Rights*, *in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 75, 75 (Thomas Pogge ed., 2007).

on Unalienable Rights,[264] and one which human rights originalism answers by the apparent discipline of selectivity of certain historical texts. In establishing the Commission on Unalienable Rights, Secretary of State Pompeo noted the proliferation of rights and their ad hoc quality, calling for an authoritative ranking of "unalienable" rights over their contemporary, and seemingly less authoritative, articulations.[265]

The concern about "new" human rights or the "proliferation" of existing ones is longstanding to the discourse, and its negative connotations are made clear by the terms that are applied: "rights inflation,"[266] "overreach,"[267] "ballooning,"[268] or "hypertrophy."[269] Indeed, with every advance of the nature and scope of human rights, particularly for previously excluded groups, concerns have been raised about "quality control."[270] The concerns are variously lodged about the integrity and legitimacy of existing rights guarantees and systems,[271] the ambiguity or indeterminacy that becomes apparent when the normative content of rights seems open-ended,[272] or the compliance gaps that occur when states selectively choose between different rights.[273] The arguments, long cast against the recognition of economic,

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[264] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 48.

[265] U.S. Mission Holy See, *Secretary Pompeo on Unalienable Rights and the Securing of Freedom*, U.S. EMBASSY TO THE HOLY SEE (July 24, 2020), https://va.usembassy.gov/secretary-pompeo-on-unalienable-rights-and-the-securing-of-freedom/ [https://perma.cc/ANT2-8HLH] ("[W]ithout this grounding our efforts to protect and promote human rights is unmoored and, therefore, destined to fail. . . . [T]he proliferation of rights is part of the reason why this report is so important.")

[266] IGNATIEFF, *supra* note 239, at 90. Some of the same terms are collected in Brandon L. Garrett, Laurence R. Helfer & Jayne C. Huckerby, *Closing International Law's Innocence Gap*, 95 S. CAL. L. REV. __ (forthcoming 2021).

[267] HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH xvii (2019).

[268] JAMES GRIFFIN, ON HUMAN RIGHTS 212–13 (2008).

[269] *See* POSNER, *supra* note 166, at 56.

[270] Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 607 (1984).

[271] POSNER, *supra* note 166, at 137 (arguing that the proliferation can make human rights "seem frivolous and thus throw the enterprise into disrepute").

[272] *See* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 113 (2008).

social, and cultural rights as human rights,[274] are gaining new ground now as environmental rights—particularly human rights that address climate change—become a critical new focal point for human rights claims.[275] Although unprecedented, harms from new diseases, extreme temperatures, destructive weather, and chronic mental health impacts[276] are still captured by the fundamental obligations between a state and those people within its territory or effective control. These include the duties to prevent foreseeable harms and cooperate internationally in the face of global challenges and emergencies.[277]

The issue of the changing knowledge about, and experiences of, human rights and their violations should engage the question of how to evaluate, rather than control, such claims. As early as 1984, Philip Alston argued that

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[273] *See* Wuerth, *supra* note 183, at 280–81 (describing "fundamental changes" that arose from proliferation, including "mak[ing] it harder to generate compliance with many norms of international law"); Garrett et al., *supra* note 269

[274] *See, e.g.*, Maurice Cranston, *Are There Any Human Rights?*, 112 DAEDALUS 1, 1–17 (1983); Rosa Freedman & Jacob Mchangama, *Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates*, 38 HUM. RTS. Q. 164, 190–91 (2016).

[275] Indeed, as the Commission on Unalienable Rights began its meetings in September 2019, a landmark complaint was lodged before the UN Committee on the Rights of the Child under the Third Optional Protocol to the Convention on the Rights of the Child involving climate activists Greta Thunberg of Sweden and Alexandria Villaseñor of the United States, as well as fourteen other child petitioners. Petition Submitted Under Article 5 of the Third Optional Protocol, Sacchi v. Argentina, United Nations Convention on the Rights of the Child (Sep. 23, 2019) https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf [https://perma.cc/47N2-YWYG]. For parallel domestic trends in several jurisdictions, see Jacqueline Peel and Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?* 7 TRANSAT'L EN'T. L. 37 (2017).

[276] Petition, *supra* note 275, at ¶¶ 3, 5, 11 (describing the American Psychological Association's recognition of 21st century disorders implicated by climate change and loss).

[277] *Id.* at 48–52. For a lengthy examination of the "new" human rights related to climate change, see BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS AND CLIMATE CHANGE: CURRENT STATUS AND FUTURE PROSPECTS (2018). In October 2021, the Child Rights Committee issued a ruling that Argentina, Brazil, France, Germany, and Turkey had effective control over the activities that had, via emissions, contributed to the reasonably foreseeable harm to children, but found the petition inadmissible for failure to exhaust legal remedies. Press Release, United Nations Human Rights, Officer of the High Commissioner, UN Child Rights Committee Rules that Countries Bear Cross-Border Responsibility for Harmful Impact of Climate Change (Oct. 11, 2021) https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27644&LangID=E [https://perma.cc/29SD-FXLF].

human rights dynamism and expansion were not the problem; rather it was "the haphazard, almost anarchic manner in which this expansion is being achieved"[278] that was the real cause for concern. The right to tourism or the right to disarmament should not be welcomed, Alston argued; instead, transparent criteria were needed and procedures should be established before new human rights could be proclaimed.[279] In defense of the stability and legitimacy of international human rights law,[280] Alston would require centralized and transparent United Nations procedures before new rights were declared.[281] It is striking that Secretary Pompeo adopted the same diagnosis of "ad hoc" rights, even as he proposed a drastically unilateral solution of control.

Recall Secretary Pompeo's concern.[282] In an opinion piece published in the *Wall Street Journal* announcing his Commission, he condemned the unfolding of "new categories of rights":

> [W]hen politicians and bureaucrats create new rights, they blur the distinction between unalienable rights and ad hoc rights granted by governments. Unalienable rights are by nature universal. Not everything good, or everything granted by a government, can be a universal right. Loose talk of "rights" unmoors us from the principles of liberal democracy. . . . The commission's mission isn't

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[278] Alston, *supra* note 270; *see e.g.*, Lorna McGregor, *Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1281, 1285 (2019) (endorsing the prioritization of "interpretative and adaptive techniques . . . in order to ensure that [international human rights law] remains relevant and resilient to the needs of changing societies").

[279] *See* Alston, *supra* note 270, at 614–18.

[280] *Compare* Section II.A, *with* Section II.C.

[281] *See* Alston, *supra* note 270, at 620. The expansion is overtly connected to new harms to people as well as observable gaps in international law. For some pertinent examples, among many, see THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS (Malcolm Langford & Anna F.S. Russell eds., 2017) (documenting the rise of international and comparative jurisprudence on the right to water and sanitation); Garrett et al., *supra* note 269 (presenting a detailed proposal for a new right to claim innocence, addressing these objections); see also Daniel Kanstroom & Jessica Chicco, *The Forgotten Deported: A Declaration on the Rights of Expelled and Deported Persons*, 47 N.Y.U. J. INT'L L. & POL. 537 (2015) (considering a declaration to protect the rights of deported person under human rights law).

[282] Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, WALL ST. J. (July 8, 2019), https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448.

> to discover new principles but to ground our discussion of human rights in America's founding principles.[283]

Assessed against the long arc of human rights history, such statements bear an ironic resemblance to the speeches of Crown loyalists on the eve of the American Revolution,[284] by seeing the proliferation of new rights, rather than the articulation of new burdens on human dignity or equality, as the problem. Yet it is a sign of the success of the unfinished construction of human rights that those previously excluded from conceptions of rights, such as women, children, those with disability, and those subjected to racial or other gender-based discrimination, now reinvoke the language of human rights.[285] Misunderstanding this success finds, again, some parallels with the Trump Administration's "Make America Great Again" agenda, in venerating a supposedly ordered tradition of liberty within America before the messiness of the seemingly progressive present. And thus, human rights originalism is sold, not simply in order to control proliferating rights, but as an obstacle to the wellsprings of progressive momentum occurring internationally.

This is not to say that originalism brings any greater order to rights interpretation. The variants within constitutional originalism are notorious—"old" and "new" versions and "semantic" and "living" originalist perspectives give rise to vastly different articulations of constitutional rights.[286] Even aside from these variations, coherence is the intellectual

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[283] *Id.* The Commission, on the other hand, recommended the United States be "open to, but cautious in, endorsing new claims of human rights," without giving serious analysis to any of the new claims of the last half century. COMM'N ON UNALIENABLE RTS., *supra* note 3, at 57.

[284] *See, e.g.*, SHEILA L. SKEMP, BENJAMIN AND WILLIAM FRANKLIN: FATHER AND SON, PATRIOT AND LOYALIST 176–77 (1994) (reproducing William Franklin's Speech to the New Jersey Assembly on Jan. 13, 1775: noting that "All that I would wish to guard you against, is the giving any Countenance or Encouragement to that destructive Mode of Proceeding which has been unhappily adopted in Part by some of the Inhabitants in this Colony, and has been carried so far in others as totally to subvert their former Constitution."). A standard retelling of the Revolution contrasts the British loyalist hostility to new freedoms with the patriots' causes of nationalism and idealism. For a striking complication to that view, however, including both a shared claim to the "inheritance of the rights of Englishmen," as well as an inverse claim to freedom on the part of Black loyalists' seeking escape from the culture of slavery, see Edward Larkin, *Loyalism*, *in* THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION, 291, 296, 304–05 (Edward G. Gray & Jane Kamensky eds., 2013).

[285] For successful articulation, see *infra* Part III.C.

