

Article

Human Rights Lost: The (Re)making of an American Story

Christopher N.J. Roberts*

The historical study of human rights has become an important area of inquiry in recent years. In analyzing the historical trajectory of human rights, legal scholars and historians have typically focused on the human rights laws, treaties, and charters that originated in the past and remain powerful today. Yet some of the most transformative events in our nation's history have escaped notice through such approaches. This Article introduces a new approach to the historical study of human rights by focusing not on established law, but rather on three "legal failures" that are completely invisible within the framework of binding law and precedent: a failed constitutional amendment in Washington D.C.; an overruled appellate opinion from California; and an unlikely movement to replace the United Nations with a more powerful "world government." This analysis reveals a surprising truth: these legal failures permanently altered the trajectory of the United States' approach to human rights and continue to shape

* Associate Professor, University of Minnesota Law School; Affiliated Faculty, Department of Sociology. For comments and suggestions, the author thanks Elizabeth Anderson, Susanna Blumenthal, June Carbone, Jessica Clarke, Carol Chomsky, Mark Goodale, Oren Gross, Jill Hasday, Fred Morrison, Fionnuala Ní Aoláin, Robin Phinney, Dan Schwarcz, Kathryn Sikkink, Jonathan Simon, Margaret R. Somers, Kiyo Tsutsui, Susan Waltz, Kim Voss, and Richard Wilson. For valuable research assistance, the author thanks Ashlyn Clark, Wm Dane DeKrey, Ceena Idicula, Andrew Miles, Spencer Ptacek, and Eric Ryu. The author is also grateful for comments received at the Fritz Thyssen Institute, Cologne, Germany, the Max Planck Institute, Göttingen, Germany, the University of Minnesota Law School Faculty Workshop, the University of Michigan Law School Human Rights Workshop, the University of Minnesota Law School Legal History Workshop, the University of Connecticut Law School Workshop, and panel sessions at the annual meetings of the Law & Society Association and the American Sociological Association.

contemporary human rights institutions and practices. This Article makes three key claims. First, a complete explanatory account of contemporary institutions and practices must include more than those laws, institutions, ideas, and practices that persist into the present day; it must also account for numerous legal, institutional, and ideational antecedents that are no longer with us. Second, the dominant conception of human rights within the United States—as an international rather than domestic phenomenon—was actively created domestically in the United States after World War II in order to advance a range of ongoing, local-level political struggles. Third, to the extent that human rights supporters in the United States today fail to appreciate these domestic origins, it is quite possible that they become unwitting collaborators of those who objected to the idea of universal human rights in the past.

Introduction

For those waging social justice struggles in the United States, human rights are not much of a domestic option—nor are they much of a thought. In the United States, human rights are viewed as matters of international concern rather than laws for domestic application. International treaties, for instance, are signed with the stipulation that human rights concepts do not apply in the domestic arena and domestic judges rarely use international human rights concepts in domestic decisions.¹ This international conception of human rights is widespread in the United States and is rarely challenged by scholars, activists, or the legal community. Human rights are simply, and perhaps inevitably, viewed as matters for international rather than domestic consumption. The fact that they are rarely applied in the domestic context has limited their domestic presence in domestic research, advocacy, and law.²

1. See M. Shah Alam, *Enforcement of International Human Rights by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMP. L. 27, 27–31 (2004) (explaining that while the United States is active in pursuing international human rights instruments, the application of those is not common in domestic courts); see generally Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 277 (1999) (discussing the propensity for States to sign human rights treaties with reservations, meaning that while they remain in technical compliance, States are free to engage in the practices such treaties condemn).

2. See generally MICHAEL JOHN GARCIA, CONG. RESEARCH SERV.,

This Article argues that the uniquely American conception of human rights as *international* rather than *domestic* is neither inevitable nor is it without consequence for those engaged in the study and practice of human rights. Rather, this conception of human rights was crafted in the years immediately following the Second World War through a series of influential domestic political struggles. These struggles pitted opposing definitions of human rights against one another, ultimately resulting in the triumph of an international-only conception of the term. Although such struggles largely have been unexplored within existing scholarship, this Article shows that they altered the trajectory of human rights in the United States and left an indelible mark on contemporary human rights debates.

Through a detailed analysis of new historical and archival data, this Article investigates three historical events that offer a window into the political struggles surrounding how best to define the emergent human rights concept in the post-war era. They include a failed constitutional amendment in Washington D.C.,³ an overruled appellate opinion from California,⁴ and an improbable movement to reorganize the world into nine “kindred” societies.⁵ Interestingly, a scholar studying the history of human rights will not find any direct evidence of such events when examining existing law or foundational international human rights texts such as the 1948 Universal Declaration of Human Rights. Yet, this analysis demonstrates that each event permanently altered the trajectory of the United States’ approach to human rights.

This Article therefore reveals that the United States’ contemporary approach to human rights is the consequence of not just the laws on the books, but rather, that it has been shaped by laws, ideas, and institutions that by all accounts have been passed off by historians as legal failures. In analyzing the failed amendment, overturned case, and a forgotten movement, this Article also outlines a novel insight and new methodological approach for legal historians—laws, cases, and movements that

RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 12–16 (2015) (explaining that the effect of an international treaty depends on whether the treaty is self-executing on its date of ratification as compared to a conflicting domestic law).

3. See S.J. Res. 102, 82d Cong. (1951).

4. See Fujii v. State, 217 P.2d 481 (Cal. Dist. Ct. App. 1950).

5. See Comm. to Frame a World Constitution, Preliminary Draft of a World Constitution, art. 5 (1948) [hereinafter Preliminary Draft of a World Constitution].

failed to come into being or achieve permanence in the American legal system that can nevertheless exert significant influence on contemporary affairs.⁶

The proposition that legal failures can alter the course of history is not as improbable as it might appear at first glance. To be sure, within a standard doctrinal analysis there is little if any place for overruled case law, rescinded legislation, or proposals that never in fact became law in the first instance. Precedent, binding law, and valid legal authority is what matters. But when examining the history of the law, legal failures can be extremely important transformative agents of change, even if scholars routinely overlook them. While this Article focuses on the importance of this proposition for the field

6. The literature on the history of human rights has expanded greatly in the past decade or so. A sampling from this ever-growing body of scholarship includes CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–55 (2003) (discussing how the Cold War and United States participation in the United Nations stymied the ability of African American leaders to advocate for social and economic rights); ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS (2005) (discussing how New Deal values influenced post-World War II international political and legal institutions); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (discussing the relationship between the United States civil rights conditions and United States foreign relations during the Cold War); HUMAN RIGHTS IN THE TWENTIETH CENTURY (Stefan-Ludwig Hoffmann ed., 2011) (examining how human rights shaped universal morality in the political crises and conflicts of the 1900s); ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008) (outlining the political history of human rights in the period before and after the creation of the United Nations in light of national rivalries, bureaucratic politics, and demands by disadvantaged groups); CHRISTOPHER N.J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS (2015) (addressing the conflicting ideas of what human rights are and how those ideas were merged into fundamental human rights documents); Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004) (highlighting the changes in historians' approaches to human rights in the 1990s); Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013) (examining the adoption of human rights into national constitutions post-World War II); William I. Hitchcock, *The Rise and Fall of Human Rights? Searching for a Narrative from the Cold War to the 9/11 Era*, 37 HUM. RTS. Q. 80, 82 (2015) (arguing that human rights have become entrenched in politics because powerful states have protected them); Samuel Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights*, 8 ANN. REV. L. & SOC. SCI. 123, 129 (2012) (postulating that historians are focusing more than the norms, doctrines, and law, but also on the scale of application and differing ideologies).

of human rights, the insight undoubtedly extends across areas of law and historical legal scholarship.

This Article proceeds in four parts. Part I begins by discussing the historical context surrounding the political struggles to define the emergent human rights concept in the United States. This context, though often neglected in existing scholarship, is critical to understanding the well-known efforts by Ohio Senator John Bricker in the early 1950s to amend the United States Constitution. Part I continues by discussing what is known about Bricker's efforts. Though Bricker's proposals to amend the Constitution were never passed, the threat of the amendment was sufficient to alter the actions of leading political figures with respect to international human rights laws. Moreover, the intent of Bricker's amendment—to curb the nation's human rights treaty-making abilities and ambitions—remains with us today. The section demonstrates that it is essential for scholars to locate and analyze the lasting effects of such "failures" and shows that although much has been written about Bricker, there is much that remains missing from the narrative.

Part II begins to address gaps in historical human rights scholarship through an analysis of *Fujii v. State*,⁷ a watershed case in 1950 that invalidated a state law based on the human rights principles outlined in the 1945 United Nations Charter. Though it was quickly overruled, the case set in motion a lasting series of transformative events in the history of the United States' relationship with international human rights law. The analysis of the case both illustrates the relevance of legal failures and introduces a second key argument; despite the contemporary conception of human rights as an international phenomenon, the battle over human rights treaties actually reflected local-level struggles that eventually helped to define human rights within the domestic context.⁸

7. *Fujii*, 217 P.2d 481.

8. The *Fujii* case is examined in varying detail in the following studies: KIM VOSS, THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY (1993); Jane Dailey, *Race, Marriage, and Sovereignty in the New World Order*, 10 THEORETICAL INQUIRIES L. 511, 525–30 (2009); Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1070–72 (2007); Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 330–32 (2006); John E. Noyes, *Roger J. Traynor Professorship*, 39 CAL. W. INT'L L.J. 381, 387–88 (2009); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1601–09 (2006);

Part III continues to fill the void in existing scholarship by analyzing the lasting consequences of a now largely-forgotten “world government” movement that once aimed to dismantle the United Nations and replace it with a stronger, more powerful global organization.⁹ Though the movement for global government—which occurred in the late 1940s and early 1950s—experienced a series of unprecedented political and legislative victories, it ultimately collapsed under the weight of its own success, but not before imparting a lasting influence on how the United States was to view itself in international and domestic affairs. Thus the movement provides additional evidence of the Article’s two key claims: that even legal failures can have enormous significance for the contemporary world and that human rights struggles in the United States invariably reflect local-level struggles.

Part IV of this Article synthesizes key lessons from each section and offers a novel normative appraisal of the contemporary place of human rights within domestic law, policy, and scholarship. The section argues that the contemporary conception of human rights was not inevitable, but rather was determined by a series of local-level struggles over how to best define human rights in the post-war era. While the relatively well-known Bricker story offers a partial glimpse of these struggles, a full account of the historical context surrounding such struggles has to this point remained hidden from view. By exposing the broader context, this Article shows that the victory in such struggles was in fact a conception of human rights that prioritized international over domestic application. Part IV concludes by arguing that this conception has important consequences for both law and scholarship.

I. A FAILED CONSTITUTIONAL AMENDMENT

In the closing days of the Second World War, the soon-to-be victorious Allies united in San Francisco to create an international institution that would ensure lasting international

Johan D. van der Vyver, *The Binding Force of Economic and Social Rights Listed in the Universal Declaration of Human Rights*, 30 HAMLINE J. PUB. L. & POL'Y 125, 164–68 (2008).

9. The “world government” political movement was “to establish a constitutionally limited, democratically representative, federal world government in order to effectively abolish war.” 1 JOSEPH PRESTON BARATTA, THE POLITICS OF WORLD FEDERATION: UNITED NATIONS, UN REFORM, ATOMIC CONTROL 1 (2004).

peace and security.¹⁰ It is within the founding text of this international institution—the United Nations (“UN”—that the contemporary idea of international human rights began to take shape. The UN Charter (“the Charter”) articulated a commitment to uphold the human rights of citizens.¹¹ In subsequent years, the Universal Declaration of Human Rights (“UDHR”), a non-binding statement of principle, and the International Covenant (“the Covenant”), a binding international treaty, were to offer greater specificity and legal grounding to the schematic articulation of human rights that was offered in the Charter.¹²

These foundational texts are crucial to understanding the history of human rights. Yet, as this Article argues, scholars and historians must be more mindful of how the epic domestic legal struggles surrounding human rights—many of which have long been cast off as inconsequential failures—have played a greater role in defining what human rights are and what place, if any, they have in law in the United States. Part I of this Article begins with an overview of the background of the post-World War II historical context that provides the backdrop for the events in question. It then examines what is known about Senator John Bricker’s failed Constitutional amendment and its lasting influence. As a departure point for the rest of this Article, it then provides a critical analysis of the blind spots and gaps in the existing historical literature.

10. *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/> (last visited Oct. 19, 2016).

11. U.N. Charter art. 1, ¶ 3 (“[I]n promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .”).

12. What was originally intended to be a single Covenant that contained civil, political, and socioeconomic rights was split in 1952 into the two Covenants we have today—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Together, the UDHR and the two Covenants are considered to be the foundational human rights texts in the contemporary international system of human rights. To avoid the obvious anachronism, in this Article when speaking in historical context prior to 1952, I use the singular, “Covenant.” See JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH, 379–81 (4th ed. 2015).

A. BACKGROUND: HUMAN RIGHTS STRUGGLES IN THE UNITED STATES

The human rights principles embodied in the Charter, the UDHR, and the Covenant represented the principle that what took place within one nation's borders was properly a concern for other nations. This principle was not novel in the domestic legal context in the United States; the relevance of international agreements for domestic law had been established in past precedent. In nineteenth century America, for instance, many local land disputes necessarily implicated existing international agreements between sovereign nations.¹³ In 1920, the United States Supreme Court, for instance, issued a landmark ruling in *Missouri v. Holland*, holding a bilateral migratory bird treaty to be the "supreme law of the land" for every state in the nation.¹⁴

As of October 1945, the official birth of the United Nations, the United States and other member states had to contend with a strikingly new innovation within the Charter's brief provisions on human rights. Within the Charter's relatively vague, preliminary articulation of human rights stood an important proposition that spoke not of land or resources, but rather of the treatment of *individuals*. Notably, under the terms of the Charter, how individuals were treated in the domestic setting had international repercussions. Citizens, it appeared, were now a proper subject of international law.