[286] *See, e.g.*, BALKIN, *supra* note [46]; *see also* Laurence H. Tribe, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 65 (Amy Gutmann ed., 1997) (arguing contrary to Justice Scalia's view of the role of structure in Constitutional interpretation);

sacrifice of constitutional originalism, given its reliance on historical certitude.[287] Nonetheless, by reducing the sources of human rights analysis to a favored, exceptional period, human rights originalism purports to both order rights and—controversially—rank them according to their proximity to an unalienable status.[288] The rights ranked highest are not necessarily coherent, including the early American expressions of religious liberty and, more surprisingly, property.[289] Freedoms of speech and assembly, habeas corpus, and protections against tyranny are given surprisingly short shrift. Those dismissed as mere policy (those pronouncing gender equality, for example) are lowest, as is made clear below.

### 3. The Constitutional Rights–Human Rights Nexus

Despite the professed distance between American constitutional rights and international and comparative law,[290] human rights originalism introduces surprising connections between unalienable rights and U.S. constitutional law. Of course, broader approaches within American constitutionalism have long addressed the genealogical and conceptual nexus between human rights and U.S. constitutional rights:[291] connections that appealed to the less originalist-inclined members of the Supreme Court.[292]

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Mary Ann Glendon, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 96 (Amy Gutmann ed., 1997) (observing that "selective deployment" of originalist modes of interpretation lead to interpretive "chaos"); Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 116 (Amy Gutmann ed., 1997) ("If judges can appeal to a presumed legislative intent to add to the plain meaning of "speech" and "press," . . . why can they not appeal to the same legislative intent to allow a priest to enter the country?"). *Compare* Barnett, *supra* note 15, at 623–25 (rejecting Brest's argument that determining the Founders' intent, and thus originalism, was unworkable), *with* Brest, *supra* note 48, at 144 (likening originalism to "questing after a chimera"), and Berman *supra* note 44, at 2 ("That original intents and meanings matter is not enough to render originalism true.").

[287] *See* Baude, *supra* note 16, at 2352; *see* Barzun, *supra* note 22, at 1335.

[288] *See* COMM'N ON UNALIENABLE RTS., *supra* note 3, at 12, 38.

[289] *See id.*, at 13.

[290] *See* Dorsen, *supra* note 12, at 519, 521. One type of rejection is relevant to the Commission—the rejection of foreign-law-as-natural-law, mounted by Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 85 (2005) (noting that foreign citation "marks Justice Kennedy . . . as a natural lawyer. The basic idea of natural law is that there are universal principles of law that inform—and constrain—positive law.")

[291] *See* Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 405 (1979).

[292] That viewpoint hearkens back to a presently almost unrecognizable era, at least in

For many jurisdictions, such links are express and facilitated by interpretive practices, as mentioned above.[293] But human rights originalism innovates around this nexus in ways that have strong import for U.S. constitutional doctrine, from looming domestic disputes around religious freedom, private property, women's and LGBTQ+ rights, and racial equality and racial justice. These implications require a fuller unpacking than is possible within this Article. They are not to be found on the face of the Report of the Commission on Unalienable Rights, which resists any running constitutional doctrinal commentary. Nonetheless, the Report endorses certain features of America's constitutional tradition, including the originalist reading of the right to bear arms[294] and dismisses others, such as the constitutional jurisprudence that is concerned with what it labels "social and political controversies,"[295] namely the protection of abortion, same-sex marriage and affirmative action.

The nexus is assisted first by the fact that the Commission is not a court. Human rights originalism, like its constitutional counterpart, rejects the ability of courts, as well as international treaty bodies or other procedures, to provide a special access point to human rights meaning beyond their original understanding. Paradoxically, however, the Commission seeks to assign such a role to itself. Using originalism as its guide, this roster of qualified individuals is supposed to give final voice to the American rights tradition, inspiring neither litigation nor bureaucracy in the process.[296] In so doing, the Commission markets one of the main selling points of constitutional originalism—its apparent resolution of constitutional law's counter-majoritarian difficulty—by purporting to constrain judges to the previous democratic expressions of the people.[297] Yet the originalist investigation into

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U.S. constitutional law and scholarship. For a summary, see generally, JACKSON, *supra* note 181 (providing a comparative constitutional law overview of approaches to transnational law); Tushnet, *supra* note 109 (proposing that U.S. courts can "sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere"); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997) (noting Americans' reluctance to engage with the original understanding of non-U.S. texts).

[293] *See supra* Section II.B.

[294] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 18.

[295] *Id.* at 24.

[296] Recall, Mary Ann Glendon herself has criticized this tradition. *See generally* GLENDON, *supra* note 128.

[297] *See* Greene, *supra* note 243, at 664–65; PURCELL, JR., at 25, *supra* note 15; Colby, *supra* note 46.

unalienable rights arguably empowers judges committed to constitutional originalism,[298] by expanding the stock of interpretive sources, this time through the Declaration of Independence and the Universal Declaration of Human Rights.

This substantive nexus requires another innovation. This is the Report's division between unalienable/negative rights and institutionalized/positive rights.[299] That division hypes the long-standing distinction between so-called negative and positive rights in U.S. constitutional law. It is justified on the idea that the U.S. Constitution contains a series of prohibitions on government and classical restraints on state action (for example, "Congress shall make no law . . . ."[300]), rather than positive guarantees. Yet positive rights (which are better termed, at least for this observer, as the "positive obligations" that are needed to secure all basic human rights[301]), are an enduring feature of the U.S. constitutional tradition. As Emily Zackin indicated in her study of U.S. state constitutional guarantees in education, workers' rights, and environmental protection,[302] such rights were actively asserted, and institutionalized, through highly operative state laws.[303] One need not go so far as to claim that *all* rights are positive;[304] rather, one can accept that fundamental rights entail both negative duties of restraint and positive duties of action, and that these are well-theorized in human rights law.[305] The notable typology of duties to respect, protect, and fulfil rights that is applied to civil, political, economic, social, and cultural rights, captures more fully the levers for securing human rights in the context of a state-based, law-based, regime.[306] In brief, duties to respect rights emphasize the

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[298] *See* text accompanying note 16.

[299] COMM'N ON UNALIENABLE RTS., *supra* note 3.

[300] U.S. CONST. amend. I.

[301] *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 138 (1980).

[302] EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

[303] *Id.* at 67 & n.3 (describing, as early as 1780, the duty with respect to the provision of education set out in the Massachusetts Constitution).

[304] STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999) (emphasizing the positive infrastructure required to enforce all legal rights).

[305] *See* Alan Gewirth, *Are All Rights Positive?*, 30 PHIL. & PUB. AFFS. 330, 326 (2001) ('all rights are *not only* positive; they may also be negative in part.'").

[306] *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED 69–70 (2008). This has been

government's own restraint; duties to protect emphasize the safeguarding against human rights violations by third parties, and duties to fulfil emphasize the government's active infrastructure of provision.[307] That said, the priority given to negative duties to respect rights makes sense as a doctrine of judicial restraint.[308] It has become steadily less credible as an explanation of rights' ethical importance,[309] or legislative relevance,[310] and indeed United Nations human rights doctrine explicitly calls for the "indivisibility" of rights and emphasizes that states have duties to both positively act and negatively restrain their actions to secure rights.[311]

Although framed as an endorsement of judicial restraint, the so-called negative/positive division invited by human rights originalism actually empowers courts to override the legislative and executive branches in support of the primacy of unalienable rights. Indeed, those professing an originalist approach to constitutional interpretation in the Supreme Court may give less credence to precedent,[312] or other forms of judicial restraint;[313] positions amplified by the observed increases in ideological alignment between

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adapted from Shue's own work. *Id.* at 69 ("[Shue] suggests instead that for every right, 'there are three types of duties, . . . duties to avoid, duties to protect, and duties to aid").

[307] *Id.* at 69 –70.

[308] *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 UNIV. OF CHI. L. REV. 864, 886 (1986); *see also* KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 178-9 (2012) (noting that the backdrop of private and public law can complicate the positive and negative distinction)

[309] *See* Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFFS. 315, 315 (2004).

[310] WEBBER ET AL, *supra* note [197].

[311] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) ("All human rights are universal, indivisible and interdependent and interrelated."); *see* James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 HUM. RTS. Q. 984, 984, 992 (2008).

[312] For the most prominent example, *see* South Carolina v. Gathers, 490 U.S. 805, 825 (1989) Scalia, J., dissenting ("it is the Constitution which [a judge] swore to support and defend, not the gloss which his predecessors may have put on it"); *see further* Greene, *Selling Originalism*, *supra* note [xx], 689 (observing cases in which "originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake".)

[313] Empiricists have attempted to map the distance between doctrines of restraint and actual deference, to precedent or Congress: Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 377 (2008).

Justices and political parties.[314] Given the preference of hierarchy between rights, and the endorsement of limited government, the divide between negative and positive rights supports a selective version of judicial supremacy which enforces duties on the government to cease regulation, rather than duties that actively require government to secure rights (the so-called duty to protect, under the typology mentioned above). When the Supreme Court overturned the D.C. gun control statutes in *D.C. v. Heller*,[315] for example, it was venerated as enforcing the individual right to bear arms rather than undermining the positive duty of the government to regulate third parties in order to protect rights.[316] And yet under contemporary understandings of human rights, a reasonable regulation of the sale, possession, and use of firearms is deemed protective of the human rights to life and security.[317]

This recasting of judicial activism and judicial restraint on the part of the Commission on Unalienable Rights is one reason that human rights originalism may be adopted by members of the Supreme Court of the United States open to further reinterpreting the "unalienable rights" of the Constitution. Although this Article is not the place to explore the potential

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[314] Conditions which have been described as "neo-Lochnerian" for the protection of rights: Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Cal. L. Rev. 1703, 1740 (2021) *see further* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 301 (2016) (noting greater ideological conformity between Justice and the party of the nominating president).