Articles 55 and 56 of the Charter took the initial steps toward defining this human rights concept anew for the post-World War II context. Article 55 reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

13. See *Foster v. Neilson*, 27 U.S. 253, 314–16 (1829) (establishing the concept of non-self-executing treaties); *United States v. Percheman*, 32 U.S. 51, 82–98 (1833) (reversing *Foster* by holding that a treaty between Spain and the United States was self-executing); see also Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151, 168 (John E. Noyes et al. eds., 2007); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L. J. 135, 143–59 (2012).

14. *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920).

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁵

In turn, Article 56 provides that “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁶ Thus, the two articles set forth a preliminary definition of the new post-war human rights concept. This definition stressed that the well-being of citizens of United Nations member states was the appropriate subject of international concern. Moreover, the articles established the commitment that member states would uphold and promote the human rights of citizens. The sovereignty of states, of course, was not dead—or even flagging. Article 2(7) of the UN Charter states:

Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁷

In contemporary human rights research, foundational human rights texts like the Charter, the UDHR, and the Covenants, are, of course, crucial parts of the story. Without these documents, the contemporary international system of human rights would not exist in anything close to its current form.¹⁸ That said, it is also crucial for scholars and historians not

15. U.N. Charter art. 55.

16. *Id.* art. 56.

17. *Id.* art. 2, ¶ 7. Chapter VII covers “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.” *Id.* arts. 39–51.

18. The United Nations Human Rights Office of the High Commissioner

to rely exclusively on the content of these documents to tell the history of human rights. There are countless events and contextual representations of the formation of human rights that appear nowhere in the legal texts today that nevertheless shed just as much, if not more, light on the history.¹⁹

Even before the United Nations could articulate specific human rights provisions or nations could enact domestic implementing legislation, the idea that certain domestic social matters were properly a matter of concern for members of the international community began to have consequences. Within the United States in the late 1940s, for instance, the Truman administration recognized that the United States' treatment of its own citizens had become a political challenge for some State Department officials. In 1947, a presidential commission on civil rights wrote in its report that “[a]n American diplomat cannot forcefully argue for free elections in foreign lands without meeting the challenge that in many sections of America qualified voters do not have free access to the polls.”²⁰ Local domestic issues such as discrimination, the authors of the report maintained, are not sealed within the nation’s own borders; they “echo from one end of the globe to the other.”²¹

In 1950, the United States State Department amplified this assertion when it revealed to the American public the foundations of its new foreign policy approach in a 100-page report entitled *Our Foreign Policy*.²² The State Department stated the foundation of its new approach to foreign affairs was rooted in a new post-War global reality.²³ Nations—including the United States—could no longer hide beneath a false mantle of absolute sovereignty and argue that their own domestic policies were of no concern to other nations.

has identified nine core international human rights documents, including the UDHR and the Covenants. See OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., THE CORE INTERNATIONAL HUMAN RIGHTS TREATIES, at v, U.N. Sales No. E/06/XIV/2 (2006).

19. For instance, one might look to drafting debates at the U.N. State Department policy meetings, public opinion polls, or representations of human rights in the media and in popular literature to locate important events surrounding the development of the modern human rights concept.

20. U.S. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 101 (1947).

21. *Id.* at 100.

22. See U.S. DEP'T OF STATE, OFFICE OF PUB. AFF., PUBLICATION 3972, OUR FOREIGN POLICY 4 (1950).

23. *Id.* at 7–11 (describing the current state of global affairs).

Our Foreign Policy began with a basic premise: “There is no longer any real distinction between ‘domestic’ and ‘foreign’ affairs.”²⁴ It then provided a series of examples of domestic affairs that were now inseparable from foreign affairs.

Practically everything we do, the way we tax and spend our national income, the way we run our public and private business, the way we settle the differences among ourselves and with other nations, what we say in our newspapers, over the air and on public platforms, our attitudes toward each other and toward other peoples—all these things affect not only our security and well-being at home, but also our influence abroad.²⁵

The Report concluded by offering its readers an appraisal of the existing global reality. The longstanding distinction between domestic and international matters, as well as the presumption of unfettered state sovereignty, it suggested, simply did not exist anymore.

Today the foreign policy of the United States is a declaration of the interdependence of men and nations. We now know, as Woodrow Wilson told us 34 years ago, that “we are participants, whether we would or not, in the life of the world. The interests of all nations are our own also. We are partners with the rest. What affects mankind is inevitably our affair as well as the affair of Europe and Asia.”²⁶

It was not by chance that drafters of the Report invoked the words of former President Wilson. Though Wilson spoke those words during World War I with the hope of creating a “League” that would help develop a lasting peace and ensure friendly relations among the nations of the world, the international commitment to do so fell apart before the necessary institutional conditions could be achieved.²⁷ In particular, a strong group of isolationists within the United States Senate objected to joining the League of Nations.²⁸ Without the United States’ participation, the organization was doomed from the start and

24. *Id.* at 4.

25. *Id.*

26. *Id.* at 99–100.

27. See JOHN MILTON COOPER, JR., BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS 55–108 (2001).

28. See, e.g., *id.* at 55 (explaining that the opposition was led by senator Henry Cabot Lodge and the republican leadership at the time).

soon the world descended into war once again. Nevertheless, even after another World War, a strong contingent of isolationists remained in Congress. Because they continued to object to the constraints, obligations, and outlays that an internationalist agenda would impose on the United States, the exhortations within Truman's foreign policy report sought to make the case that there was no longer any political position that could be legitimately be called "isolationism."²⁹ International politics were already part of domestic politics, and vice versa—even in the area of how a nation treated its citizens.³⁰ Thus as early as 1950, political leaders in the United States had begun to articulate a vision of policy that prioritized the application of international principles in domestic law. But even the strongest interpretation of this policy did not bind the domestic actions of the United States in a way an enforceable human rights treaty might.

Although the State Department recognized that one nation's treatment of its own citizens was a valid concern for all, it also recognized that actually instituting the idea and establishing the requisite political and legal institutions was nothing short of revolutionary. The same foreign policy report conceded:

The drafting of human-rights covenants is one of the boldest as well as one of the most difficult projects ever conceived by a group of nations. In the judgment of history, this quiet and generally unsung work may rank as one of the great revolutionary enterprises of the United Nations.³¹

Several months before the UDHR would be completed and adopted by the General Assembly, in August of 1948, a State Department official wrote of the dramatic nature of the Covenant in its public bulletin:

The theory of the covenant in itself is revolutionary: an undertaking by international treaty to insure certain rights which have traditionally been regarded as being solely of national concern. A sufficient impetus has been created in the Commission for the completion of a

29. See U.S. DEP'T OF STATE, OFFICE OF PUB. AFF., *supra* note 22, at 16.

30. See *id.* at 98–99 (discussing the universality of human rights and its presence in the United States from the inception of the country).

31. *Id.* at 98.

covenant, on the basis of a sincere desire to avoid catastrophes such as those launched by Hitler in his persecution of the Jews, and to improve the standards of international human rights in a field which appears to many to be more important than the ever expanding field of science. But this impetus may be lost if the initial program is too ambitious. To allow an individual to appeal from a decision of his country's court of last resort is a serious step; yet this might be the consequence of recognizing the right of individual petition.³²

During this period, in fact, a number of commentators underscored the manifest challenges associated with the new human rights project by conceding its revolutionary nature. After the UN Charter was complete, and just as the UDHR and Covenant were underway, even the most dedicated human rights advocates at the time spoke with a mix of hope and uncertainty about its radical nature. For example, John Humphrey, the Canadian legal scholar responsible for the initial draft of the UDHR, commented during a gathering of academics:

[L]et us not be blind to the difficulties. What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of supranational supervision of this relationship between the state and its citizens.³³

In 1948, the renowned scholar of human rights and international law, Hersch Lauterpacht, offered a similar appraisal of what he believed was an "almost revolutionary" development within the law.³⁴ Lauterpacht's use of the word *revolutionary*, however, was not based on the mere possibility of incorporating international law into domestic law. Unlike the

32. James Pomeroy Hendrick, *Progress Report on Human Rights*, 19 DEPT ST. BULL. 159, 163 (1948).

33. John P. Humphrey, *International Protection of Human Rights*, 25 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 21 (1948).

34. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 367 (1948).

State Department and Humphrey, he was referring to an actual instance in which the Supreme Court of the United States seemed to be bringing homeward the international human rights provisions in the UN Charter. In *Hurd v. Hodge*, Lauterpacht wrote, “the Supreme Court of the United States, by way of a novel and almost revolutionary interpretation of the Fourteenth Amendment of the Constitution . . . stated, without referring expressly to the Charter, that prohibition of discrimination was now—by reason, *inter alia*, of treaties concluded by the United States—part of the public policy of its law.”³⁵

Thus, it appeared at the time that the principles contained within international human rights treaties were slowly being incorporated into the domestic political sphere. Despite the domestic emergence of international human rights principles, however, whether the new international idea of human rights would be truly revolutionary was still an open question; it depended on whether domestic law and domestic politics were amenable to incorporating international human rights law into their own framework. Again, this historical process is one of epic successes and momentous failures. Typically, the successes, rather than the failures, occupy the most prominent place in the history books.³⁶ Yet, a historical understanding that is based solely—or even mostly—on historical successes and the laws, treaties, institutions, and ideas that survive into the present is a historical understanding that is incomplete.

B. SENATOR JOHN BRICKER’S CONSTITUTIONAL CHALLENGE

Ohio Senator John Bricker’s efforts to restrict the treaty-making provisions within the United States Constitution and the presidential powers surrounding executive agreements are some of the most well-known domestic episodes in the history of United States human rights and international law.³⁷ Yet while

35. *Id.*

36. See, e.g., ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS (2005) (chronicling the history of American involvement in the movement that led to the creation of the UN Charter, the Universal Declaration of Human Rights, and modern conceptions of human rights); MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001) (detailing Eleanor Roosevelt’s involvement in the creation of the Universal Declaration of Human Rights).

37. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995); see also DUANE

Bricker's efforts have been well-documented by historians and human rights scholars, the broader context within which Bricker was operating has to date remained relatively unexplored.³⁸ This section describes what is known about Bricker's efforts to amend the Constitution and their lasting impact. In doing so, the section serves as a departure point for investigating who and what Bricker was fighting against—namely, other legal “failures,” often passed over by scholars—that nevertheless permanently altered the course of human rights in the United States.

1. A Proposal to Amend the United States Constitution

Bricker first spoke to his Senate colleagues in the summer and fall of 1951 about his proposed amendment to prevent the United States from entering into human rights agreements. His efforts were centered on the Covenant, a binding international human rights treaty then being drafted at the United Nations. Using his characteristic apocryphal rhetoric, he warned them that the Covenant “would permit the destruction of freedom of the press” and “could be used to destroy freedom of religion.”³⁹ During these early Senate debates, he drew a deep political line around the issue with the suggestion that “no patriotic American will be able to support the United Nations if it continues to threaten national sovereignty by claiming jurisdiction over fundamental human rights. Those who encourage the UN’s treaty-making ambitions are the UN’s worst enemies.”⁴⁰ In September 1951 Bricker called the Covenant “a trap for the liberties of the American people” endorsed by a State Department that was bent upon creating a “world government.”⁴¹

Scholars have extensively studied the events surrounding the Bricker amendment controversy during the 1950s to determine the reason Bricker led this multi-year crusade

TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY ix–xi (1988); NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 29–36 (1990).

38. See Henkin, *supra* note 37, at 341.

39. 97 CONG. REC. 11,510 (1951) (statement of Sen. Bricker). At this point, there were only plans for a single Covenant. It subsequently was split into the two Covenants we have today, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).

40. *Id.* at 10,795.

41. *Id.* at 11,513.

against human rights treaties.⁴² It is well known now that Bricker was concerned with a number of things that related to human rights treaties. For example, given the geopolitical climate at the time, Bricker often claimed that being obligated to follow international human rights treaties would subject Americans to communist influence within domestic law.⁴³ Similarly, Bricker argued that human rights treaties would diminish the Constitutional protections and basic rights afforded to American citizens.⁴⁴ Another common bundle of arguments Bricker offered was that human rights treaties would infringe on domestic jurisdiction, states' rights, and of course the limiting of national sovereignty.⁴⁵

An examination of the initial resolutions Bricker submitted in the Senate, along with the arguments he raised when speaking on the Senate floor, provides support for these themes that are the mainstay of the Bricker story to date. On July 17, 1951, Bricker submitted Senate Resolution 177 ("S. Res. 177"), the first of many resolutions.⁴⁶ Although S. Res. 177 was only a hortatory statement, it clearly outlined the general nature of his grievances with human rights treaties as well as the course of action he would take in subsequent years. The text read:

Resolved, That it is the sense of the Senate that—

1. the Draft International Covenant on Human Rights, as revised by the United Nations Commission on Human Rights at its seventh session, would, if ratified as a treaty, prejudice those rights of the American people which are now protected by the bill of rights of the Constitution of the United States;

42. See, e.g., Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 324–31 (2010); Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 309–313 (1988); Nelson Richards, *The Bricker Amendment and Congress's Failure to Check the Inflation of Executive's Foreign Affairs Powers, 1951–1954*, 94 CAL. L. REV. 175, 176–78, 184–87 (2006).

43. See Kaufman & Whiteman, *supra* note 42, at 326–27 (recognizing that Senator Bricker wished to curb the use of executive agreements but arguing that Bricker's primary initial target was human rights treaties).

44. *Id.* at 322–23.

45. *Id.* at 323–25, 327–28.

46. S. Res. 177, 82d Cong. (1951).

2. the President of the United States should advise the United Nations that the proposed International Covenant on Human Rights is not acceptable to the United States; and
3. the President of the United States should instruct United States representatives at the United Nations to withdraw from further negotiations with respect to the Covenant on Human Rights, and all other covenants, treaties, and conventions which seek to prescribe restrictions on individual liberty which, if passed by the Congress as domestic legislation, would be unconstitutional.⁴⁷

For Bricker, the Covenant was the embodiment of an internationalist agenda that sought to integrate international institutions and laws with domestic institutions and laws in the United States. His solution was to urge the Senate and the American public to pressure the Truman administration to halt its participation not only in the ongoing drafting of the Covenant, but all future human rights projects at the United Nations.⁴⁸

If the text of the resolution left anything to the imagination of his Senate colleagues, Bricker quickly put to rest any question about his intentions regarding the Covenant specifically, and international human rights treaties generally:

I have submitted this afternoon for appropriate reference a simple resolution declaring it to be the sense of the Senate that the proposed covenant on human rights be not approved, and that negotiations with respect thereto by representatives of the United States be terminated. My purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection.⁴⁹

Bricker was not one to hold back his vitriol or hyperbole. He went on to suggest that the Covenant would better be called the

47. *Id.*

48. See 97 CONG. REC. 8254 (1951).

49. *Id.* at 8263.