[315] 554 U.S. 570 (2008).

[316] For an exploration of the UN's Programme of Action to control the illicit trade in small arms and light weapons, see BOB, *supra* note 235, at 109, 133 (noting the parallel spread of this agenda in UN fora, including the National Rifle Association's complaint of "'the UN Plan to Destroy the Bill of Rights, . . . America's first freedom' . . . the 'birthright of all humankind'" (quoting WAYNE LAPIERRE, THE GLOBAL WAR ON YOUR GUNS: INSIDE THE UN PLAN TO DESTROY THE BILL OF RIGHTS 226 (2006))). For examination, see JAN ARNO HESSBRUEGGE, HUMAN RIGHTS AND PERSONAL SELF DEFENSE IN INTERNATIONAL LAW (2017).

[317] United Nations International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; *see* Rep. of the High Comm'r for Human Rights, Human Rights and the Regulation of Civilian Acquisition, Possession and Use of Firearms, ¶¶ 14–35, U.N. Doc. A/HRC/32/21 (Apr. 15, 2016) (referencing human rights to liberty and security of the person, as well as women's rights, children's rights, and prohibition of torture offenses). This fact could not have been lost on Secretary of State Pompeo, who himself was subject to criticism—including by the U.S. State Department's Office of Inspector General—for evading arms exports controls. *See* Diane Bernabei & Beth Van Schaack, *State Dept. Inspector General Report: A Troubling Message on Arms Sales*, JUST SEC. (Aug. 26, 2020), https://www.justsecurity.org/72188/state-dept-inspector-general-linick-saudi-arms-sales/weapons trading [https://perma.cc/2XMV-AA6Y].

doctrinal arguments at any length, contemporary American constitutional challenges around religion, equal protection, property, and reproductive rights all touch on this recasting of unalienable rights as human rights.[318] Consider the following reframing of recent Supreme Court decisions, which, when assessed under contemporary international human rights law, implicate the pressure to balance between (1) the protection of freedom of religious belief with the rights of people not to be discriminated against on the grounds of sexual orientation,[319] and (2) the protections of free assembly, free speech, and labor rights against the protection conferred on property.[320] Similarly, high-profile cases for the coming Term will see the Supreme Court considering issues which implicate (3) the state's duties to protect the human rights to liberty and security of the person, as well as women's rights, children's rights, and the prohibition of torture, in regulating the use of firearms,[321] and (4) the state's duties to protect women's sexual and reproductive rights.[322] To be sure, there is no express doctrinal nexus between

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[318] Again, it is worth observing that the two tracks, although assigned "acoustic separation," may not always be kept apart. *See, e.g.*, Berman, *supra* note 44, at 27. This separation itself rests on the subtleties of originalist method. *See e.g.*, Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution*, 89 S. CAL. L. REV. 637, 638 (2020) (arguing that the Declaration presents "a rich data source," but not a direct source, for the Constitution's original meaning).

[319] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (unanimous holding that a city's conditioning of its foster care contract with Catholic Social Services on the organization's inclusion of same-sex couples as foster parents violated the free exercise clause of the First Amendment); *see further* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (referencing the "unalienable" right to religious exercise in authorizing employers' exemption from providing contraceptive coverage) Additionally, the need to balance religious freedom with the state's duty to protect the rights to life, security of the person, and rights to health care is implicated in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and other COVID-19 public health emergency cases, where the Court's majority enjoined restrictions that they held would treat secular activities more favorably than religious exercise.

[320] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (holding six to three that a California regulation granting union organizers a "right to take access" to the property of an agricultural employer to solicit support constituted a per se physical taking under the Fifth and Fourteenth Amendments, requiring compensation).

[321] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 818 Fed. Appx. 99 (2d Cir. 2020) *cert. granted*, 141 S. Ct. 2566 (2021) (addressing the question as to whether the State of New York's denial of an application for concealed-carry licenses for self-defense violated the Second Amendment). *See Brief of Amnesty International USA and the Gun Violence And Human Rights Initiative of the Whitney R. Harris World Law Institute as Amici Curiae In Support Of Respondents*, No. 20-843, at 3 ("The adoption of legislation and other government measures to minimize gun violence are fundamental to the fulfillment of this obligation). *See further supra* notes 289–290.

international human rights law and U.S. constitutional law, at least under the present consensus.[323] Yet there are political and cultural stakes to be gained or lost in what human rights are understood to require, and whether unalienable rights amount to constitutional rights. All four cases are situated around major consensus points within international human rights law, which are drastically different from human rights originalism. These substantive departures are described below.

### B. THE SUBSTANTIVE DEPARTURES OF HUMAN RIGHTS ORIGINALISM

This brings us to the most obvious weaponization of human rights, the elevation of two rights—freedom of religion and, to a more ambiguous extent, freedom of property—in which America's approach has been a notable outlier.[324] One would expect, given the usual treatment of the two landmark texts under study, that the more lasting of America's human rights legacy—the U.S. conception of self-government—the "consent of the governed"[325] and its contribution to the multilateral pledge—"a common standard of achievement"[326]—would be considered paramount. Instead, human rights originalism introduces distinctive understandings about religious freedom and property,[327] that are favored by the conservative right.[328] Neither are expressly mentioned in the Declaration of Independence. And while both rights to religious freedom and property are expressed in the

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[322] *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 268–269 (5th Cir. 2019), *cert. granted*, (2021) (addressing the question as to whether a Mississippi law that prohibits elective abortions after the fifteenth week of pregnancy, except in cases of health emergencies or fetal abnormalities, is constitutional). *See Brief of United Nations Mandate Holders as Amici Curiae in Support of Respondents,* No. 19-1392 (Sept. 20, 2021) at 33 (UN experts submitting that "overturning nearly 50 years of constitutional protections for women's and girls' reproductive rights would contravene the United States' international human rights obligations.").

[323] Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (detecting, some 15 years ago, instances of monism in the then-constituted U.S. Supreme Court); JACKSON, *supra* note 181 (noting varieties of engagement in different constitutional systems).

[324] The outlier status is not restricted to these rights, given other departures from what has been described as "generic constitutional law." *See* Versteeg & Law, *supra* note 106; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005).

[325] THE DECLARATION OF INDEPENDENCE (U.S. 1776)

[326] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[327] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 13.

[328] Post & Siegel, *supra* note 17 ("Originalism expresses the need to ward off an unremitting stream of dangers, whether experienced as threats to religious beliefs, sexual mores, gender roles, family, or property"); Greene, *supra* note 243.

Universal Declaration of Human Rights, their interpretation is subject to debate. Moreover, neither of these rights enjoy the same recognition in subsequent international human rights instruments. After the Universal Declaration, decolonization and feminist movements worked to unsettle the import, or at least conception, of each, by noting tensions with rights to equality and non-discrimination, including for religious minorities and women, and to economic, social, and cultural rights, such as rights to social security, education, or health care. These movements, alongside the more commonly reported Cold War standoff between the United States and the Soviet bloc, dislodged any notion that religion or property could enjoy such prominence. It is worth exploring the originalist treatment of each in some detail. This Part therefore assesses the departures from human rights understandings represented by the originalist emphasis on (1) religious freedom and (2) private property, and by the deemphasis of (3) women's and LGBTQ rights, and (4) racial equality.

1. Religious Freedom

For religious rights, human rights originalism embraces an emphasis on religious liberty within America's founding and the centrality of religious observance within its current traditions. It gives voice to the threats on religious freedom experienced by the earliest European settlers and—curiously for a human rights assessment—privileges Protestant Christianity, alongside civic republicanism and classical liberalism, as the three "stand out" traditions that formed and nourished "the American spirit."[329] In one sense, this focus on religious liberty is unsurprising. A majority of the members of the Commission on Unalienable Rights were experts on religious liberty, including its prominent Chair. Advocates of religious freedom have made a longstanding—and legislatively supported—contribution to U.S. approaches to human rights, with a known record of assistance for those who have been persecuted for their religious beliefs abroad.[330]

And although religious approaches to human rights are often cosmopolitan, plural, and informative for debates about matters of "conscience, dignity, reason, liberty, equality, [and] tolerance," among other

[329] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 8.

[330] International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401–6483 (establishing Commission on International Religious Freedom); *see also* G.A. Res. 36/55, art. 2, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 13, 1981). For a study of these activities, see ANNA SU, EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER (2016).

concepts,[331] the human rights originalist approach is far less open. Critics have suggested that the Commission on Unalienable Rights favors a "First Freedom" hierarchy of religious liberty over the more balanced approaches to religious freedom of the Universal Declaration's Article 18.[332] As for its originalism, which has long been favored by the American evangelical movement for the interpretation of religious texts,[333] its commitment to text and constraint remains a contested methodology within different religious traditions and within factions of different religions. Its attractiveness to certain religious movements is discussed below, and its apparent fixture of rights-meaning has troubling implications for the debates on issues of religious freedom and social equality,[334] which have been polarized along partisan lines.

Religious freedom, of course, is a crucial human and moral value, and allowing room for spiritual and religious discourse works to the advantage of the public square.[335] And yet, this elevation of religious liberty must be

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[331] John Witte, Jr. & M. Christian Green, *Introduction*, *in* RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 1, 16 (John Witte, Jr. & M. Christian Green eds., 2012) (referencing conceptual resources in Judaism, Christianity, Islam, Buddhism, Confucianism, Hinduism, and Indigenous Religions, as well as "new balances between individual rights and social responsibilities [and] between the freedoms of humans and the needs of nature"); *cf.* BOAVENTURA DE SOUSA SANTOS, IF GOD WERE A HUMAN RIGHTS ACTIVIST x (2015) (suggesting a postsecularist conception of human rights, as a "source of radical energy toward counterhegemonic human rights struggles").

[332] Judd Birdsall, *'First Freedom' vs. Article 18: Will Biden Demote Religious Freedom in U.S. Foreign Policy?*, CHRISTIANITY TODAY, (Nov. 17, 2020), https://www.christianitytoday.com/ct/2020/november-web-only/religious-freedom-biden-trump-ministerial-rights-article-18.html [https://perma.cc/S24X-DSAZ]. The author states that the Trump administration has pushed the First Freedom view and the Commission on Unalienable Rights "added considerable intellectual heft for this view." For attention to the inconsistencies of constitutional originalism with the defense of religion, and the privileging of traditional monotheistic ones, see PURCELL, JR., *supra* note 15, at 110–14 and ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

[333] Greene, *supra* note 43, at 7 (noting the commingling of religion with constitutional originalism in the world's most religious Western democracy). For comparative observations, *see* RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010) 218-225.

[334] *See, e.g.*, Paul Horwitz & Nelson Tebbe, *Religious Institutionalism—Why Now?*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 207, 209 (Micah Schwartzman et al. eds., 2016). For a discussion on the intertwinement of religion with developing cultural and legal backdrops, see Mark Tushnet, *Social Movements and the Constitution*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION (Mark Tushnet et al. eds., 2015).

[335] As an example of the evolving approaches to human rights within secular

understood in the context of the appropriation of religion, often insidiously and for exclusionary purposes, in line with the populist and nationalist trends described above.[336] Indeed, human rights and faith-based movements must often counter a "repoliticization" of religion.[337] Commentators focused on this issue have drawn parallels between the endorsement of religious liberty in the Commission on Unalienable Rights and the populist display of Christian symbols in state schools or courtrooms in Romania and Italy, and the privileging of Hindu practices over those of religious minorities in Prime Minister Narendra Modi's India.[338] Where a "majority religion is assumed to be naturally inclusive and encompassing of the ideas of tolerance and freedom," deeper exclusionary impulses can lie.[339] Leaving to one side the connections between religion and nationalist movements that have been exploited by extremist groups within the United States, it is clear that the political practices of originalism can be more radical than their legal manifestations.[340] Indeed, it is an indication of both the appeal and danger of the "unalienable rights" rallying cry that many Christian evangelical groups were moved to publicly disavow the white Christian nationalists who campaigned under that banner during the siege of the Capitol on January 6, 2021.[341]

While religious liberty is an important human right, it is hardly the most

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environments, see the prominent exchange in 2004 between philosopher Jürgen Habermas and then-Cardinal Joseph Ratzinger (now Emeritus Pope Benedict XVI). For a discussion of the Catholic Church's embrace of the human rights discourse, see MCCRUDDEN, LITIGATING RELIGIONS, *supra* note 232, at 25–28, 33.

[336] Susanna Mancini & Michel Rosenfeld, *Nationalism, Populism, Religion, and the Quest to Reframe Fundamental Rights*, 42 CARDOZO L. REV. 463, 535–37 (2021).

[337] *Id.* at 465.
[338] *See id.* at 475 & n.43, 507–11; Ahmed, *supra* note [195].
[339] *Id.* at 510.

[340] *See* Post & Siegel, *supra* note 17, at 563; *see also* Baude, *supra* note 16, at 2362 (describing conceptions of originalism in politics or the popular press as offering "more radical theories"). There can, however, be seepage between the two: *see* Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 Roger Williams U. L. Rev. 430, 435 (2021) (describing the legal consequences of rewarding those who wish to "'return' the nation and its policies to its Christian roots").

[341] Ed Pilkington, *Evangelical Leaders Condemn Role of Christian Nationalism in Capitol Attack*, The Guardian (Feb. 24, 2021, 11:52 AM), https://www.theguardian.com/world/2021/feb/24/evangelical-leaders-christian-nationalism-capitol-riot [https://perma.cc/4NQE-A9AK] (noting open letter of over 100 evangelical leaders against the insurrection, and video footage at those seeking "to stand up for our God-given unalienable rights").

besieged.[342] The violence and harassment that takes place in the name of religion is often in service of other ends; it is a terrible irony that highlighting the religious dimension of these conflicts can fortify those seeking to politicize sectarian difference.[343] Moreover, as recent empirical explorations about constitutional rights suggest, organized religion (and particularly those in the majority in particular countries) is often able to take advantage of protected rights more than individuals or minority religions can do, giving religious freedom an advantage, in many constitutional contexts, over freedoms of the press or other civil and political protections.[344] The strength of a religious organization is itself bolstered through the ties of loyalty that they create, the social, moral, psychological, and identity-based benefits that they confer, and the mobilizational effects of physical church spaces, practices of worship, and charismatic leaders.[345] These facts are not lost on scholars of contemporary human rights law, who find "[f]reedom of religion or belief . . . one of the most sensitive and most debated rights today."[346] Numerous commentators are thus aware that anti-discrimination protections for religious beliefs, or protections against theocracy, may enjoy far weaker domestic protection than religious liberty.[347] While this Article is not the place to canvas all of these issues, it remains noteworthy that human rights originalism does not address this comparative learning and these distinctions.

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[342] Andrew Koppelman, *What Kind of Human Right is Religious Liberty?*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 103 (Rex Ahdar ed., 2018); *cf.* Robert Audi, *Religious Liberty Conceived as a Human Right*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 407, 418 (Rowan Cruft et al. eds., 2015) (pointing to the depth of felt harm to one's sense of identity as a link to why religion is special).

[343] Koppelman, *supra* note 342, at 106–07 (noting oppressions can occur for "'ethnic, racial, economic, political, postcolonial and national reasons,'" and highlighting that the religious dimension can fortify those politicizing sectarian differences (quoting ELIZABETH SHAKMAN HURD, BEYOND RELIGIOUS FREEDOM: THE NEW GLOBAL POLITICS OF RELIGION 48, 116 (2015) (discussing examples from Myanmar, Syria, and elsewhere)).

[344] ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 231 (2020).

[345] *Id.* at 240–42.

[346] Merilin Kiviorg, *Dangers of the Changing Narrative of Human Rights: Why Democracy and Security Need Religious Freedom*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 331, 332 (Rex Ahdar ed., 2018) (discussing protections within the European Convention on Human Rights, article 9, and Russia).

[347] *See* CHILTON & VERSTEEG, *supra* note 344, at 233–34; FREDMAN, *supra* note 185, at 401–56; Tarunabh Khaitan, *Two Facets of Religion: Religious Adherence and Religious Group Membership*, 34 HARV. HUM. RTS J. 231, 233–234 (2021).

2. Private Property

For property rights, the approach of human rights originalism is susceptible to several readings, within the Report itself and in the rhetoric of Secretary Pompeo's amplified presentation of it. At least in its treatment of the Declaration of Independence, human rights originalism elevates a Lockean focus on property as the means to secure one's life, liberty, and happiness, and a justification for a constitutional ethos of small government.[348] This contested view of property, although certainly campaigned for by prominent backers in the United States, including in parallel with religious claims,[349] stands apart from multiple other (ethical and religious) conceptions of property rights. These departures are obvious with respect to constitutional protections of property in comparative jurisdictions, which tie support for property to democratic wellbeing or the protection of vulnerable groups.[350] Although less obvious, they also overlook certain historical disagreements with the early U.S. understandings.[351]

At the same time, the Commission's endorsement of private property is modified by the Report's embrace of the economic and social rights of the

[348] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 13.

[349] *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015) (observing that *Lochner* ideals of private ordering and redistribution resistance have been incorporated into religious freedom doctrine, which threatens the regulatory state).

[350] *See generally* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006) (noting the range of proponents for constitutional property, including neoliberal and progressive perspectives which make the case for either economic or democratic wellbeing). Such a range is shared in international human rights law. *See* José E. Alvarez, *The Human Right of Property*, 72 U. MIAMI L. REV. 580, 662 (2018) (noting that pressures from the equality guarantees of instruments like the Convention on the Elimination of All Forms of Discrimination Against Women or the American Convention on Human Rights, focus interpretations on property rights' impact on vulnerable groups, including women, indigenous peoples, minorities, or those living with disability); Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[351] There is too wide a range of literature by historians to reference here, going well beyond originalism's infamous "law office history." For indicating multiple possible origins of the unalienable right of "the pursuit of happiness," some of which emphasize a deliberate rejection of property within the "glittering generality" of the phrase, *see* Carli N. Conklin, *The Origins of the Pursuit of Happiness,* 7 WASH. U. JURISPRUDENCE REV. 195, 198 (2015) (suggesting Jefferson's rejection of property might have been tied to discomfort with slavery) and ALLEN, *supra* note [71] (examining and reconsidering the meaning of the words of the Declaration of Independence in order to emphasize conceptions of equality).

Universal Declaration of Human Rights. In several passages, the Report reinforces the New Deal administrative state, noting the influence of Franklin D. Roosevelt's proposed "second Bill of Rights" on the Universal Declaration of Human Rights, and its incorporation of rights to a good education, a decent home, medical care, work, and "'adequate protection from the economic fears of old age, sickness, accident, and unemployment.'"[352] These rights are referenced in the Report, not as "new", but as "drawing out the latent implications of unalienable ones."[353] This recognition goes at least as far as previous administrations with respect to economic and social rights,[354] and assuages the initial fears that the Report would exclude them altogether.[355]

The originalist elevation of property is consequently far more ambiguous than its support for religious liberty. This ambiguity applies not only to the distance between the Report and Secretary Pompeo's presentation of it,[356] but also to passages of the Report itself. Indeed, it is hard to reconcile the Report's celebration of "the right of private property [in] a sphere generally off limits to government"[357] with its originalist embrace of the Universal

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[352] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 21. The "second Bill of Rights" was announced in President Franklin Delano Roosevelt's January 1944 State of the Union Address, with, as the Report recognizes, "close analogues in the 1948 Universal Declaration." *Id.* For the difference in terminology, see G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 71 (Dec. 10, 1948).