“Covenant on Human Slavery or subserviency to government.”⁵⁰ This treaty, he continued was a “monstrous document” that amounted to nothing more than a “blueprint for slavery.”⁵¹ For Bricker, this kind of charged rhetoric when he submitted his resolutions was quite common; he often conducted lengthy and impassioned floor discussions to explain the purpose of his legislative proposals.⁵²

Another of Bricker’s primary concerns was that international human rights treaties would require the cession of United States sovereignty. Though Article 2(7) of the UN Charter reaffirmed the sovereignty of nations, the human rights provisions contained within the Charter explicitly introduced the idea that domestic issues had international ramifications, thereby putting into question the true extent and limits of state sovereignty.⁵³ Throughout his battle, Bricker warned lawmakers and the American public not to surrender their sovereignty. For example, in one Senate speech he said: “No nation has any real sovereignty if the economic and political rights which it extends to its people are subject to recognition, modification and review by an international authority.”⁵⁴ In another speech he spoke in sweeping terms about the danger of relinquishing national sovereignty: “[T]he paramount issue of our time is whether or not the sovereignty and the Constitution of the United States shall be preserved. Because of a constitutional loophole which I shall discuss, it is possible for the sovereignty and the independence of the United States to be surrendered by treaty.”⁵⁵ Indeed, the fear of losing the nation’s sovereignty to international human rights was a central issue for Bricker for years to come.

Bricker submitted his next resolution two months later, in September 1951. Unlike his previous resolution, this was not simply a hortatory resolution intended to indicate a political mood within the Senate. Instead, this resolution, Senate Joint Resolution 102 (“S.J. Res. 102”), was the first official version of his many subsequent resolutions that called for the amendment of the United States Constitution.⁵⁶ Similar to his earlier Senate

50. *Id.* at 8255.

51. *Id.*

52. *Id.* at 8254–63.

53. U.N. Charter art. 2, ¶ 7.

54. 97 CONG. REC. 11,512 (1951) (statement of Sen. Bricker).

55. 98 CONG. REC. 908 (1952) (statement of Sen. Bricker).

56. S.J. Res. 102, 82d Cong. (1951).

discussion, the discussion that he offered the Senate in support of S.J. Res. 102 also contained a number of the themes that had been outlined in historical scholarship on Bricker. For example, he spoke at length about how the Covenant on Human Rights would diminish constitutional protections that were afforded to American citizens and would infringe on the nation's sovereignty. The State Department, he argued, "was forced to choose between the Constitution and national sovereignty on the one hand and the prospect of achieving in the future a world government. The State Department chose world government."⁵⁷ He continued: "The Covenant on Human Rights is a trap for the liberties of the American people."⁵⁸ And of course, much of his discussion was suffused with anti-communist, Cold War rhetoric. He warned that a "majority of the U.N. members are nations which have succumbed to communism, socialism, or some form of dictatorial rule. The common characteristic of all these countries is that they exalt the power of the state over the individual."⁵⁹ Thus, it was as clear to his contemporaries as it is to historians today that one of Bricker's main goals was to prevent the integration of international human rights principles into domestic law.

2. Influence of Senator Bricker's Amendment

Within historical literature, the consensus regarding Senator Bricker's influence is clear: though unsuccessful in amending the Constitution, the *threat* of an amendment was extremely influential with respect to shaping the United States' participation at the United Nations on human rights issues and treaty-making, as well as its foreign and domestic policies regarding human rights.⁶⁰ Specifically, it caused the Eisenhower Administration to take actions that set a course for decades to come.

By the spring of 1953, the domestic political pressures had mounted upon the Eisenhower Administration. A February 1953 State Department memo summed up the administration's concern over Bricker's actions:

57. 97 CONG. REC. at 11,513 (1951) (statement of Sen. Bricker).

58. *Id.*

59. *Id.*

60. See TANANBAUM, *supra*, note 37, at 191–215 (describing Bricker's subsequent attempts to pass a constitutional amendment and the impact on the Eisenhower administration).

The Covenants are under attack by large and important groups in this country such as the American Bar Association and a number of members of the U.S. Senate. For the administration to press ahead with the Covenants would tend to keep alive and strengthen support for the Bricker amendments to the Constitution.⁶¹

The coalition spearheaded by Bricker was strong enough to compel the Eisenhower Administration to back away from committing to the Covenants, originally intended to be the teeth of international human rights agreements. The President chose to quit the Covenant, which had by this time been split into two documents.⁶² Under President Eisenhower, the State Department set forth its new plan: the United States would not attempt to ratify the Covenants, but it would continue to take part in their drafting.⁶³

As Henkin argues, the long-term effects of Bricker's agitation were profound.⁶⁴ This episode showed that there would be a political cost for supporting human rights treaties. As a result, elected representatives began to tread very carefully, if at all, when offering their support for such treaties. Legally, this qualified support took the form of addenda to international treaties, which stated that such treaties would have no domestic effect. Such practices have continued into the present day. The United States, upon signing and ratifying human rights treaties, always includes "legal footnotes" called reservations, understandings, and declarations ("RUD"s). These are statements that range from merely voicing opinion to completely negating entire portions of the treaty.⁶⁵

61. *United States Policy Regarding the Draft United Nations Covenants on Human Rights: the 1953 Change*, in FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, UNITED NATIONS AFFAIRS, VOLUME III, at 1551 (Ralph R. Goodwin & William Z. Slany eds., 1979).

62. *Id.* at 1552-54.

63. See *id.* at 1572; see also ANDERSON, *supra* note 6, at 227-29.

64. Henkin, *supra* note 37, at 341-50.

65. Baylis, *supra* note 1, at 277-329 (discussing the propensity for States to sign human rights treaties with reservations, meaning that while they remain in technical compliance, States are free to engage in the practices such treaties condemn).

3. Scholarly Blind Spots in the Bricker Controversy

Ironically, a scholar studying the three foundational human rights texts—the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”—will find little if any direct evidence of Bricker’s impact (or even his existence). Nor is there any evidence of Bricker’s proposed amendment in the United States Constitution or domestic case law. The Bricker controversy thus draws attention to what is a major issue for scholarship that seeks to trace the origins of the modern international human rights regime: a case that was overruled or proposed legislation that never became law still can exert a dramatic influence on subsequent laws and policies.

Although much has been written about the Bricker Amendment controversy, there are a number of crucial matters scholars have failed to investigate, such as: Who exactly was Bricker arguing against? Why did he need to assemble such a massive coalition? What ideas, laws, and movements was he fighting against? The result is that we have only a very partial knowledge of the historical circumstances surrounding Senator Bricker’s actions. Much is known about Bricker’s actions and the content of his proposals, yet the broader context surrounding his campaign to amend the Constitution have thus far remained hidden from view.

In particular, the questions posed above relate to what were Bricker’s “aversive alternatives.”⁶⁶ That is, what threats, whether real or imagined, was he fighting against?⁶⁷ By assuming that the entire episode was at least in part reactive, it is possible to trace back in time the nature and influence of those institutions, laws, organizations, and ideas that are no longer with us, but nevertheless significantly shaped contemporary practices, institutions and outcomes.⁶⁸ Such *a priori* assumptions raise new questions and set the research on a new course into uncharted historical territory in search of Bricker’s causal antecedents. It is not enough to simply ask *what* Bricker

66. See Kim Lane Schepppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross National Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 298–99 (2003).

67. *Id.* at 298.

68. *Id.* at 300.

was fighting for; it is also essential to also ask *what* and *who* he was fighting against.

Specifically, it is necessary to ask *who* was responsible for promoting the alternative version(s) of human rights that John Bricker opposed. As it turns out, scholars generally have not followed these important historical leads that are actually displayed quite prominently in the primary source materials. Throughout his speeches and writings, Bricker made it a point to broadcast who he was fighting against; for example, aiming at President Truman and a number of people within his administration who were actively involved in the creation of the Covenant on Human Rights.⁶⁹ Similarly, he accused Attorney General McGrath of misleading the American people through his assurances that the Covenant did not “weaken the protection of freedoms secured by the Bill of Rights.”⁷⁰ He suggested that the President, the State Department, and the United States representatives to the United Nations had been working under the influence of communist nations and their ideas.⁷¹ He singled out both State Department officials and representatives to the United Nations, such as Dean Acheson,⁷² Eleanor Roosevelt,⁷³ and her advisor at the State Department, James Pomeroy Hendrick, as being intent on subverting the constitutional rights of Americans.⁷⁴

Yet while Bricker spent a great deal of time attacking President Truman and members of his administration, in his initial Senate debates he devoted far more time to attacking three law professors: Harvard Law Professor Zechariah Chafee, Robert Hutchins of the University of Chicago, and Columbia University’s Philip C. Jessup.⁷⁵ Bricker devoted significant time to attacking Chafee and his involvement with a report on freedom of the press that was drafted by a group headed by Hutchins.⁷⁶ He went to great lengths to discredit the views of Jessup, mentioning him at least twenty times in one Senate debate.⁷⁷ Bricker also mentioned, time and time again, a man

69. 97 CONG. REC. 8254 (1951).

70. *Id.* at 8259 (statement of Sen. Bricker).

71. *See id.* at 11,511.

72. *Id.* at 11,512–13.

73. *Id.*

74. *Id.*

75. *See id.* at 8257–58, 11,509.

76. *See id.* at 8257–58.

77. *Id.* at 11,509–13; see also John W. Bricker, *Constitutional Insurance for a Safe Treaty-Making Policy*, 60 DICK. L. REV. 103, 116 (1956); John W. Bricker

named Sei Fujii.⁷⁸ Who were these people and what alternative visions of human rights did they represent? These new lines of inquiry that take the historical analysis in exciting new directions are based on a basic, though often neglected, fact—people, ideas, and laws that no longer possess clear relevance or direct import for contemporary observers might have been supremely influential in their day.⁷⁹

The next two sections of this Article prioritize asking what particular concepts, such as human rights, mean within the historical context under consideration. Although the brief foregoing analysis of Bricker's crusade seems to confirm much of what is already known about the history, it also raises several questions that scholars have not yet asked. Specifically, *who* was promoting the alternative conception of human rights Bricker fought against? Bricker often used a number of somewhat unfamiliar terms in his discussions of the United Nations and the Human Rights Covenant. For instance, throughout his Senate debates, he devoted significant time to discussing the dangers of "world government."⁸⁰ He spoke about the idealistic and naïve "one-worlders," and he excoriated those who advocated for a "world Bill of Rights."⁸¹ What do these terms refer to, and what do they suggest about the broader historical context?

What is particularly notable is the fact that Bricker maintained his focus on the *Fujii* case (discussed in the following Section), continued to fight against "world government" advocates, and discredited the work of Jessup, Hutchins and Chafee simultaneously.⁸² Kaufman and Whiteman (1988) show that in 1953 the amount of time Bricker devoted to the discussion of world government in the Senate exceeded the amount of time he spent discussing the threat of communism, human rights infringing on domestic law, or the threat human rights posed to democracy.⁸³ The topic of Sei Fujii, world

& Charles A. Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME L. REV. 529, 544 (1954).

78. 97 CONG. REC. 8254–68, 11,509–14; 98 CONG. REC. 911 (1952).

79. See Bricker, *supra* note 77 and Bricker & Webb, *supra* note 77, for examples of such highly influential ideas and people.

80. See 97 CONG. REC. 8254–68, 11,509–14 (1951); 98 CONG. REC. 911 (1952); see also Bricker, *supra* note 77, at 116; Bricker & Webb, *supra* note 77, at 543.

81. 97 CONG. REC. 8263 (1951).

82. *Id.* at 8257–63, 11,510–12 (1951); 98 CONG. REC. 911 (1952).

83. Kaufman & Whiteman, *supra* note 42, at 321–32.

government, and the views of these professors, in fact, take up such a significant part of Bricker's public speaking life that they demand at least some investigation to figure out exactly what these concepts meant to Bricker and why he was so persistent in his attacks.

In the standard Bricker story, historians either do not pick up on his mention of Sei Fujii or his "world government" and "world constitution" language, or presume that Bricker is simply talking about the United Nations and international human rights treaties. In fact, what he spoke of was quite different.⁸⁴ Bricker did not just look forward to what would happen with future covenants and human rights treaties; he also looked back at what had happened already and reacted to very recent developments, movements, and trends that were at the time raw, well-known, and widely discussed.⁸⁵ Because many such references have been overruled, discredited, and forgotten, however, scholars have not integrated them fully into the history of human rights in the United States. The next two parts of this Article bring this neglected historical context into view by exploring who Sei Fujii and Robert Hutchins were, what "world government" was, and what each represented in Bricker's struggle.⁸⁶

II. AN OVERRULED CASE

Today, courts in the United States do not consider the validity of domestic laws in light of international human rights treaties.⁸⁷ This was not always the case. In 1950, a California appellate decision named the human rights provisions in the UN Charter as the supreme law of the land, thereby invalidating a California law that prevented Japanese residents from owning land.⁸⁸ The *Fujii* case, as it came to be known, initiated a political firestorm.⁸⁹ Two years later, the California Supreme Court forever wiped the decision from the books.⁹⁰

84. See Kaufman & Whiteman, *supra* note 42, at 325–31.

85. See *id.*

86. A subsequent article examines Bricker's contentious relationship with the other two law professors, Chafee and Jessup.

87. See Kaufman & Whiteman, *supra* note 42, at 309.

88. *Fujii v. State*, 217 P.2d 481, 486 (Cal. Ct. App. 1950), *rev'd*, 242 P.2d 617 (Cal. 1952).