[353] COMM'N ON UNALIENABLE RTS., *supra* 3, at 21.

[354] *Compare* Michael H. Posner, Assistant Sec'y, Bureau of Democracy, Human Rights, and Labor, *The Four Freedoms Turn 70*, Address to the American Soc. of Int'l Law, Ritz Carlton Hotel, Washington, D.C. (Mar. 24, 2011) https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm [https://perma.cc/59CP-J85A] ("As President Obama has made clear, it is this same belief in human dignity that underlies our concern for the health, education, and wellbeing of our people."); with Cyrus R. Vance, Address by Secretary of State Vance, Human Rights and Foreign Policy, Athens, Georgia (April 30, 1977) https://history.state.gov/historicaldocuments/frus1977-80v01/d37 [https://perma.cc/2T89-T9M9] ("President Carter said, 'Because we are free we can never be indifferent to the fate of freedom elsewhere.'").

[355] Ward & Flowers, *supra* note 204, at 9–10 (2019) (expressing initial fears and noting discrepancies in commentary of the Heritage Foundation on the status of such rights).

[356] Clifford D. May, *Mike Pompeo's Fight for Unalienable Rights,* WASH. TIMES (July 21, 2020), https://www.washingtontimes.com/news/2020/jul/21/mike-pompeos-fight-for-unalienable-rights/ [https://perma.cc/6U4C-KGY8] (quoting approvingly of Secretary Pompeo's selective endorsement of the "foremost" rights of property and religious liberty).

[357] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 13.

Declaration of Human Rights and its signature protection of "freedom from want." At the very least, this attempt to draw support for both visions minimizes the ambitions of the post-World War II period, just as it disregards contemporary approaches.[358] A duly originalist approach to the Universal Declaration of Human Rights' economic and social rights would have to embrace the ambitious spirit of international cooperation created at that moment.[359] Instead, the Report cites only the national infrastructure for economic and social rights, making their realization dependent on the "organization and resources of each State."[360] This contrasts heavily with the originally understood meaning of a "social and international order"[361] established between states to realize economic and social rights with cross-national design and support.[362]

The Report's approach to economic and social rights, which is to reduce their international realization to the small-scale aid delivered by the United States to select countries,[363] is thus evasive of the burdens of originalism, just as it ignores contemporary understanding. In this latter respect, extraterritorial obligations remain contested; nonetheless their importance has grown alongside the reach of globalization.[364] For the U.S., as for other countries, economic and social rights impact trade, aid, and sanctions decisions, and in principle require the U.S. to cooperate to address such cross-border issues as pandemics, environmental hazards, or the global market's

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[358] *See infra* Part III.B.4.

[359] For example, through the Bretton Woods institutions charged with powerful interventionist planning and support, and the redistributions seen as necessary to secure international peace and security.

[360] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 34 (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 22 (Dec. 10, 1948)).

[361] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 28 (Dec. 10, 1948).

[362] Commentators have drawn attention to this latter article in order to ground cosmopolitan duties to address global poverty, for example: THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 76 (2d ed. 2008).

[363] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 36.

[364] *See* ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 5–6 (2011) https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [https://perma.cc/9HUW-7YCE]; *cf.* Young, *supra* note 172 (defending the rejection of universal jurisdiction under the Alien Tort Statute and assessing the future of human rights litigation in U.S. courts).

effect on safe working conditions or economic inequality.[365] This diminishment, overt with respect to U.S. foreign policy, also applies to the Report's omission of the economic and racial justice movements within the United States, whose claims put necessary pressure on the unrestricted enjoyment of private property and limited government.[366]

At the same time as the Report elevates religion and property, it also paradoxically extols the "indivisibility" of all rights.[367] In so doing, the Report only half-commits to the long-standing United Nations doctrine that human rights are "indivisible, interdependent and interrelated".[368] A fuller acknowledgment of indivisibility would have acknowledged overlap in the dignity, freedom, and equality secured by such rights, as well as the inevitability of some conflict between different rights. The right to religious freedom, for example, can clash with the rights of women to education or reproductive health care, or the rights of those in the LGBTQ+ community.[369] The right of property can clash with the rights of the poor to food, health care, housing, or water.[370] One approach is to interpret such rights restrictively, so

[365] *Id.* See further Ralph Wilde, *Dilemmas in Promoting Global Economic Justice through Human Rights Law*, in THE FRONTIERS OF HUMAN RIGHTS: EXTRATERRITORIALITY AND ITS CHALLENGES 127, 131, 172 (Nehal Bhuta ed., 2016) (noting greater "norm-clarification than norm-enforcement" in recent efforts to delineate extraterritorial obligations, as well as the omission of deeper historical roots of present inequalities).

[366] *See* Davis, *supra* note 204, at 321 (2012) (symposium on the domestic operation of economic, social, and cultural rights in the United States).

[367] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 56–57.

[368] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993); *see generally* DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY (2010) (accounting for the contestations around this idea).

[369] For pluralist standpoints, see generally RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (exploring whether conflicts between faith communities and LGBTQ+ communities can reach mutually agreeable solutions) and RELIGION AND PUBLIC POLICY: HUMAN RIGHTS, CONFLICT, AND ETHICS (Sumner Twiss et al. ed., 2015) (exploring the role of religion in issues of human rights and peace).

[370] *See generally* FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 204 (investigating transformations in economic and social rights campaigns outside the United States). The most pertinent submission, in this respect, was made by on the part of The Center for Rural Enterprise and Environmental Justice (CREEJ), The Leadership Conference Education Fund, Northeastern Law School Program on Human Rights and the Global Economy (PHRGE), and The US Human Rights Network (July 20, 2020) available at Archived Content, *supra* note 34; [https://2017-2021.state.gov/draft-report-of-the-

as to ensure such clashes never occur. Supposedly, a hierarchy between rights might be tenable in that scenario, but this approach would make property and religious freedom far more encumbered or narrowed at the outset. The more common approach, adopted by prominent bodies such as the European Court of Human Rights and domestic courts, is to assess the proportionality of any restriction on apparently conflicting rights,[371] as it does with any limitation of a right that is reasonable and necessary in an open and democratic society. This method for securing an accountable and justifiable approach to rights conflicts is simply disregarded in the Report, suggesting a departure from human rights that is marked, indeed radical, in scope.

3. Women's and LGBTQ+ Rights

A third substantive departure of human rights originalism lies in its constrained approach to the guarantee of "equality of all, in dignity and rights" promised by the Universal Declaration of Human Rights.[372] As criticism of the Report attests, notable matters of contemporary international concern are minimized in the report, such as the equality and autonomy rights of women and LGBTQ+ communities.[373] For women's rights, the Report is openly dismissive of the human rights to sexual and reproductive health.[374] Although the Report extolls the historical achievements of women's rights campaigners within the United States, such as Elizabeth Cady Stanton and Susan B. Anthony and the struggle for women's right to vote,[375] it does not engage with the claims of feminists for recognition in the Universal Declaration of Human Rights, along broader lines of work, property, education, and family support.[376] Nor does it engage with current U.S. or

commission-on-unalienable-rights-public-comment/index.html]

[371] *See* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 178–80 (2012); *cf.* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3123 (2015) (noting fewer perceived conflicts between rights within U.S. constitutional doctrine and thus "less felt need to find ways of reconciling such conflicts").

[372] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 71 (Dec. 10, 1948).

[373] *See, e.g.*, Fujimura-Fanselow et al., *supra* note 34; *see also* The Ctr. Just. & Accountability, *supra* note 33; Archived Content, *supra* note 34;

[374] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 24 (observing that "divisive social and political controversies in the United States—abortion, affirmative action, same-sex marriage" are not well served by claims of basic rights).

[375] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 20–21.

[376] *See* Regula Ludi, *The "Rights of Man" and Sex Equality: International Human Rights Discourses in the 1930s*, *in* THE ROUTLEDGE HISTORY OF HUMAN RIGHTS 122 (Jean H. Quataert & Lora Wildenthal, eds., 2020) (exploring debates on gender and human rights

international human rights movements for gender equality, omitting jurisgenerative movements for an equal rights amendment,[377] for example, and describing access to family planning and abortion as a mere policy issue.

Considering just this example, it is hard to overstate how far this approach departs from the current focus of women's rights movements, which have worked to expose the violations on dignity, freedom, and equality that occur when reproductive autonomy is curtailed.[378] Of course, religious objections to abortion are long-standing and were pronounced even at the famous Beijing Conference on Human Rights, when Hillary Clinton had stated the official U.S. position that "women's rights are human rights."[379] Disagreement as to the due focus for human rights was a feature of that conference, with many activists from the Global South agitating for their freedom from coerced abortions and contraception, rather than for abortion access, and were more inclined to assert the importance of religion, motherhood, and economic protections.[380] Human rights originalism ignores the distinctiveness of these calls, as well as several decades of careful advocacy and compromise around the Convention on the Elimination of Discrimination Against Women and other human rights treaties and statements regarding, for example, strategies to end violence against women or what it means to have access to sexual or reproductive health.[381] This distance from contemporary women's rights movements is particularly sharp,

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in the 1930s); *see also* Aoláin, *supra* note 102, at 339–41 (2009) (noting the effect of the Universal Declaration of Human Rights in preserving the separation between public and private spheres).

[377] *See generally* JULIE C. SUK, WE THE WOMEN (2020) (telling the stories of women who led the fight for the Equal Rights Amendment).