89. See 97 CONG. REC. 11,512 (1951).

90. *Fujii v. State*, 242 P.2d 617 (Cal. 1952).

Although there is little direct evidence in existing law of what is now a legal nullity, the case represented a sharp turning point in the domestic history of human rights. Following the *Fujii* case, what had become an increasingly common practice—citing international human rights provisions in domestic cases⁹¹—soon halted. The case lit a fire for Senator Bricker's opposition.⁹² The domestic struggle over *Fujii* helped translate, and therefore define, what human rights were and what they would be for the American public.⁹³

A. THE *FUJII* CASE OF 1950

During the late 1940s and early 1950s, many indicators pointed to the fact that domestic courts and aggrieved parties were considering whether and how the provisions of the UN Charter related to domestic laws and policies within the United States. Between 1948 and 1955, there were a number of Supreme Court cases in which the Court, parties' briefs, or amicus briefs, referenced the United Nations Charter in such discussions.⁹⁴ Similarly, during this period, the same thing began to appear in state court cases in the United States. Many of those who had suffered what they perceived to be harms started looking towards international law as a moral touchstone—if not legal authority—for shaping the domestic law. In a series of state-level cases, for instance, the court discussed the Charter or the issues surrounding the use of the Charter within the domestic context.⁹⁵ Only one of these cases,

91. See generally Bert B. Lockwood Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984) (detailing cases applying the human rights provisions of the United Nations Charter in state and federal court).

92. See 97 CONG. REC. 11,512 (1951); Kaufman & Whiteman, *supra* note 42, at 316–17.

93. See Kaufman & Whiteman, *supra* note 42, at 316–18.

94. These cases have been compiled by Lockwood Jr., *supra* note 91, and include Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70 (1955); Boiling v. Sharpe, 347 U.S. 497 (1954); Barrows v. Jackson, 346 U.S. 249 (1953); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Zorach v. Clauson, 343 U.S. 306 (1952); Rochin v. California, 342 U.S. 165 (1952); United States *ex rel.* Jaegeler v. Carusi, 342 U.S. 347 (1952); Henderson v. United States, 339 U.S. 816 (1950); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949); Hurd v. Hodge, 334 U.S. 24 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948); Oyama v. California, 332 U.S. 633 (1948); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

95. See Rice v. Sioux City Mem'l Park Cemetery, 60 N.W.2d 110, 157 (Iowa 1953) (holding that the Charter has no application to private conduct between

however—the 1950 *Fujii* case—actually invalidated a domestic law.⁹⁶

The *Fujii* case involved the inability of Japanese residents to own land in California.⁹⁷ Sei Fujii was a resident of California who, because of existing immigration and naturalization laws, could not become an American citizen on account of his Japanese ancestry.⁹⁸ Thus, the California Alien Land Law prohibited him from ever owning land in the State.⁹⁹ After his legal challenge to the Alien Land Law was defeated in the Superior Court of Los Angeles County, Fujii appealed.¹⁰⁰ On appeal, the court decided to invalidate California's Alien Land Law based on a novel—perhaps “revolutionary”—theory of law that integrated U.S. Constitutional provisions with international law and domestic state law.¹⁰¹

Citing Article VI, Section 2 of the United States Constitution, the court maintained that the Charter—a valid treaty—was, under the supremacy clause, “now the supreme law of the land.”¹⁰² Once the court had established the UN Charter as governing law, it spelled out the implications that required that, “every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose

citizens); *Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (holding that the Charter was not a self-executing treaty and therefore could not supersede state legislation); *Dossett v. State*, 52 So. 2d 490, 491 (Miss. 1951) (holding that the Charter cannot divest a state from its own jurisdiction); *In re Backstron*, 220 P.2d 742, 743 (Cal. Ct. App. 1950) (implying that the Charter falls outside the scope of a habeas corpus inquiry); *Fujii v. State*, 217 P.2d 481, 488 (Cal. Ct. App. 1950), *rev'd*, 242 P.2d 617 (Cal. 1952) (holding that the Charter was the supreme law of the land); *Namba v. McCourt*, 204 P.2d 569, 604 (Or. 1949) (using the Charter to support its holding that Oregon's alien land law was unconstitutional); *Perez v. Sharp*, 198 P.2d 17, 45 (Cal. 1948) (referencing the Charter to support its holding that California's ban on interracial marriage was unconstitutional); *Kemp v. Rubin*, 69 N.Y.S.2d 680, 686 (N.Y. 1947) (stating that the Charter expressly “h[as] nothing to do with domestic matters nor with agreements between citizens of the United States”). The cases noted here represent the author's own analysis.

96. *Fujii*, 217 P.2d at 481.

97. *Id.* at 482.

98. *Id.*

99. *Id.* at 482–83.

100. *Fujii*, 242 P.2d at 619.

101. *Id.* at 622.

102. *Id.* at 619–20. The Supremacy Clause of the United States Constitution provides that “all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, § 2.

and intent.”¹⁰³ The plain language in Articles 55 and 56 of the Charter, the court argued, were entirely clear:

It is agreed in Chapter IX, Article 55, that ‘the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ By Article 56 it is declared that ‘All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.’¹⁰⁴

Ultimately, the court held that the provisions within the Alien Land Law were in “direct conflict with the plain terms of the Charter.”¹⁰⁵

Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Laws must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable.¹⁰⁶

Although this decision was overruled within two years, it stood for a dramatic proposition: the United States and its own domestic laws were bound by the international human rights provisions within the Charter.¹⁰⁷ Even at this early stage—that is, before the binding Covenant had been completed—the brief human rights provisions within the Charter were now to be counted, at least by this California court, as the supreme law of the land.¹⁰⁸

What was actually a short and straightforward opinion set off a firestorm in the United States, and it is at this point in the

103. *Fujii*, 217 P.2d at 486.

104. *Id.* at 487.

105. *Id.* at 488.

106. *Id.*

107. *See id.*

108. *See id.*

story that Senator John Bricker becomes important.¹⁰⁹ The struggle over what this case represented was an extremely important, defining moment in the post-World War II history of international human rights.¹¹⁰ Historical literature focuses on the orientation of Bricker's actions toward mitigating future effects of the Covenant and other human rights treaties.¹¹¹ This is absolutely true. But as the *Fujii* case makes clear, Bricker was also reacting to a series of events that already had been set in motion by the early 1950s.

It was not merely the laws that Bricker worried were taking hold; it was the perceived—and perhaps growing—legitimacy of using international human rights ideas within the domestic setting. The fact that judges were even discussing the merits of the domestic use of international human rights law was in fact a major problem for Bricker. And even if *Fujii* was the only case that had up until that moment been willing to use international human rights law to invalidate a domestic law, it was a sign of a possible shift, one that could make significant progress toward defining the domestic acceptance of human rights even before the Covenant was completed. If other courts, for instance, followed the *Fujii* Court's interpretation of international human rights law, so too might public opinion, domestic legislation, and institutional structures.¹¹² Bricker was therefore not just looking forward, but was reacting to events that had already transpired.

The goal of Bricker and others like him was to discredit this emergent notion of applying international human rights in the domestic context, while impugning its advocates, gathering supporters, and creating a legal bulwark against the domestic impact of international human rights law. Thus, when Bricker spoke to the United States Senate about loss of sovereignty, his arguments were not abstract or hypothetical. Rather, they were

109. See generally Alona E. Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 AM. SOC'Y INT'L. L. PROC. 66 (1951) (discussing the impact of international legislation such as the Genocide Convention on domestic law); Quincy Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L L. 62 (1951) (discussing the tension between non-self-executing treaties and domestic law in courts in the United States).

110. See Evans, *supra* note 109; Wright, *supra* note 109.

111. See Kaufman & Whiteman, *supra* note 42, at 309, 316.

112. Although historians of human rights generally focus on the way international treaty provisions define what human rights are, the functional meaning of human rights in practice is must include the conceptual interpretations that occur at the local level.

focused on a specific series of events that had transpired over the past several years. In particular, Bricker made it quite clear that the *Fujii* case was a primary concern during his Congressional statements, stating: “I do not agree that the determination of the court in the *Fujii* case is a proper judicial decision.”¹¹³

Bricker’s solution was to create a legal blockade against international human rights law with his constitutional amendment. In February 1952, for instance, when discussing his own Senate Joint Resolution 130 (“S.J. Res. 130”), he described the purpose of the amendment with explicit reference to the *Fujii* case.¹¹⁴ He explained that in *Fujii* “a California court held that the State’s Alien Land Law was repealed by article 55 of the UN Charter.”¹¹⁵ Thus, he continued, one of the chief purposes of S.J. Res. 130 was to “prevent treaties from automatically becoming the supreme law of the land and thereby nullifying an indeterminable amount of Federal and State legislation without further action by the Congress.”¹¹⁶ While much of the talk of the effect of international human rights law had been speculative, *Fujii* provided Bricker with a tangible example of what might happen in the United States if the trend towards incorporation continued.

B. FUJII AND LOCAL HUMAN RIGHTS STRUGGLES

One crucial, and often overlooked, aspect of this history is that the issue of human rights is not merely an international issue. Human rights are necessarily and simultaneously a domestic concern.¹¹⁷ The *Fujii* case shows that the struggles over international human rights actually pertain to existing and future domestic concerns. In the early 1950s both sides of the human rights debate had significant stakes in the outcomes regarding whether international human rights would be incorporated into the domestic law.¹¹⁸ Thus, establishing a lasting conception of human rights as domestic law had just as

113. 97 CONG. REC. 11,512 (1951).

114. 98 CONG. REC. 911 (1952).

115. *Id.*

116. *Id.*

117. See, e.g., Mark Goodale, *Locating Rights, Envisioning Laws Between the Global and the Local*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 25–26 (Mark Goodale & Sally Engle Merry eds., 2007).

118. See *id.* at 17–33.

many political consequences for those aggrieved parties and individuals who had been seeking its admittance as it did for the future of those who were actively fighting against it. Though often overlooked, this domestic aspect of human rights—even their domestic rejection—is an integral part of the human rights concept formation process.

Bricker, for instance, argued a great deal about the loss of sovereignty.¹¹⁹ In the abstract, however, sovereignty does not offer much analytic purchase for understanding the particular situation in question. The real question for Bricker—and what was so deeply troubling to him—was not simply the necessity of relinquishing sovereignty under an international system of human rights, but it was the question of who would be bound and by what authority.¹²⁰ He maintained:

The basic premise of the so-called new international law is that the relationship between citizens of the same government and between the individual and his government are appropriate subjects for negotiation, definition, and enforcement in multilateral treaties. Under this theory of the function of international law, no economic or political rights are beyond the reach of the treaty-making power.¹²¹

In this regard, the relation that human rights implied between the domestic and international realms was of great concern. Seizing upon the language of the State Department's reports, Bricker turned the government's language around for his own argument that the State Department was "promoting this *revolutionary* legal theory by statements that the distinction between foreign and domestic affairs is virtually nonexistent."¹²²

A close read of Bricker's arguments is particularly illuminating in showing just how locally-driven his arguments about human rights and sovereignty actually were. "If the *Fujii* case should eventually be affirmed by the United States Supreme Court," Bricker warned, "literally thousands of Federal and State laws will automatically become invalid."¹²³ If human rights treaties were incorporated into domestic law, he

119. 98 CONG. REC. 911 (1952).

120. *Id.* at 908–09.

121. *Id.*

122. *Id.* at 909 (emphasis added).

123. *Id.* at 911.

continued, the nation might be forced “to provide equal rights for women. Obviously, something must be done to prevent treaties from having such far-reaching and unintended consequences.”¹²⁴ Of course, such consequences of incorporating human rights law into domestic law were fully intended by many who had failed to achieve the justice they felt they deserved under the United States Constitution. A brief look at the kinds of social issues at stake in the cases in which plaintiffs had looked toward international human rights law, for instance, shows a series of ongoing battles over local legal issues, such as anti-miscegenation laws, racially restrictive covenants, and alien land ownership laws.¹²⁵

Bricker was quite correct about the necessity of having to relinquish a certain amount of sovereignty if international human rights were to be admitted into domestic law. Although Bricker and others thought this was one of the worst things that could happen to the American republic, as a practical matter, the necessity of relinquishing a certain amount of freedom when creating new laws is entirely unremarkable. Just as business regulations and criminal laws limit the freedom to pollute or commit murder, for instance, human rights laws similarly must restrict certain conduct if they are to work. Bricker warned about the effects of accepting a domestic notion of human rights by offering specific examples of the local social consequences.¹²⁶ Exaggeration, fabrication, and scare tactics were common in his impassioned rhetoric. He claimed that international human rights would suppress or deny Americans the freedom of religion, the right to a public trial, freedom of speech, association, and “the right of the United States to protect itself against the subversive activities of Communists.”¹²⁷

Bricker’s inflammatory rhetoric was effective. Many citizens who were already invested in various local political battles took naturally and rapidly to Senator Bricker’s call to arms and became his allies.¹²⁸ Human rights, though initiating from

124. *Id.* At the time, there were several proposed constitutional amendments intended to ensure gender equality within the United States. Bricker mentioned one such proposed amendment by name, Senate Joint Resolution 3, in his discussion of the dangers of the *Fujii* case. *Id.*

125. See Lockwood, *supra* note 94 (discussing cases in state and federal courts from 1946 to 1955 where plaintiffs raised the application of UN Charter human rights provisions).

126. 98 CONG. REC. 911–12 (1952).

127. *Id.* at 909.

128. See Richards, *supra* note 42, at 203–04.

international texts, appeared to them as just another local threat to the local battles they were fighting. While these struggles spurred some Americans to look toward human rights for relief, others took it upon themselves to prevent human rights from reaching domestic shores.¹²⁹ By the early 1950s, completely wiping human rights treaties off the books was not possible—the United Nations had made too much progress and had too much forward momentum at this point to halt it. Thus the only option for domestic opponents of human rights was to define them for the American public in a way that was as consistent as possible with their local-level political aims and goals.

C. THE RELEVANCE OF *FUJII* FOR SENATOR BRICKER

The legal and political aspects of the Bricker episode are extremely important pieces of the overall story of human rights concept formation in the United States. But the *Fujii* case helps to illustrate the broader consequences of this episode in terms of the development of the United States' contemporary domestic conception of human rights. Bricker and his allies were not just fighting against the Covenant or for a Constitutional amendment; they were fighting for a lasting conception of human rights for the United States—one that would continue to do Bricker's work long after he and the particulars of the struggle were forgotten. The *Fujii* case helps illuminate this aspect of the story because what was at stake was whether rights would flow into the United States from the international realm. Bricker was fighting for an international-only conception of human rights in which rights could flow from the United States into the international realm, he argued, but not the other way around.¹³⁰

Although we know Bricker opposed human rights treaties, it is incorrect to say he opposed human rights. Senator Bricker, in fact, on numerous occasions advocated strongly on behalf of "human rights."¹³¹ But as the following quotes show, his brand of human rights was quite different than that which was embodied within the Covenant on Human Rights. In July 1951 he said on the floor of the Senate:

129. See *id.* at 203–06.

130. 97 CONG. REC. 8255 (1951).

131. *Id.* at 8255, 11,514.

Our constant effort . . . ought to be to lift the other peoples of the world up to our high standard of individual human rights, rather than in any way to qualify our standard, or to agree with any position which other governments might take, or seek to have us take which have the effect of lowering it.¹³²

For Bricker, human rights sprang from the United States Constitution, not an international treaty. He argued that it would be possible for the United States to “play a leading part in advancing the cause of human rights all over the world.”¹³³ But those human rights, as far as he was concerned, had to originate within the Constitution.¹³⁴ Within his understanding of the matter, the slightest departure from the Constitution made any external human rights treaty null and void.

We should try to convince the other nations of the world that neither communism nor socialism is the wave of the future . . . we should try to spread the doctrine that human rights can be achieved only by adhering to the principles embodied in the Constitution of the United States and in the Declaration of Independence. By precept and example we strengthen ourselves and can best guide others to nobler concepts of human rights.¹³⁵

A key insight emerges: Bricker actually supported human rights, though a version of human rights that originated within the provisions of the Constitution and emanated out, beyond the borders of the United States rather than the other way around. Thus, Bricker was not against human rights, but was fighting for a particular conception of them. The meaning of human rights for the present and future generations was what was at stake within the context of this struggle. To the extent that we, in the present, fail to appreciate the historical origins of our own contemporary human rights concept, it is quite possible that we might become unwitting collaborators of those who invented it in the past.

132. *Id.* at 8255.

133. *Id.* at 11,514.

134. *Id.*

135. *Id.*

III. A VANQUISHED SOCIAL MOVEMENT

For those studying the history of human rights, it is easy to let characters such as Senator John Bricker take control of the story. Bricker was a larger than life individual with missionary zeal, legions of supporters, great power, and outsized influence over public matters. But focusing on his personality and biographical details is not particularly useful for answering the broad questions about contemporary conceptions of human rights in the United States. Instead, it is more useful to focus on what Bricker represented in context. That is, it is important to focus the inquiry on examining the particular historical setting that informed the ideas and proposals that Bricker put forth; to consider the structural conditions that enabled him to gain such support at the time; and to use his story to learn about this extremely unique and defining moment in United States history.

One topic of debate that was raised repeatedly by Senator Bricker was the threat of something he called “world government.” To Bricker, the Covenant, human rights treaties, *Fuji*, and the United Nations were each part of a scheme for world government. “According to this scheme,” Bricker argued, “we are to be a state in a great nation of states, with our destiny not shaped by ourselves, but by a super government.”¹³⁶ The inflammatory nature of Bricker’s rhetoric is clear in the statements he used to describe world government:

Our Government, our educational system, our trade and commerce, our own domestic laws, the control of our Armies, Navies, and Air Forces are to be given completely to this super-world-government, all in the name of preserving peace. Is that the kind of peace the builders of this great Nation want? Is peace so sweet that we are willing to be made slaves in order to obtain it?¹³⁷

Interestingly, his accusations were not strictly partisan. He explained in his speech to the Senate that both “Republicans and Democrats are included among those who would convert the United Nations into an instrument of world government by the use of treaties.”¹³⁸

136. *Id.* at 12,294.

137. *Id.*

138. 98 CONG. REC. 909 (1952).

Bricker's answer to the impending threat of world government, of course, was his Constitutional amendment. Before the United States "is engulfed by some form of world or regional government," Bricker warned, "the American people must, admittedly, take that revolutionary step, by amending the Constitution."¹³⁹ Though Bricker did not shy away from scare tactics, looking back at this history from our own contemporary perspective it is difficult to know where his embellishments end and the truth begins. After all, the phrase "world government" means far less, if anything, to us today than it did in the post-World War II context. This section places Bricker's rhetoric about world government in its context and explores the constellation of proposed ideas, laws, and institutions surrounding the overlooked and unsuccessful, yet highly influential, world government movement.

A. CHANCELLOR HUTCHINS AND A PLAN FOR WORLD GOVERNMENT

When Bricker first submitted S. Res. 177 in July 1951, he lambasted a report on freedom of the press that was authored by Chancellor Robert Hutchins of the University of Chicago.¹⁴⁰ Hutchins was a public figure in American politics, public affairs, and academia who was at the time well known in popular conversation.¹⁴¹ Hutchins was not one to retreat from potential controversy; in fact, he preferred to author it. Hutchins headed a commission that had been created to study the issue of freedom of the press. The Commission of Freedom of the Press ("the Commission") was well-appointed in funds and in notable public figures. The Commission's Report was financed with grants of \$200,000 from Time, Inc. and \$15,000 from Encyclopedia Britannica, Inc.¹⁴² These, of course, were extremely significant figures for any such endeavor, but particularly so for a project that was primarily academic in nature.

Many of the notable public figures who joined Hutchins on the Commission worked in political posts and for causes that

139. *Id.* at 911.

140. 97 CONG. REC. 8254–68 (1951).

141. See generally MILTON MAYER, ROBERT MAYNARD HUTCHINS: A MEMOIR 255 (John H. Hicks ed., 1993) (discussing the life and career of Robert Hutchins).

142. THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

Bricker opposed.¹⁴³ Some Commission members, for example, had been part of Franklin Roosevelt's administration. For instance, Archibald Macleish was an American member of UNESCO's governing board, and was responsible for writing the preamble to its 1945 Constitution.¹⁴⁴ Several years earlier, he directed the Office of Facts and Figures (later the Office of War Information), and was appointed by Franklin Roosevelt to chair a committee charged with outlining his Four Freedoms in 1942¹⁴⁵—a precursor idea to human rights that appears in the UDHR's preamble.¹⁴⁶ In this latter task, Macleish was joined by another Commission member, Reinhold Niebuhr. Additional members of the Commission, such as Zechariah Chafee and Jacques Maritain, worked and advocated for the UN and human rights.¹⁴⁷

But what is most noteworthy, and directly relates to the context of Bricker's fierce rhetoric surrounding world government, is the fact that there were a number of individuals on the Commission who had been arguing that the United Nations was not strong enough or acceptable in its then-present form.¹⁴⁸ Although Bricker made similar arguments, these individuals had a very different solution. Instead of relying on the United Nations to attain and preserve international peace

143. For a list of members, see *id.* Note that the list of Commission members appears on an unnumbered page at the beginning of the text.

144. *About the U.S. and UNESCO*, U.S. DEP'T OF STATE, <http://www.state.gov/p/io/unesco/usunesco/> (last visited Nov. 5, 2016).

145. Herbert Mitgang, *Books of The Times; A Poet Who Also Held a High Government Rank*, N.Y. TIMES (June 3, 1992), <http://www.nytimes.com/1992/06/03/books/books-of-the-times-a-poet-who-also-held-a-high-government-rank.html>.

146. *Eleanor Roosevelt and the Universal Declaration of Human Rights*, ROOSEVELT FOUR FREEDOMS, <http://www.fourfreedoms.nl/en/roosevelt-four-freedoms/eleanor-roosevelt-and-the-universal-declaration-of.htm> (last visited Nov. 5, 2016).

147. See Milton, *supra* note 141, at 257–58.

148. For example, American banker Beardsley Ruml is famously known to have said the following:

At the end of five years you will consider the United Nations is the greatest vision ever realized by man. At the end of ten years you will find doubts within yourself and all through the world. At the end of fifty years you will believe the United Nations cannot succeed. You will be certain that all the odds are against its ultimate life and success. It will only be when the United Nations is 100 years old that we will know that the United Nations is the only alternative to the demolition of the world.

WILLIAM SHAWCROSS, DELIVER US FROM EVIL: PEACEKEEPERS, WARLORDS AND A WORLD OF ENDLESS CONFLICT 224 (2000).

and security, these Commission members advocated disbanding the United Nations and creating a stronger, truly supranational from of government. For example, Beardsley Ruml, who was Chairman of the Board of the department store R.H. Macy and Company and had been the Chairman of the Federal Reserve Bank of New York, was a strong advocate of such a plan.¹⁴⁹

Other Commission members were members of another Committee that Hutchins headed, the Committee to Frame a World Constitution (the “Committee”). This second group was dedicated to researching, promoting, and enacting plans for what they called “world government”—the very same world government that Bricker was advocating against in the Senate.¹⁵⁰ The Commission members who were or had been associated with the eleven-member Committee included Robert Redfield, William K. Hocking, Reinhold Niebuhr, and of course, Robert Hutchins, who was the head of both groups.¹⁵¹

Hutchins’ Committee to Frame a World Constitution was responsible for publishing a monthly world government journal called *Common Cause* that by the end of 1951 had published over two thousand pages for its subscribers.¹⁵² But, more importantly, they were also responsible—and better known—for authoring a complex draft “World Constitution” that outlined in rich detail the institutional structure and composition of a new world order, as well as all of the associated rights and duties of the “world citizens” living beneath their invented system of global governance.¹⁵³ It was this type of “world constitution” that Bricker spoke of at length in his congressional statements.

Hutchins’ World Constitution (the “Chicago Plan”) contained a “Declaration of Duties and Rights” that included provisions for the stewardship of the “four elements of life—earth, water, air, energy.”¹⁵⁴ The Chicago Plan divided the world into “nine Societies of kindred nations and cultures, or

149. See *Guide to the Beardsley Ruml Papers 1917-1960*, UNIV. OF CHI. LIBR., https://www.lib.uchicago.edu/e/scrc/findingaids/view.php?eadid=ICU.SPCL.RU_ML&q=bank#idp125585296 (last visited Nov. 21, 2016).

150. See 97 CONG. REC. 8257 (1951).

151. Preliminary Draft of a World Constitution, *supra* note 5, at 38. Only Hutchins and Redfield themselves were on the Committee.

152. See COMM. TO FRAME A WORLD CONSTITUTION, COMMON CAUSE: A MONTHLY REPORT OF THE COMMITTEE TO FRAME A WORLD CONSTITUTION (1947).

153. See Preliminary Draft of a World Constitution, *supra* note 5.

154. See *id.* at 6.

Regions . . . “with names such as “Europa,” “Eurasia,” “Afrasia,” “Atlantis,” “Asia Major,” “Australasia,” and “Columbia.”¹⁵⁵ The World Constitution invalidated any region’s law that ran contrary to it.¹⁵⁶

Although Bricker did not mention it in his Senate speech, he undoubtedly would have been very much aware that Hutchins was intimately involved in the project to develop a world constitution. As described in detail below, it was a fact that had come up for discussion in many previous Senate and House debates.¹⁵⁷ Nor would Bricker have needed to mention what was well known to his Senate colleagues: Hutchins’ plan for world government was but one of a great number of plans that advocated for restructuring the United Nations, or doing away with it altogether, and in its place instituting a world government. In the fall of 1951 several dozen of these plans had been drafted into resolutions and were awaiting their fate in the United States Congress.¹⁵⁸

As improbable as they seem today, all of these resolutions sought to transform the relationship the United States and its citizens held with the rest of the world, either by transforming the United Nations or through an entirely new supranational governmental institution. Doing so would require substantial reform and would require the United States to relinquish a major portion of its sovereignty. A number of the plans even called for amending the United States Constitution, though years before Bricker had put forth the idea for very different purposes.¹⁵⁹ Although Bricker’s rhetoric today appears alarmist when placed in a contextual vacuum, for all of his liberal embellishments, Bricker actually downplayed the nature and extent of what was actually occurring at the time concerning the issue of world government.

155. *Id.* at 11–12.

156. *Id.* at 25–26.

157. See Section III(B), *infra*.

158. See Section III(C), *infra*.

159. For a comprehensive list of resolutions which did and did not envisage changes in the United States Constitution, see William Tucker Dean, Jr., *World Government and the Constitution of the United States*, 38 CAL. L. REV. 452 (1950).

B. NATIONAL POLITICAL SUPPORT FOR WORLD GOVERNMENT

When Bricker introduced his resolutions in July and September of 1951, he was acting within a unique, though unstable, political and social context. Over the past several years, “world government” supporters had made a series of sweeping advances surrounding the question of how to organize the post-war world. They had, for instance, made significant inroads into all three branches of the United States’ federal government.¹⁶⁰ For a number of years, Congress had been considering how to deal with a number of legislative proposals that advocated for various forms of world government or UN transformation.¹⁶¹ A reluctant and cautious Truman administration was also trying to figure out its path forward in the face of growing support for such ideas.¹⁶² The courts at this time also appeared to be moving towards ideas of international human rights law in a way that they had never before (or again) done. It is within this contextual backdrop of considerable national advances toward world government Bricker was operating. Because existing human rights scholarship has failed to account for much of the basic facts surrounding this historical episode, this Section offers a resource-rich outlay of historical data, providing extensive examples of the legislation, the politics, and the court cases that emerged.