[378] *See* Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, *in* GENDER AND HUMAN RIGHTS 13–26 (Karen Knop ed., 2004).

[379] Rep. of the Fourth World Conference on Women, Beijing, at 1, 3, 161, U.N. Doc. A/Conf.177/20/Rev.1 (Sept. 4–15, 1995).

[380] Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, 56 FEMINIST REV. 3, 20 (1997) (noting coalitions around reproductive rights formed across these concerns, as well as the different responses to the experiences of economic crises, from structural adjustment to social services cuts).

[381] Katharine G. Young, *Introduction: A Public Law of Gender?*, *in* THE PUBLIC LAW OF GENDER 1, 1–16 (Kim Rubenstein & Katharine G. Young eds., 2017); *see also* ALICIA ELY YAMIN, WHEN MISFORTUNE BECOMES INJUSTICE: EVOLVING HUMAN RIGHTS STRUGGLES FOR HEALTH AND SOCIAL EQUALITY (2020) (exploring challenges in using human rights to support women's health, and sexual and reproductive rights).

given current movements and protests—startlingly contemporary—against governments that have sought to restrict abortion in Poland, Hungary, Brazil, and, of course, the United States.[382] The COVID-19 pandemic, too, has heralded a "profoundly precarious moment" for women's rights, exacerbating inequalities for women in work and family roles, and in exposure to domestic violence.[383]

Even before the final Report was released, the State Department had changed its aid policy to eliminate health assistance funding to any foreign NGOs that provided abortion-related services or advocated for the expansion of abortion access—amplifying the effects of the Mexico City Policy (also known as the "Global Gag Rule"), which, in a partisan back-and-forth starting with the Reagan Administration, has meant that Republican administrations have tightly restricted U.S. family planning assistance.[384] In addition, the U.S. State Department eliminated information about reproductive rights from its annual *Country Reports on Human Rights Practices*,[385] omitting data on rates of maternal mortality, access to safe and legal abortions, and contraception. Most notably, Secretary of State Pompeo went on to invoke unalienable rights in support of the "Geneva Consensus Declaration," which called on states to promote women's rights and health without access to abortion.[386] This Declaration, signed two weeks before the 2020 presidential election, was co-sponsored by Brazil, Egypt, Hungary, Indonesia, and Uganda, with twenty-seven further signatories including Poland, Belarus, Saudi Arabia, Bahrain, the United Arab Emirates, Iraq,

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[382] *See, e.g.*, Anna Śledzínska-Simon, *Populists, Gender, and National Identity* 18 INT'L J. CONST. L. 447 (2020); Rebecca Sanders, *Norm Spoiling: Undermining the Women's Rights Agenda* 94 INT'L AFFS. 271 (2018); De Búrca & Young, *supra* note [201]; *see also* text accompanying [328] [Jackson Women's Health Org. v. Dobbs]

[383] Lina Abou-Habib, Valeria Esquivel, Anne Marie Goetz, Joanne Sandler & Caroline Sweetman, *Introduction: Gender, Development, and Beijing +25*, 28 GENDER & DEV. 223, 223–37 (2020); UN WOMEN, MEASURING THE SHADOW PANDEMIC: VIOLENCE AGAINST WOMEN DURING COVID-19 (Nov. 21, 2021) (tracking increases in violence in 13 countries)

[384] *See* Sanders, *supra* note 382 at 281–82. *See also* Akila Radhakrishnan & Elena Sarver, *Canary in the Coal Mine: Abortion & the Commission on Unalienable Rights*, 4 COLUM. HUM. RTS. L. REV. ONLINE 1, 158–59 (2019) (noting expansion of the so-called "Mexico City Policy" to deny all family planning and global health assistance funding to foreign NGOs providing information on, or access to, abortions).

[385] Risa E. Kaufman, *Commission on Unalienable Rights and the Effort to Erase Reproductive Rights as Human Rights*, 4 COLUM. HUM. RTS. L. REV. ONLINE 1, 7–8 (2019).

[386] *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (Oct. 22, 2020) https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf [https://perma.cc/598S-BWPG].

Sudan, South Sudan, and Libya.[387] As commentators noted, this list of signatories included a substantial number of the worst-ranked performers with respect to women's rights, and none of the countries with the best records on peace, security, and women's rights other than the United States agreed to take part.[388]

Human rights originalism also leaves no room for protection of the rights of the LGBTQ+ community. Such rights, explored for example by the Yogyakarta Principles of 2006, represent an effort to protect human rights in areas of sexual orientation and gender identity, with significant involvement of U.S. advocacy groups alongside the International Commission of Jurists and others.[389] These Principles were supplemented in 2017 with the recognition of intersectionality, and guide the interpretation of international human rights treaties in line with agreed upon obligations.[390] They are not uncontested; and yet human rights originalism merely dismisses rather than engages with the merits of their recognition. While some domestic courts and other national institutions have sought guidance from such principles, as has the Council of Europe, considerable pushback has occurred within the UN General Assembly and amongst particular states.[391] U.S. support, promoted under the Obama Administration, ceased under the Trump Administration, resulting in an absence of U.S. assistance when populist leaders railed against

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[387] Julian Borger, *U.S. Signs Anti-Abortion Declaration with Group of Largely Authoritarian Governments*, THE GUARDIAN (Oct. 22, 2020, 1:06 PM), https://www.theguardian.com/world/2020/oct/22/us-trump-administration-signs-anti-abortion-declaration [https://perma.cc/HM9N-5MPU] (noting country ranks from the Women, Peace and Security Index established by Georgetown University).

[388] *See, e.g.*, *Id.*; Kerry Cullinan, *Will Trump's Anti-Abortion Geneva Consensus Fall Apart?*, OPEN DEMOCRACY (Jan. 25, 2021, 10:38 AM), https://www.opendemocracy.net/en/5050/will-trumps-anti-abortion-geneva-consensus-fall-apart/ [https://perma.cc/D3XX-VTQU].

[389] *See* Natalie E. Serra, *Queering International Human Rights: LGBT Access to Domestic Violence Remedies*, 21 AM. U. J. GENDER SOC. POL'Y & L. 583, 594 & n.50, 596 (2013) (discussing the 2007 publication of the Yogyakarta Principles, which include a recommended program of training and awareness-raising for state actors regarding non-discrimination and equality for LGBT people); *see also* Deborah Anker & Sabi Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 529, 556 & n.69 (2012) (describing the input of the Council for Global Equality).

[390] *See generally* Michael O'Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. OF HUM. RTS. (2015) (concluding that the Yogyakarta Principles are relevant in efforts to secure compliance with existing international human rights law).

[391] *Id.* at 288–91.

so-called "gender ideology" abroad.[392]

4. Racial Equality

A fourth departure of human rights originalism lies in its capacity to address racial equality and justice. The limits of this capacity were magnified when the mandate of the Commission on Unalienable Rights coincided with America's profound reckoning with racial justice, sparked by the murder of George Floyd at the hands of a Minneapolis police officer on May 25, 2020.[393] That extrajudicial killing, unlike that of Breonna Taylor, but like those of Ahmaud Arbery and others, was captured on camera, prompting anti-racism demonstrations across the United States, under the cry and the demand that Black Lives Matter.[394] As became obvious in the weeks and months after George Floyd's death, these demands were felt strongly both within and outside of the United States, sparking urgent protests in cities abroad in relation to systemic racial injustice, as experienced in the United States and elsewhere.[395] Indeed, such protests prompted an unprecedented call for urgent debate at the Human Rights Council on June 17, 2020, where Philonise Floyd addressed an emergency special session, reserved within that forum for extreme human rights situations.[396]

The pairing of the struggle for human rights and racial equality has a complex history, both within the U.S. and internationally.[397] African-American human rights activists have long leveraged the international human

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[392] Śledzínska-Simon, *supra* note 382, at 447; *see* Kaoma, *supra* note 195, at 5.

[393] E. Tendayi Achiume, *Transnational Racial (In)justice in Liberal Democratic Empire,* 134 HARV. L. REV. F. 378, 390 (2021).

[394] *Id.* at 381 (noting that the protests, which began in Minneapolis, "spread to over 2000 U.S. cities and across the globe").

[395] *Id.* These issues were initiated by the African Group for urgent debate at the 43rd session of the HRC in June 2020. For current analysis of the potential U.S. responses to this issue, and other issues raised in 347 country responses to the U.S. in the 2021 Universal Periodic Review, see JoAnn Kamuf Ward & Jamil Dakwar, *Is There a New Era for Human Rights on the Horizon?*, JUST SEC. (Mar. 19, 2021), https://www.justsecurity.org/75429/is-there-a-new-era-for-human-rights-on-the-horizon/ [https://perma.cc/7DVU-NQZV].

[396] Achiume, *supra* note 393, at 378.

[397] This pairing exposes, not only "America's 'dirty laundry'", but global legacies of colonization and decolonization: *see, e.g.,* ANDERSON, *supra* note 101, 273-6 (noting pressures to marginalize those supporting human rights as "communistic, Soviet-inspired, and treasonous" during the Cold War); *see also* JENSEN, *supra* note 92, 5 (noting pressures around race and religion).

rights system in order to draw attention to domestic—and international—racism.[398] Indeed, an extensive tradition of protest against racial discrimination arguably helped found the contemporary human rights movement,[399] just as the abolition of slavery and the slave trade helped ground its longer history.[400] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), for example, was drafted in 1965 during the height of the civil rights movement in the United States—the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were passed just prior to its adoption by the UN General Assembly, on December 21, 1965.[401] As one of the oldest UN human rights conventions, ICERD has been in effect since 1969,[402] and is one of the few to which the United States is a party (since 1994).[403] In spotlighting U.S. obligations under ICERD, for example, a series of delegations from the United States to that treaty body have sought to "reframe racial justice as a human rights demand and push for higher standards of accountability than is offered by US civil rights law."[404] This

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[398] Achiume, *supra* note 393, at 379; *see also* ANDERSON, *supra* note 101, 276 (documenting efforts by Malcolm X, Martin Luther King, Jr.; Bradley, *supra* note xx, 48-49 (documenting these and other "naming moments" and proposing to conceptualize racism as a direct violation); Henry J. Richardson, III, *Dr. Martin Luther King, Jr. as an International Human Rights Leader*, 52 VILL. L. REV. 471, 473–75 (2007) (discussing Martin Luther King, Jr.'s fusion of civil rights and human rights); LAURENT, *supra* note 84, at 255 (describing the attempt by Martin Luther King Jr., to resuscitate the New Deal and disentangle its racial exclusions).