After 1945, a series of proposed laws and court cases had embraced the core idea of this budding internationalist trend that advocated for greater United States participation in global institutions and international sources of law. By 1948, a variety of individuals, groups, and organizations had advanced a wide range of often-revolutionary proposals; there were several dozen resolutions under consideration in the House of Representatives,

160. See, e.g., *id.* (detailing the host of legislative resolutions then pending before the 81st Congress); *id.* at 459 (describing the Atlantic Union Committee, led by distinguished judges Mr. Justice Roberts, Judge Robert P. Patterson, and former Undersecretary of State Will Clayton); see generally Campbell Craig, *Why World Government Failed After World War II: A Historical Lesson for Contemporary Efforts*, in GLOBAL GOVERNANCE, GLOBAL GOVERNMENT 77 (Luis Cabrera ed., 2011) (explaining President Truman’s initial interest in, and eventual rejection of, world government).

161. See generally Dean, Jr., *supra* note 159 (describing various resolutions introduced in the United States Congress during the 1940s).

162. See generally Craig, *supra* note 160 (illustrating the political and social context in which the Truman Administration was operating).

with many more in the works.¹⁶³ Although many were similar to one another, there was also significant variation. The legislative proposals ranged from relatively modest suggestions to work within the confines of the United Nations to honor its core principles, to the amendment of the UN Charter to facilitate sweeping structural changes, to the wholesale rejection of the United Nations in place of a supranational so-called “world government” (see Table 1). In 1948, there was enough agitation and lobbying on the matter to gain the attention and support of a growing group of lawmakers in the House and Senate of the United States Congress.¹⁶⁴

By 1948, the issue of UN reform and world government had become prominent enough that the House Committee on Foreign Affairs held hearings on the matter in May 1948 to closely examine and consider the legislative proposals before it.¹⁶⁵ The House Committee on Foreign Affairs again held hearings on the matter in October 1949.¹⁶⁶ And after establishing a Senate Foreign Relations subcommittee on the “Revision of the United Nations Charter” to study the issue and examine the growing number of resolutions, the Senate subcommittee held its own hearings in February 1950.¹⁶⁷

An extraordinary amount of time and resources were focused on the hearings. Together, the hearings spanned nearly three weeks, during which time the House and Senate committees and subcommittees conducted interviews, heard oral testimony, and received written communication from over 351 individuals and groups, amassing over 1,600 pages of

163. *General United States Policy Toward the United Nations*, in FOREIGN RELATIONS OF THE UNITED STATES, 1948, GENERAL; THE UNITED NATIONS, VOLUME I, PART 1, at 22 n.3 (Ralph R. Goodwin ed., 1948) [hereinafter *General United States Policy Toward the United Nations*].

164. *Id.*

165. See *Structure of the United Nations and the Relations of the U.S. to the United Nations: Hearings Before the H. Comm. on Foreign Affairs*, 80th Cong. (1948).

166. See *To Seek Development of the United Nations into a World Federation: Hearings Before the Comm. on Foreign Affairs H. Rep.*, 81st Cong. (1949).

167. See *Resolutions Relative to Revision of the United Nations Charter, Atlantic Union, World Federation, Etc.: Hearings Before the Subcomm. of the S. Comm. on Foreign Relations*, 81st Cong. (1950) [hereinafter *81st Cong. Subcomm. Hearings*]. For a more in-depth look at the official documentary record of United States policy decisions regarding the United Nations, see FOREIGN RELATIONS OF THE UNITED STATES, 1950, THE UNITED NATIONS; THE WESTERN HEMISPHERE, VOLUME II (Ralph R. Goodwin et al. eds., 1976).

documentation.¹⁶⁸ Several months after the Senate Hearings, the Senate Committee on Foreign Relations issued a sixty-four-page report (the “Senate Report”) that provided a synthesis of the proposals as well as an overview of the 1950 hearings to assist lawmakers in their understanding of the issues and proposals before them.¹⁶⁹

The Senate Report recognized that in recent years there had been a “loss of confidence” in the UN from many quarters.¹⁷⁰ After World War II, the authors explained, achieving lasting international peace and security was of paramount concern.¹⁷¹ In 1950, preventing another global war, of course, remained just as pressing a concern as ever, but the authors explained that in just a few years a number of momentous obstacles had emerged; the world in 1950 was quite different from the one that the architects of the UN had confronted in 1945.¹⁷² For one, the organization and its founding document—the UN Charter—were both constructed *before* the public at large knew about atomic energy.¹⁷³ The power that was unleashed over Japan in the waning days of World War II was an unforeseen technological development. In 1950, the Soviet Union possessed the same technology.¹⁷⁴ At this point, the organization that the nations of the world had put their faith in for mitigating the threat of war did not possess the laws or mechanisms for controlling the proliferation and use of this potentially devastating weaponry.¹⁷⁵

The threat of atomic warfare was compounded by the political tensions that had emerged between the United States

168. See 81st Cong. Subcomm. Hearings, *supra* note 167.

169. See S. REP. NO. 2501 (1950).

170. *Id.* at 10.

171. *Id.*

172. *Id.* at 6–8.

173. The United Nations was officially formed in June 1945, while the first atomic bomb was not dropped on Hiroshima until August 6, 1945. See *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/> (last visited Oct. 28, 2016); *Atomic Bomb Dropped on Hiroshima*, HISTORY, <http://www.history.com/this-day-in-history/atomic-bomb-dropped-on-hiroshima> (last visited Nov. 6, 2016).

174. *Soviets Explode Atomic Bomb*, HISTORY, <http://www.history.com/this-day-in-history/soviet-explode-atomic-bomb> (last visited Nov. 6, 2016).

175. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Seth Grae, *The Nuclear Non-Proliferation Treaty’s Obligation to Transfer Peaceful Nuclear Energy Technology: One Proposal of a Technology*, 19 FORDHAM INT’L L.J. 1985, 1989 (1995).

and the Soviet Union. The Soviet Union's repeated use of its veto in the Security Council brought to light the divergent—if not mutually exclusive—political interests of the two nations.¹⁷⁶ It also prevented the United Nations from addressing and acting upon important international matters on its agenda. In these early days of the Cold War, the Senate Report acknowledged that the United Nations was an absolute necessity if the world was not to descend into anarchy.¹⁷⁷ But at the same time, the Senate Report acknowledged that there were serious questions about whether the United Nations was strong enough to carry out the original mission its architects had set out for it—or whether the UN could even endure.¹⁷⁸ Referencing the ideological nature of the Cold War, the authors of the Report wrote that the “positive advantages [of the UN] must, of course, be measured against the question as to how long the organization can survive the increasing pervasiveness and intensity of the ideological struggle for the minds and loyalties of men.”¹⁷⁹ The challenges confronting the United Nations were formidable.

The authors of the Senate Report wrote that it was obvious that there needed to be some kind of action or change by the UN to address these problems. Lawmakers, State Department officials, and engaged members of the public all recognized that business as normal at the UN could not be a lasting solution for international peace and security. The authors of the Senate Report wrote: “[T]he point does not need to be labored that the United States should do what it can to maintain and strengthen the United Nations.”¹⁸⁰ Indeed, it was not just the United States that recognized these problems; those closest to the day-to-day political challenges within the UN also recognized the extent of its internal divisions. In 1948, for example, the UN’s own Secretary General, Trygve Lie, admitted that the “wartime alliance from which the United Nations was born started to pull

176. For example, following the extension of emergency aid to the Greek Government by the United States and paralysis of Security Council action by Soviet veto, the United States brought the case before the General Assembly in 1947. Primarily as a result of Soviet obstructionism it was at that time impossible to reach an agreement on the plan for international control of atomic energy approved by a majority of United Nations members. S. REP. No. 2501, at 10–11 (1950).

177. *Id.* at 6–8, 16–17.

178. *Id.* at 8–9, 17–18.

179. *Id.* at 17.

180. *Id.* at 18.

apart all too quickly and, had the establishment of the United Nations been delayed even a few months, the Organization might never have been created.”¹⁸¹ The most pressing question for United States lawmakers and State Department officials was what kind of institutional changes were necessary and appropriate.

Until that time, the Truman administration and various members of Congress had begun to explore two very distinct paths for addressing the UN’s difficulties. The first was to work within the framework of the United Nations—though proposals differed on whether it was best to amend the Charter, and by extension the structure of the organization, or to leave it as it was. The second path, recognizing the deficiencies and inherent limitations of the UN, was to develop laws, international institutions, and relationships outside of the organization. The Vandenberg Resolution—a resolution that had already received a favorable reception in the Senate—recommended heading along both avenues simultaneously.¹⁸² It called not only for the United States to work within the framework of the United Nations to achieve peace, but also for regional security arrangements outside of the UN’s framework.¹⁸³

One-part idealism and one-part realism, the Vandenberg Resolution mirrored the uncertainty and the separate directions taken by the many competing legislative proposals then being considered. For the most part, though, these other proposals expanded liberally on each of the paths already taken by Vandenberg and his resolution’s supporters, offering to take the nation far afield of where it already was. It remained quite uncertain to all whether the best hopes for lasting international peace and security resided within the UN or in a separate institutional framework.

The resolutions before Congress spanned a broad range.¹⁸⁴ There were, for instance, plans to strengthen the UN by altering

181. Introduction to the Secretary-General’s Third Annual Report, U.N. GAOR, 3d Sess., Supp.1, U.N. Doc. A/565 (July 5, 1948), reprinted in PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS, VOLUME 1: TRYGVE LIE 1946–1953, 137–38 (Andrew W. Cordier & Wilder Foote eds., 1969).

182. Hearings on the Vandenberg Resolution and the North Atlantic Treaty took place over the course of twelve days in 1948 and 1949. See *The Vandenberg Resolution and the North Atlantic Treaty: Hearings Held in Executive Session Before the S. Comm. on Foreign Relations*, 80th and 81st Cong. (1948–49).

183. See, e.g., *id.* at 1, 93.

184. Table 1 groups each of the then-pending resolutions into separate categories (calls for a world government; calls to strengthen the UN by

the rules surrounding the veto, by establishing armament regulations or security provisions.¹⁸⁵ There were proposals to work outside of the United Nations to establish regional Unions,¹⁸⁶ and finally there were many proposals that advocated the creation of a world government.¹⁸⁷

During each of the congressional hearings on UN reform and world government, the Truman administration sent representatives to testify before the congressional committees.¹⁸⁸ In these hearings, the Truman administration quickly acknowledged there were a number of obstacles before the UN and its member states.¹⁸⁹ It also recognized that there was significant interest among lawmakers and members of the American public about the matter, how to address it, and the sizeable consequences that resided with any course of action.¹⁹⁰ Secretary of State George C. Marshall said to the House Committee in May of 1948:

The interest shown by the great majority of Americans in the United Nations and in increasing its effectiveness is an impressive fact. A vast amount of thought is being devoted throughout our country to means of furthering the objectives of the Charter in the prevailing world circumstances. The attitude of the United States towards the problems of the United Nations will have a profound effect on the future of the organization.¹⁹¹

Throughout this period, the State Department officials, not surprisingly, maintained a strict policy stance of opposing any

amending the UN Charter; calls to work within the confines of the UN; and calls for regional federalism) into separate categories, and outlines their nature by providing a brief description of each.

185. *See id.* at II.

186. *See id.* at IV.

187. *See id.* at I.

188. STAFF OF S. COMM. ON FOREIGN RELATIONS, 81ST CONG., REP. OF THE COMMITTEE ON RESOLUTIONS RELATIVE TO REVISION OF THE UNITED NATIONS CHARTER, ATLANTIC UNION, WORLD FEDERATION, AND SIMILAR PROPOSALS 3 (Comm. Print 1950) ("The subcommittee, in the second phase of its hearings, heard the testimony of the Department of State on each of the resolutions.").

189. *81st Cong. Subcomm. Hearings, supra* note 167, at 1.

190. *See, e.g., id.* at 101–02 (discussing public support or Resolution No. 56), 118 (discussing the potential consequences of a war with Russia).

191. *General United States Policy Toward the United Nations, supra* note 163, at 22.

emergent proposals to alter the UN Charter or establish a world government in its place.¹⁹²

In retrospect, there are two aspects of this historical period that are particularly noteworthy. The first is that there were major concerns about the United Nations and its ability to function. The Truman administration, members of Congress, and the American public were largely in agreement on this particular issue.¹⁹³ The most effective solution, however, was certainly a matter of intense debate. Marshall, outlining the Truman administration's position, explained to the House Committee:

The United Nations was created after years of study and after many months of difficult negotiations. It now has 58 members. It is the symbol of the aspirations of mankind . . . Let us not in our impatience and our fears sacrifice the hard-won gains that we now possess in the United Nations organization.¹⁹⁴

The second noteworthy aspect of this historical moment is that even the most seemingly far-fetched proposals for world government enjoyed support from serious, respected, powerful members of the public and the United States government.¹⁹⁵ Amazingly, the State Department felt compelled to address even the most fantastic plans for world government. Indeed, the majority of these proposals no doubt appear outlandish to the modern observer—as many apparently did to many observers at the time. But the point here is not to assess whether they

192. See *id.* at 27–28. See also *General United States-United Nations Relations*, in FOREIGN RELATIONS OF THE UNITED STATES, 1950, THE UNITED NATIONS; THE WESTERN HEMISPHERE, VOLUME II, at 4–5 (Ralph R. Goodwin et al. eds., 1976) [hereinafter *General United States-United Nations Relations*] (discussing the position of State Department officials opposing revision of the UN Charter or establishing other forms of world government).

193. *General United States Policy Toward the United Nations*, *supra* note 163, at 22 (“The interest shown by the great majority of Americans in the United Nations and in increasing its effectiveness is an impressive fact.”).

194. *Id.* at 28.

195. See, e.g., S. Con. Res. 52, 81st Cong. (1949) (the Thomas-Douglas or “Article 51” resolution), S. Con. Res. 56, 81st Cong. (1949) (the Tobey or “World Federalist” resolution), S. Res. 133, 81st Cong. (1949) (the Sparkman resolution or the “ABC proposal”), S. Con. Res. 57, 81st Cong. (1949) (the Kefauver or “Atlantic Union” resolution), S. Con. Res. 66, 81st Cong. (1949) (the Taylor or “World Constitution” resolution), and S. Con. Res. 12, 81st Cong. (1949) (the Fulbright – Thomas or “European Federation” resolution); see also *General United States-United Nations Relations*, *supra* note 192, at 4.

possessed any merit or how likely they were to succeed; it is to document a contextual reality and to show that the range of possible solutions for the issues of human organization was, in the minds of many, far broader and more open to such possibilities than it is now. Even with the State Department's lack of enthusiasm for virtually all of the existing world government proposals, advocates for institutional change had made significant political inroads in the Congress. Their greatest political and legislative successes, however, were at the state level.

C. STATE POLITICAL SUPPORT FOR WORLD GOVERNMENT

By 1950, states had adopted resolutions in favor of world government.¹⁹⁶ Many of the states that passed or considered such resolutions used similar language in their resolutions. There were a number of different resolutions of varying strengths and emphases circulating in state legislatures. Rather than passing world government resolutions outright, some states took initial steps to study the issue before taking any decisive action on the matter. For example, on May 6, 1949, the Maryland General Assembly—that state's legislative body—approved Senate Joint Resolution 23 ("S.J. Res. 23"): "Joint Resolution requesting the Governor of Maryland to appoint a Commission to study the advisability of the State of Maryland urging the United States to take the initiative in strengthening the United Nations Organization."¹⁹⁷

Under the provisions of S.J. Res. 23, Maryland's General Assembly called on the Governor to establish a commission that was to be comprised of at least ten members: two from the Maryland judiciary, four from the Maryland State Assembly, and the remainder to be selected from the state of Maryland at large.¹⁹⁸ The resolution recognized the same public mood evidenced in the United States Congressional hearings. It referenced a "world situation in which the fear of war is ever present," and cited a collective "sense of insecurity" the background condition behind the measure.¹⁹⁹ But the chief concern as expressed in the resolution was "the lack of effective

196. See Table 1, *infra*.

197. S.J. Res. 23, 335th Gen. Assemb., Reg. Sess. (Md. 1949).

198. *Id.*

199. *Id.*

international law to govern the nations of the world.”²⁰⁰ Just as the Truman administration and the United States Congress had acknowledged, the text of the Resolution similarly suggested that the United Nations was not equipped to address exigent global circumstances.²⁰¹ The Resolution noted within its text that two other nearby states like Massachusetts and Connecticut, as well as other “sister states,” had already decided how to address these matters of global concern, namely, by adopting measures that sought to strengthen the “United Nations organization with a view of changing it from its present powerless state . . . to the status of a strictly limited World Federal Government.”²⁰² The question to be placed before the Maryland Commission was whether the state should join them.

It is important not to make too much of proposals like this one in terms of it being a piece of legislation with legal teeth. The Maryland Resolution only called for a committee to be created to study the issue. If the commission reported favorably about the matter of world government, then the issue might be placed on the ballot in upcoming state elections. If the voters in turn approved the world government resolution before them, then depending on the precise wording of the ultimate resolution, the Maryland State Assembly would urge those responsible for such matters in the federal government to take necessary actions toward strengthening the United Nations or establishing a world government.

The state of Connecticut, as referenced in the Maryland initiative, was a step or two ahead. The Connecticut State legislature had already approved Connecticut Public Act No. 5: “An Act Concerning Question Concerning Charter of United Nations” several months earlier in 1948.²⁰³ After putting the question to its citizens several months later, Connecticut voters approved the initiative that appeared on their ballots as the following proposition:

Do you, as a sovereign citizen of Connecticut and the United States of America, direct our representatives in

200. *Id.*

201. STAFF OF S. COMM. ON FOREIGN RELATIONS, 81ST CONG., REP. OF THE COMMITTEE ON RESOLUTIONS RELATIVE TO REVISION OF THE UNITED NATIONS CHARTER, ATLANTIC UNION, WORLD FEDERATION, AND SIMILAR PROPOSALS 11 (Comm. Print 1950).

202. *Id.*

203. 1948 Conn. Pub. Acts 21.

the national congress to urge the president and the congress to take the lead in calling for amendments to the United Nations charter strengthening the United Nations into a limited world federal government capable of enacting, interpreting and enforcing laws to prevent war.²⁰⁴

The text of this resolution was very similar to some of the many non-binding resolutions that various states passed within their legislatures. A standard example was that of New Hampshire's "Joint Resolution Relating to World Government" which was approved on April 7, 1949.²⁰⁵ Its solution to the problems facing the United Nations was to establish "a world federal government, universal and strong enough to prevent armed conflict between nations, and having direct jurisdiction over the individual in those matters within its authority."²⁰⁶ The resolution directed its state representatives in the United States Congress to:

[T]ake the initiative in requesting amendments to the United Nations Charter strengthening the United Nations into a limited world federal government capable of enacting, interpreting and enforcing laws to prevent war. The secretary of state is directed to send a copy of this resolution to our representatives in the national Congress, to the speaker of the national house of representatives, to the president of the national senate and to the President of the United States.²⁰⁷

In the spring of 1949, the Oklahoma legislature adopted a much more strongly-worded resolution which could only take effect if it received a majority of votes in the state's referendum elections the following year.²⁰⁸ This resolution was entitled Senate Joint Resolution No. 3: "Amendment to Charter of the United Nations."²⁰⁹ The following text, which appeared on the ballot, was a very brief, truncated version of the actual resolution.

204. *Id.* at 21–22.

205. 1949 N.H. Laws 526.

206. *Id.* at 525–26.

207. *Id.* at 526.

208. S.J. Res. 3, 22nd Gen. Assemb., Reg. Sess. (Okla. 1949).

209. *Id.*

[I]t is the wish of the people of Oklahoma that the delegates of the United States to the United Nations propose or support amendments to the charter of the United Nations which will strengthen the United Nations and make it a world federal government able to prevent war.²¹⁰

Interestingly, the full resolution called for much stronger institutional and legal provisions than what was conveyed in the ballot measure. In part, it read:

WHEREAS, the security of the people of Oklahoma and other States of the United States requires the establishment of a supra-national authority with power (1) to define “war crimes” and criminal acts menacing the peace of the world; and (2) to cause the arrest and lawful trial of persons accused of such crimes, and to provide for the lawful punishment of persons thus convicted of such crimes . . . WHEREAS, the Charter of the United Nations does not provide for the establishment of a supra-national authority possessing these powers.²¹¹

Although most of the states only adopted non-binding resolutions, several states took a much more dramatic approach to the issue.²¹² Instead of simply urging the appropriate representatives to consider transforming the United Nations into a world government, these states passed resolutions calling for a constitutional convention to amend the United States Constitution in order to require the creation and participation in world government. For instance, in April 1949, the California Assembly approved Joint Resolution No. 26: “Relative to the Participation of the United States in a World Federal Government.”²¹³

The text of the resolution began like most of the other resolutions, containing a basis of the issue and a description of the perceived problem. In particular, it referenced the

210. *Id.*

211. *Id.*

212. See Burton Andrews, *Amending the U.S. Constitution for Participation in World Government*, 4 LAW. & L. NOTES 21, 21 (1950–51) (stating that legislatures in California, Connecticut, Florida, Maine, New Jersey, and North Carolina all adopted resolutions asking Congress to call a convention to propose an Amendment related to a world government).

213. S.J. Res. 26, 1949 Gen. Assemb., Reg. Sess. (Cal. 1949).

technological developments in atomic weaponry that had appeared publicly only after the United Nations Charter was drafted:

WHEREAS, war is now a threat to the very existence of our civilization, because modern science has produced weapons of war which are overwhelmingly destructive and against which there is no sure defense.²¹⁴

Similar to many other state resolutions, it suggested that the United Nations was not in a position to be able to ensure international peace and security:

WHEREAS, the United Nations, as presently constituted, although accomplishing great good in many fields, lacks authority to enact, interpret or enforce world law, and under its present [C]harter is incapable of restraining any major nations which may foster or foment war.²¹⁵

Resolution No. 26 referenced the fact that other states had considered the issue and passed resolutions outlining a position in favor of world government:

WHEREAS, many states have memorialized Congress, through resolutions by their state legislatures or in referenda by their voters, to initiate steps toward the creation of a world federal government reserving to the nations and to the people those rights not specifically granted as necessary to the establishment of the maintenance of world law and order.²¹⁶

But unlike most of the others, to date, this resolution contained the following text:

[N]ow, therefore, be it . . . *Resolved, By the Assembly and Senate of the State of California, jointly, [t]hat application is hereby made to the Congress of the United States, pursuant to Article V of the Constitution of the United States, to call a convention for the sole purpose of*

214. *Id.*

215. *Id.*

216. *Id.*

proposing amendment of the Constitution to expedite and insure the participation of the United States in a world federal government, open to all nations, with powers which, while defined and limited, shall be adequate to preserve peace, whether the proposed charter or constitution of such world federal government be presented in the form of amendments to the [C]harter of the United Nations, or by a world constitutional convention, or otherwise.²¹⁷

By taking stock of the legal failures that have heretofore been overlooked by scholars, the entire Bricker narrative is now turned on its head. Although Bricker is generally associated with the idea to amend the Constitution to achieve his political goals, the movement for world government actually began long before him. Bricker was merely reacting to a similar, yet polar opposite strategy of amendment. The first largescale attempts to amend the Constitution were to require a radical, global restructuring of the domestic and international realms. Bricker's attempt was designed to prevent it.

D. THE IMPACT OF THE WORLD GOVERNMENT MOVEMENT

Though this oft-forgotten movement was ultimately unsuccessful, the historical record reveals the lasting effects of its efforts. One of the primary consequences was to inspire the political backlash of which Senator Bricker was a part. The movement proposed a revolutionary restructuring of the United States' relationship with the rest of the world. Its ambitions were extreme and readily challenged by opponents. In just a few years, nearly every state that passed a world government resolution rescinded it through formal legislative process. Ideas for world government were quickly swept aside even by former supporters.²¹⁸

Yet while the new world order envisioned by world government supporters did not materialize, several ideas contained within the movement did take hold internationally. Chief among these was the need for international institutions to regulate the new state of affairs. As World War II was coming to

217. S.J. Res. 26, 1949 Gen. Assemb., Reg. Sess. (Cal. 1949).

218. See generally BARATTA, *supra* note 9, at 486 (explaining that the world federalist movement declined rapidly after 1950, and that the states rescinded their federalist resolutions).

an end, the need to form international relationships beyond the nation state was widely recognized.²¹⁹ The United Nations is one example of this need being met through the creation of an intergovernmental organization. But it was also recognized that the United Nations alone could not hold the weight of the world's geopolitical needs. For many in the United States during the late 1940s and early 1950s, world government was the solution to this latter realization.

World government was, however, just one of many responses to the problem. The idea of world government, though defeated, contained the seeds of other lasting institutions that emerged in its wake. The European Union, the North Atlantic Treaty Organization, and the International Atomic Energy Agency are just a few of the numerous institutions and measures that emerged from this earlier impetus and that remain with us today.²²⁰ Thus, the ideas contained within a failed movement helped inspire the development of the contemporary structure of international institutions.

Finally, the struggle between world government supporters and their opponents inspired a compromise that sheds a clear light on the contemporary conception of human rights in the United States. To appease both supporters and opponents of a stronger world order, political leaders reached a tacit agreement: the United States would strongly support human rights in the international arena, but not on domestic soil. Human rights would solely be an export commodity: something for the United States to offer its support internationally but conspicuously absent from the domestic arena. In time, however, the domestic absence of human rights lost its conspicuousness and became a taken for granted reality. Few Americans are consciously aware of the historical roots of this domestic void.

219. See generally EVAN LUARD, A HISTORY OF THE UNITED NATIONS VOLUME 1: THE YEARS OF WESTERN DOMINATION, 1945-1955, at 21-25 (1982) (discussing the post-World War II realization that many states had concerning forming a supranational, conflict-mediating organization).

220. See DUNOFF ET AL., *supra* note 12, at 212 (stating that the Rome Treaty that lead to the formation of the European Economic Community, now known as the European Union, was ratified in 1957); *A Short History of NATO*, NATO, <http://www.nato.int/history/nato-history.html> (last visited Nov. 7, 2016) (stating that the North Atlantic Treaty was signed on 4 April, 1949); *History*, INT'L ATOMIC ENERGY AGENCY, <https://www.iaea.org/about/overview/history> (last visited Nov. 14, 2016) (stating that the "IAEA was created in 1957 in response to the deep fears and expectations generated by the discoveries and diverse uses of nuclear technology").

Given its lasting influence, it is perhaps surprising that within the existing literature on the history of human rights, it appears that the movement for world government never even happened. As this Article has endeavored to illustrate, the historical record is replete with evidence of the movement in newspaper articles, Congressional hearings, debates, resolutions, State Department records, books, magazine articles, documents from state legislatures, and so forth, all lying hidden in plain sight.²²¹ And just as with the Bricker controversy, the legacies of the world government movement abound.

IV. LESSONS FROM LEGAL FAILURES

Through a largely neglected account of the struggles involving a failed constitutional amendment, an overturned court case, and the forgotten movement for world government, this Article illustrates a simple proposition for historical legal scholarship: laws, ideas, and institutions that appear in hindsight to be failures can, and *do*, alter the course of history. Crucially, the new research approach outlined herein allows scholars to access this formerly unknown history that has shaped the contemporary world of human rights. In this Article, Senator John Bricker's attempts to amend the United States Constitution serve as a historical entry point for an analysis of now-forgotten struggles that have fundamentally shaped the development of human rights in the United States and continue to exert an influence on contemporary affairs. The analysis affirms that a complete explanatory account of contemporary institutions and practices must include not only those laws, institutions, ideas, and practices that persist into the present day, but also the numerous institutional and ideational antecedents that are no longer part of contemporary understandings, structures, and practices (but were nevertheless extremely influential in terms of contemporary outcomes). Part IV of this Article synthesizes the contributions,

221. See, e.g., U.S. DEPT OF STATE, OFFICE OF PUB. AFF., *supra* note 22 (outlining the role of the international community and the possibility of a form of world government); Preliminary Draft of a World Constitution, *supra* note 5 (explaining that there was a committee devoted to creating a world constitution); Kaufman & Whiteman, *supra* note 42, at 321–32 (discussing how Senator Bricker spent the majority of his time on the Senate floor in 1953 discussing the world government movement); *Guide to the Beardsley Ruml Papers*, *supra* note 148 (discussing support for the world government movement).

consequences, and normative implications of this new approach, as well as the history it uncovers.