[399] JENSEN, *supra* note 92.

[400] MARTINEZ, *supra* note 155.

[401] 660 U.N.T.S. 195.

[402] *Id.*

[403] The U.S. signed the convention in 1966 and ratified it in 1994. The ICERD is now joined by 184 states, making it one of the most widely ratified human rights conventions. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, STATUS OF RATIFICATION INTERACTIVE DASHBOARD, https://indicators.ohchr.org/ [https://perma.cc/BC2K-7ACY] (last visited Dec. 22, 2021). The Trump Administration, departing from precedent established from the George W. Bush to Obama administrations, had not nominated a U.S. candidate to sit on the Committee on the Elimination of Racial Discrimination, marking U.S. absence there as with other bodies. Ryan Kaminski & Grace Anderson, *Estrangement Over Engagement: How the Trump Administration is Bucking Bipartisan Human Rights Diplomacy at the UN*, JUST SEC. (Oct. 14, 2020).

[404] U.N. HUMAN RTS. OFF. OF THE HIGH COMM'R, 50 Years of Fighting Racism: Success Story–USA, https://www.ohchr.org/EN/HRBodies/CERD/50/Pages/USA.aspx [https://perma.cc/T5JD-YA48]. For vigorous criticism that the Human Rights Network had exerted too much power before the committee, on earlier occasions, see Steven Groves, *The Inequities of the UN Committee on the Elimination of Racial Discrimination,* HERITAGE

included a presentation by Sybrina Fulton, the mother of black teenager Trayvon Martin, who had been fatally shot in the setting of Florida's "stand your ground" laws in 2012.[405] Alongside gun violence and police violence, the delegation emphasized that "economic, civil and political rights are all interrelated,"[406] endorsing the indivisibility of rights protected within the ICERD, as with other human rights conventions. Another delegation, under the Convention Against Torture, sought to spotlight U.S. human rights obligations with respect to torture and cruel, inhuman, and degrading treatment: before a plenary meeting of that treaty body, the parents of Michael Brown and young Black leaders from St. Louis testified about his fatal shooting by a police officer in 2014.[407]

These aspects of the international human rights regime offer a global forum for deliberating on issues of racial equality and justice. Of course, as thoroughgoing inquiries launched by critical race theory and Third World Approaches to International Law emphasize, they are neither a panacea nor problem free.[408] As Tendayi Achiume has noted, those engaging within international human rights institutions must actively work to subvert the long-observed racial stereotypes of "saviors" and "victims."[409] She suggests that a "structural and intersectional approach" to racial discrimination requires the strong participation of communities of color "not only in fighting racial inequality, but also in defining the very nature of human rights."[410] Similarly, comparative approaches to human rights are instructive about racial equality. This includes the post-apartheid regime of South Africa, for example, which continues to update an audience outside of its jurisdiction on attempts—successful or otherwise—to realize human rights against a legacy of racial and gender inequality and the prevailing backdrop of economic inequality.[411]

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FOUNDATION (Aug. 7, 2008), https://www.heritage.org/report/the-inequities-the-un-committee-the-elimination-racial-discrimination [https://perma.cc/3BJE-UAUU].

[405] *See* U.N. HUMAN RTS. OFF. OF THE HIGH COMM'R, *supra* note 404.

[406] *Id.*

[407] Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 123 (2015).

[408] *See* James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1610 (2021).

[409] Achiume, *supra* note 393, at 397 (citing Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 207–08 (2001)).

[410] E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 SUR—INT'L J. ON HUM RTS. 141, 141 (2018).

[411] *See* Gathii, *supra* note 408, at 1625 & n.57; YOUNG, *supra* note [313]; Bonilla

As noted above, human rights originalism bypasses both the international and comparative lessons for racial equality.

Not irrelevant to this issue is that the constitutional methodology of originalism has been called out for its "race problem."[412] Whether in doctrinal or political terms, scholars have traced the troubling connections of racist ideas and the legitimacy of original meaning. This problem is arguably greater than the original lack of representation, also felt by excluded women and indigenous peoples.[413] As Jamal Greene has noted, "It is not just that people of African descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure."[414] Although these express flaws have been addressed by constitutional amendment, namely the Thirteenth and Fourteenth Amendments, constitutional originalism arguably fails to reorient its legitimating narrative—with its primary focus on restoration and return—to address America's past.[415] Moreover, in promising the "control" of rights proliferation—of dismissing the prospect of plurality in normative orders, and foreclosing the possibility of "legitimate dissent from history"—originalism abandons the prospect for engagement.[416] These constitutional theoretical objections coincide with the archival tracing of constitutional originalism as grounding a coordinated political resistance to the desegregation of schools mandated by *Brown v. Board of Education*.[417]

The broadside by Secretary Pompeo against the *1619 Project* does not give solace to the hope for originalism's reform.[418] The Commission on

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Maldonado, *supra* note 182; Fredman, *supra* note [191].

[412] Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 517 (2011); *see also* Fox Jr, *supra* note 68 (arguing that attempts to address the exclusion of minorities and women within originalism are inadequate).

[413] *See* Greene, *supra* note 412, at 518.

[414] *Id.* at 518–19.

[415] *See id.* at 521 (noting the possibility of redemptive over restorative projects within "living originalism" (citing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–303, 308–09)).

[416] *Id.* at 522 (noting the violence created by such discipline (Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 40, 68 (1983)).

[417] TerBeek, *supra* note 215, at 822 (arguing, in a searing analysis of the conservative strategy, that originalism was coded as "an ostensibly non-racialized first constitutional principle to delegitimize *Brown*.")

[418] *Compare* Pompeo, *supra* note 69 (arguing that the *1619 Project* us in conflict with

Unalienable Rights did acknowledge the moment of America's racial reckoning, noting in a Prefatory Note that its work drew to a close as "social convulsions shook the United States, testifying to the nation's unfinished work in overcoming the evil effects of its long history of racial injustice . . . [and] the many questions roiling the nation about police brutality, civic unrest, and America's commitment to human rights at home."[419] Notwithstanding this concession, the overall method of human rights originalism fails to address these questions. Although arguably more receptive to racial justice than constitutional originalism—given the Report's inclusion of the Universal Declaration of Human Rights, as well as the words of Martin Luther King Jr.—human rights originalism fails to heed the later demands of the civil rights movement, particularly in relation to the subsequent women's equal rights and poor people's campaigns (and their transnational counterparts).[420] Such a position freezes the implications for America's human rights at the postwar moment—and worse, undoes homegrown attempts to address the "unfinished work"[421] of racial equality and justice. It remains to be described—inevitably, only briefly—the shape of that overlooked, evolving, contribution.

### C. RECOVERING AMERICA'S CONTRIBUTION TO HUMAN RIGHTS

The United States is famous for the flourishing of its constitutional traditions under "great religious, ethnic, and cultural heterogeneity."[422] Within that context, historical recourse to early documents is not per se diminishing to human rights. A more contemporary, "living" assessment of the same texts, as proponents of "living originalism" (or international human rights law) seek, addresses some of the hypocrisies of the favored era. The lack of representation for enslaved African-Americans, indigenous peoples, or women at the time of the Declaration of Independence, or the lack of representation for colonized peoples and many women and racial minorities during the drafting and adoption of the Universal Declaration of Human

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America's "founding principles"); *with* Hannah-Jones, *supra* note 71 (arguing that America's "founding ideals" of equality and freedom were lies).

[419] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 4, 24.

[420] *See, e.g.,* SUK, *supra* note 377 (documenting the evolution of the women's equality movements and the vision of rights); LAURENT, *supra* note 84, at 253–55 (noting the considerable emphasis on inalienable rights for the poor, oppositional to mainstream presentations of property rights).

[421] COMM'N ON UNALIENABLE RTS., *supra* note 3, at 4, 24.

[422] As is clear from the Report of the Commission on Unalienable Rights. COMM'N ON UNALIENABLE RTS., *supra* note 3, at 4, 54.

Rights, are cause for rejecting fidelity, but not rejection wholesale.[423] This is a key point of contemporary human rights advocacy, from environmental justice and climate change, to women's rights, disability rights, LGBTQ+ recognition, and social equality: a loose and diverse advocacy community, made up of a range of human rights, social justice, and faith-based organizations, that supporters of the Commission have dismissed as "the human rights establishment."[424]

A "living" approach to these landmark documents can situate each with respect to the global transformations that occurred in the eighteenth, nineteenth, twentieth and now twenty-first centuries. As scholars have noted, an engagement with "empire, imperialism, colonialism, transatlantic, hemispheric, and circumlantic" trends can displace national frameworks, bringing North America into:

> a contested space where a host of peoples, including British, French, Native American, Spanish, and, of course, African, entered into contact and conflict. Once we decenter the national narrative of the United States, it is possible to perceive a multiplicity of American identities, racially, ethnically, culturally, religiously, and politically inflected. Moreover, if "American" doesn't refer exclusively to the white settlers who successfully revolted against British imperial authority to create the United States of America, we can begin to see a variety of other American peoples and identities . . . .[425]

This is an expansion, not a substitution. And yet by this expansion, much more can be said about the Declaration of Independence and the Universal Declaration of Human Rights, including particularly from the perspective of gender and racial equality, described above. Not all of them sound explicitly in human rights.[426] Yet many do. They are also updated in real time.

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[423] *See, e.g.*, ALLEN, *supra* note [71] 36-38 (claiming inheritance to the Declaration, as an African American woman).

[424] May, *supra* note 356.

[425] Larkin, *supra* note 284, at 294. This call has been answered in more recent approaches to the Declaration of Independence. *See, e.g.*, WOODY HOLTON, LIBERTY IS SWEET: THE HIDDEN HISTORY OF THE AMERICAN REVOLUTION (2021).

[426] *Compare* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1846 (2019) (using federal Indian law to reveal, amongst other insights, "the inadequacy and historical contingency of public law's presumption that minorities are best served by rights and national power") *with* Riley & Carpenter, *supra* note [212] (observing changing approaches to conceptualizing human rights for indigenous

Contemporary homegrown calls for recognition include (1) the human right to housing, brought into sharp relief during the subprime mortgage crisis and now COVID-19;[427] (2) the human right to health care, still sharply denied despite the Affordable Care Act;[428] (3) the human right to water, so notoriously infringed in Flint and Detroit;[429] and (4) the right to education, as a long-promised guarantee in U.S. state constitutions.[430] These are all, themselves, human rights demanded and expressed in the United States. These apparently novel claims are in fact deeply intertwined with long-standing efforts to "bring human rights home."[431] Notwithstanding the pull of litigation, these efforts often seek out courts only defensively, or as a last

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peoples)

[427] *See, e.g., California Introduces First-in-the-Nation Amendment to Recognize Housing as a Human Right*, NAT'L LAW CTR. ON HOMELESS AND DIGNITY, (May 13, 2020) https://homelesslaw.org/ca-amendment-to-recognize-housing-as-a-human-right/ [https://perma.cc/8EFK-TCEL]; Eric Tars, Tamar Ezer, Melanie Ng, David Stuzin & Conor Arevalo, *Challenging Domestic Injustice Through International Human Rights Advocacy: Addressing Homelessness in the United States*, 42 CARDOZO L. REV. 913, 974 (2021).

[428] Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367, 1382 (2011) (noting "sporadic yet persistent movement on behalf of universal health care . . . for the past century").

[429] *See* Sharmila L. Murthy, *A New Constitutive Commitment to Water,* 36 B.C. J.L. & SOC. J. 159, 159 (2016).For commentary to the related right to access sanitation, *see* Catherine COLEMAN FLOWERS, WASTE: ONE WOMAN'S FIGHT AGAINST AMERICA'S DIRTY SECRET 177-9 152-8, (2020); The Alabama Center for Rural Enterprise (ACRE), The Columbia Law School Human Rights Clinic and The Institute for the Study of Human Rights at Columbia University *Flushed and Forgotten: Sanitation and Wastewater in Rural Communities in the United States* 30-5 (May, 2019) (providing a human rights analysis of inequalities in access to sanitation in the United States).

[430] ZACKIN, *supra* note 302 (mapping the right to education in state constitutional law, amongst other constitutional rights). For applications in the federal constitutional context, see Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education,* 43 N.C. CENT. L. REV. 1, 1 (2021); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006); *see generally* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135 (Kimberly Jenkins Robinson, ed., 2019).

[431] BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 86 (Cynthia Soohoo et al. eds., 2007); *see also* Marissa Jackson, *Crossing the Bridge: African-Americans and the Necessity of a 21st Century Human Rights Movement*, 5 HUM. RTS. & GLOBALIZATION L. REV. 56, 57–58 (2014) (noting that, for African-Americans and other minorities in the United States, only a "human rights framework that elevates socioeconomic rights to a level equal with political and civil rights and rejects American isolationism" can advance citizenship appropriately).

resort;[432] human rights commissions, cities and other subnational forms of governance are key.[433] Recognizable at home, these versions of America's contributions to human rights then inform its foreign policy abroad.

The Biden Administration has pledged to withdraw U.S. sponsorship of the Geneva Consensus Declaration and reinstate support for women's and girl's sexual and reproductive health,[434] just as it has also reinstated support for the LGBTQ+ community.[435] Further changes have been recommended, as U.S. influence shifts geopolitically and consensus support for human rights fragments. Commentators recommend that the United States increase its support for alliances with a range of both states and civil society (including religious) groupings.[436] Substantively, a more reflective engagement with economic and social rights, with respect to both the vision within domestic movements, and the obligations established extraterritorially, is urgently needed.[437] Global trends in relation to climate change, digital technologies,

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[432] The analysis of human rights has the advantage of proceeding separately from courts, as frameworks particularly of international, transnational, and philosophical accounts of rights indicate, *supra* Section II.A–D. Even comparative human rights frames are often able to loosen the grip of courts, especially in systems with "weak" judicial review. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008). That said, keeping courts outside of rights disputes is a peculiarly difficult ask in the United States, and the pros and cons are not canvassed here. *See, e.g.,* GREENE, *supra* note 129; *supra* Section III.A.3.

[433] *See, e.g.,* Martha F. Davis, *Design Challenges for Human Rights Cities,* 49 COLUM. HUM. RTS. L. REV. 27, 35 (2017); JoAnn Kamuf Ward, *Challenging a Climate of Hate and Fostering Inclusion: The Role of U.S. State and Local Human Rights Commissions*, 49 COLUM. HUM. RTS. L. REV. 129, 132 (2017); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry* 115 Yale L. J. 1564, 1577 (2006).

[434] Memorandum on Protecting Women's Health at Home and Abroad, THE WHITE HOUSE (Jan. 28, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/ [https://perma.cc/73K9-SDXN].

[435] Antony Blinken, Sec'y of State, Secretary of State Antony Blinken on LGBTQ Foreign Policy Priorities, (June 21, 2021), https://www.c-span.org/video/?512798-1/secretary-state-antony-blinken-lgbtq-foreign-policy-priorities [https://perma.cc/M7PR-3SJC].

[436] *See* Sarah H. Cleveland, *A Human Rights Agenda for the Biden Administration*, 115 AM. J. INT'L L. UNBOUND 57, 59 (2021).

[437] *See id.* at 57; *see also* Katharine G. Young, *The Idea of a Human Rights-Based Economic Recovery After COVID-19,* 6 INT'L J. PUB. L. & POL'Y 390 (2020) (listing, amongst other campaigns, human rights activism around rights to housing, health care, and

and the COVID-19 pandemic, all require attention to human rights. The association of authoritarian populism with both restrictions on civil and political rights, and economic grievance, also underline the importance of the indivisibility of human rights.

These are all significant demands for a renewed human rights tradition. Yet this Article suggests that it is the formula of originalism, even more than the substantive positions that it adopts, that warrants identification and repudiation. America's approach to human rights must incorporate their "living," evolving demands, just as it must also celebrate and critically interrogate its history. The sources of the ideas expressed within the Declaration of Independence and the Universal Declaration of Human Rights are then made more meaningful. Although the crystallization of certain ideas of human equality and rights received epoch-making affirmation in the early American experience, their origins span languages and cultures over millennia. Therefore, the most distinctive feature of those ideas for the contemporary understanding of human rights is not the manner of their landing on American soil (for select beneficiaries), but that they are a possession of humanity, just like the American experience of them is now a possession of humanity, and every other augmentation of human rights in its long-unfolding process can be understood as a possession of humanity. To slice and deform this ever-augmenting, if challenging-to-grasp, possession in order to make it fit an unavoidably limited and provisional manifestation of it—such as in eighteenth century America or even in the heightened cooperation between the United States and the other nations recognized after World War II—leads to a misunderstanding of the points of evolution and disjuncture of human rights and the significance of the discourse across different parts of the world.

## CONCLUSION

Nationalism within American exceptionalism arguably reached its apogee under the Trump Administration, and its "America First" agenda. Human rights originalism arrived alongside the appointment of Secretary of State Mike Pompeo and the creation of the Commission on Unalienable Rights. Its arrival heralds a shift in human rights that will not easily disappear, and which may return more overtly in future conservative platforms, particularly if former Secretary Pompeo mounts his predicted presidential bid. This approach, similarly unilateral and isolationist, represents a curious blend of appropriating two human rights landmarks, and eschewing

sanitation within the United States and elsewhere, as well as for a "people's vaccine" for COVID-19 and other global responses).

mainstream legal, moral, and practical approaches to human rights as a matter of international—indeed, humanity's—concern. Although staged as a vital return to America's greatest human rights contributions, through the Declaration of Independence and the Universal Declaration of Human Rights, its selectivity and omissions call to mind a different exercise—that of weaponizing human rights for new religious constituencies and against old foes in the women's rights, LGBTQ+ rights, and economic justice arenas. Its epistemic strangeness is immediately evidenced by the allies it has formed within the United States, as "unalienable rights" has galvanized religious, property, and gun rights groups, and abroad, as "unalienable rights" has motivated countries with illiberal records with respect to women's and LGBTQ+ rights. The legacy of human rights which our generations inherit—and curate—is best understood as in the possession of humanity itself. We might say that this legacy came to our hands through the struggles of many famous figures, and even more who remain anonymous; it came in several languages through several cultures in a journey of millennia. To reduce this legacy to play for a partisan basis of a faction in contemporary American politics is to fail gravely our duty toward this legacy, and to each other. With new threats to human rights occurring through colossal technological, environmental and political changes, human rights originalism not only mistakes the current conditions of U.S. influence, but defies the successes of the previous opportunities that were properly grasped.