As this Article makes clear, existing scholarship focuses a great deal on Senator Bricker's opposition to international human rights treaties, infringements on sovereignty and Constitutional provisions, and communism. At one level, understanding Bricker's contemporary influence requires understanding and taking stock of his opposition against these concepts. At the same time, leaving the historical analysis unexplored severely impedes a full understanding of the history. Such analysis is a prerequisite for fully appreciating the nature of all that the contemporary world has inherited from the past.

First, concepts such as human rights, sovereignty, communism, and so forth are abstract and void of inherent meaning on their own. Indeed, as a practical matter, one does not actually fight against such *concepts* per se, but against what those concepts mean within the given social, political, legal and historical context. Second, although they are extremely familiar, these concepts are not naturally occurring entities. They require individuals, groups, organizations—*people*—to define them with respect to some underlying reality and to fight for them. So on the one hand, it is indeed instructive to acknowledge and take stock of the concepts and ideas that Bricker was in opposition to. On the other hand, however, identifying the concepts is only a very small part of a much broader conflict over the meaning of those concepts, and therefore the overall historical story they tell. Thus, in this kind of historical inquiry, once a concept is identified as a key node of conflict, it is essential to incorporate two questions into the analysis: First, what are the conflicting meanings of those concepts within the given context? And second, *who* is advocating for the conflicting meanings on each side of the debate? Within the following example, the reasons for this approach become clear.

It is most evident that one cannot rely on Bricker's depiction of the controversy as representing the truth. As this Article has shown, Bricker is prone to exaggeration and outright fabrication. Nevertheless, his rhetoric provides an entry point for situating his response—as influential as it was—within the historical context from which it came. If one shifts the analysis from simply looking at concepts such as human rights, international treaties, and sovereignty, for instance, and instead opens the inquiry to focus on who he is fighting against and what those concepts in the dispute actually mean in context, an immense, overlooked portion of the historical record instantly comes to light.

Immediately, these two questions open the door to a far more expansive story that stretches years, if not decades, prior to Bricker's resolutions. The long, protracted battle extends far beyond the halls of the United States Senate, implicating a set of events that scholars have never fully connected with Bricker, nor have they chronicled their momentous influence on the present world.

In reviewing this history, it becomes apparent that Bricker was one part of a much larger struggle over how nations and their citizens were to organize themselves in the years following World War II.²²² Developing a new understanding of the human rights concept—along with the necessary laws and institutions in both the international and domestic realms for realizing that particular concept—was a focal point in that struggle. What emerged during these domestic struggles over the emergent post-World War II human rights concept was a domestic definition of human rights that we have carried into the present. Today, it is generally taken for granted and accepted within the United States that this international-only conception of human rights is “just the way it is,” and presumed to have always been so, if the matter even rises to consciousness in the first instance.²²³ Though even if one were to consciously consider the upshot of this international-only conception of human rights, it would likely seem self-evident that *international* human rights have no political impact on domestic events in the United States. The history, as presented in this Article, shows otherwise. This particular conception of human rights was created in large measure to secure victory in a series of ongoing domestic political battles. This history also shows that the contemporary understanding of human rights within the United States is not one that is inevitable or perpetual. It can just as easily—that is, through domestic political struggles—be transformed into something else entirely. The normative question that follows close behind these observations and assertions is whether incorporating international human rights into domestic law is necessary and productive, or wrong-headed and destructive.

222. See ROBERTS, *supra* note 6, at 72–76 (discussing the general opposition against the idea of human rights after World War II from individuals, mainstream groups, nations, conservative leaders, and progressive scholars).

223. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935, 1937–42 (2002) (discussing that although the United States and other countries often sign human rights treaties, they do not always comply with them).

With knowledge of this history, advocates today might legitimately worry that pushing for domestic recognition of human rights would be counterproductive for their causes. As experienced during the 1940s and 1950s, the backlash for such attempts was swift, severe, and long lasting.²²⁴ But as the history also shows, from such failures came lasting changes in civil rights practices and laws.²²⁵ New international and regional organizations emerged as well.²²⁶ Strong notions of domestic human rights and global political institutions never came to fruition, but they did offer a credible threat for those who sought to hold on to segregation and American isolationism. That credible threat applied an additional force upon the ongoing social and political issues of the moment. Yet, in the contemporary United States there is no such force to leverage. The possibility of even suggesting that human rights could be leveraged at home is absent, in great measure because of the outcomes of the history described in this Article.

If human rights are to one day be incorporated into United States law and politics, the existing conceptual definition of human rights—as soft obligations entirely separate from domestic law—cannot do. After all, it is entirely incompatible with the notion of domestic incorporation. But it is also just a conception that was created in the midst of domestic political and social struggles. It can be redefined anew within the course of other domestic struggles, of which there are countless to choose from: Black Lives Matter, the 99%, the war on religion, and so forth. What is crucial to recognize, though, is that the understanding of human rights that emerges from such struggles does not necessarily have to be a meaning that benefits the poor and the downtrodden. In fact, the ability to define human rights requires a power and unity of purpose that either side of such struggles can effect. Human rights can be just as

224. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 12 (2000) (discussing how the choice of civil rights activists to air their grievances at the United Nations was viewed as a “great breach of loyalty,” and led to the further silencing of civil rights advocates through passport restrictions and red-baiting).

225. *See id.* at 209–10 (discussing how the international reaction to the state of civil rights in the United States helped the passage of the Civil Rights Act 1964).

226. Kim D. Reiman, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45, 45 (2006) (discussing the rapid growth of nongovernmental organizations in the post-World War II period).

easily defined to help maintain the status quo and to assist the elite.²²⁷

In the end, perhaps the matter is not as momentous as it seems. Perhaps opponents do not have to be so fearful of “external” human rights laws restricting their freedoms and altering their way of life; the past seven decades show that it certainly possible to define human rights in such a way that they are actually quite consistent with any notion of freedom or any particular way of living. But there is a bigger issue that has for the past seventy years been hidden beneath the supposed specter of “foreign law,” and has been the cause of such apprehension and opposition against international human rights. The opponents of bringing international human rights into the domestic arena fear that existing political struggles and longstanding ideological battles covering the entire range of issues in the United States would be upended and indeed they would.²²⁸ If human rights did possess normative legitimacy in the domestic United States context, they most certainly would catapult the now-deadlocked balance of power in American politics towards horizons never before seen. It was this particular vision of legal integration that caused the opponents in the 1950s to react so strongly and organize so rapidly. But interestingly, the wellspring of hope that the possibility of domestic human rights provided for many Americans in the 1940s and 1950s seems today to have run dry. Today they are not a domestic option; nor are they much of a thought.

What all of this means is simple: the United States’ international-only conception of human rights is wrong. Human rights battles are local, and the United States’ international-only understanding of them has served as silent proxy for a broad swath of social, political, and economic issues ranging from healthcare, voting rights, race, business, to education,

227. See generally Hathaway, *supra* note 223, at 1940 (finding that “not a single treaty for which ratification seems to be reliably associated with better human rights practices and several for which it appears to be associated with worse practices . . . human rights treaties may sometimes lead to poorer human rights practices within the countries that ratify them.”).

228. See generally Amy C. Harfeld, *Oh Righteous Delinquent One: The United States’ International Human Rights Double Standard - Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59, 68 (2001) (discussing that “[o]pponents of human-rights treaty ratification have justified their position with a wide array of arguments” including that ratification would “diminish fundamental American rights; violate states’ rights,” and more).

disability issues, homeschooling, and so forth. The way that the opponents once dealt with the threat was to delegitimize the human rights idea in the domestic context while allowing it to flourish internationally as the solution to global problems. Interestingly, and to a great extent, the strongest *proponents* of human rights in the United States have fallen in line and do the same.

Conclusion

The goal of this Article has been threefold. First, the Article aimed to identify collective analytic blind spots in the history of human rights and outline an approach that permits scholars to see within the historical record what has formerly been invisible. This analytic approach emphasizes understanding the formative role of overlooked laws, ideas, and institutions that failed to endure yet have had a lasting influence on United States politics. Second, the Article endeavored to apply this new analytic framework to a well-known historical event surrounding human rights in the United States—the Bricker controversy—and to show that we have missed much of the story to date. The Article marshals an impressive amount of newly uncovered original evidence to open a historical door that most never even knew was there. Finally, the Article aimed to demonstrate the profound contemporary implications of the prevailing conception of human rights within the United States. In outlining a new approach to such legal and historical inquiries, revealing previously unknown aspects of the history of human rights in the United States, and demonstrating the lasting influence of now-forgotten events, this Article shows that contemporary conceptions of human rights are not in fact international but rather reflect local struggles, the outcomes of which persist for decades.

World Government

- S. Res. 183, 79th Cong. (1945) ("Creation of a World Republic")
 - o Senator Glen H. Taylor (D., Idaho)
 - o October 24, 1945
- S. Con. Res. 54, 80th Cong. (1948)
 - o Proposed Meeting Of President-Elect Of United States And Marshal Stalin Concerning World Government
 - o Senator Glen H. Taylor
- H. Con. Res. 64, 81st Cong. (1949) ("World Federation")
 - o Representatives Brooks Hays (D., Arkansas) and Walter H. Judd (R., Minnesota), and eventually 111 co-sponsors.
- S. Con. Res. 56, 81st Cong. (1949) ("World Federation")
 - o Senator Charles W. Tobey (R., New Hampshire) and eventually 21 co-sponsors
 - o Identical to H. Con. Res 64 (1949)
- S. Con. Res. 66, 81st Cong. (1949) ("World Government Constitution")
 - o Senator Glen H. Taylor (D., Idaho), September 13, 1949

Strengthening the UN by Amending the UN Charter

- H. Con. Res. 163, 80th Cong. (1948) ("Culbertson ABC Plan")
 - o Representative Walter H. Judd (R., Minnesota) and fourteen cosponsors, including Richard Nixon (R., California, HCR-170)
 - o Identical to S. Con. Res. 50 (1948)
- S. Con. Res. 50, 80th Cong. (1948)
 - o Requesting the President to initiate measures for a revision of the United Nations Charter
 - o Senator Homer Ferguson (R., Michigan) and fifteen cosponsors, March 16, 1948
 - o Identical to H. Con. Res. 163 (1948)
- H.R. Res. 6802, 80th Cong. (1948) ("Strengthening The United Nations")
 - o Representative Charles Eaton (R., New Jersey) for the House Foreign Affairs Committee
 - o June 9, 1948

- S. Res. 239, 80th Cong. (1948) ("Regional Security")
 - o Passed, June 11, 1948 (vote of 64-4)
 - o Senator Arthur Vandenberg (R., Michigan) for the Senate Foreign Relations Committee
- S. Res. 133, 81st Cong. (1949) ("World Alliance")
 - o Senator John Sparkman (D., Alabama) and nine cosponsors, including Karl E. Mundt (R., South Dakota) and John Stennis (D., Mississippi)
- S. Res. 95, 80th Cong. (1947) ("World Disarmament Conference")
 - o Senator Millard Tydings (D., Maryland)
- H. Con. Res. 163, 80th Cong. (1948) ("Culbertson ABC Plan")
 - o Identical to S. Con. Res. 50 (1948)
 - o Representative Walter H. Judd (R., Minnesota) and fourteen cosponsors, including Richard Nixon (R., California, HCR-170)
- S. Con. Res. 50, 80th Cong. (1948) ("Culbertson ABC Plan")
 - o Senator Homer Ferguson (R., Michigan) and fifteen cosponsors, March 16, 1948 [Identical to HCR-163]
- S. Res. 239, 80th Cong. (1948) ("Regional Security")
 - o Passed, June 11, 1948 (vote of 64-4)
 - o Senator Arthur Vandenberg (R., Michigan) for the Senate Foreign Relations Committee
- S. Res. 133, 81st Cong. (1949) ("World Alliance")
 - o Senator John Sparkman (D., Alabama) and nine cosponsors, including Karl E. Mundt (R., South Dakota) and John Stennis (D., Mississippi)

Working with the UN

- S. Con. Res. 72, 81st Cong. (1950)
 - o February 7, 1950

Regional Federation

- S. Con. Res. 10, 80th Cong. (1947) ("United States of Europe")
 - o Senators J. William Fulbright (D., Arkansas) and Elbert D. Thomas (D., Utah)
 - o March 21, 1947
- S. Con. Res. 12, 80th Cong. (1947) ("United Democratic States Of Europe")
 - o Senator Alexander Wiley (R., Wisconsin)
 - o Identical to S. Con. Res. 24
- S. Con. Res. 12, 81st Cong. (1949) ("European Federation")
 - o Senators J. William Fulbright (D., Arkansas) and Elbert D. Thomas (D., Utah)
- North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
 - o First peacetime military alliance the U.S. entered outside the Western Hemisphere.
- S. Con. Res. 57, 81st Cong. (1949) ("Atlantic Union")
 - o Senator Estes Kefauver (D., Tennessee) and eventually 20 co-sponsors, including Walter F. George (D., Georgia), Guy M. Gillette (D., Iowa), J. William Fulbright (D., Arkansas), Harley M. Kilgore (D., West Virginia), Lister Hill (D., Alabama), John Sparkman (D., Alabama), Joseph R. McCarthy (R., Wisconsin)
 - o July 26, 1949
- H. Con. Res. 107–111, 81st Cong. (1949) ("Atlantic Union")
 - o Representative Walter H. Judd (R., Minnesota) and four co-sponsors, including Hale Boggs (D., Louisiana) and James W. Wadsworth (R., New York)
 - o Identical to S. Con. Res. 57 (1949)
 - o July 26, 1949
- S. Con. Res. 52, 81st Cong. (1949)
 - o Supplemental Agreement Of The United Nations To Aid Signatories In Case Of Attack
 - o Senators Elbert Thomas (D. Utah) and Paul H. Douglas (D., Illinois)
 - o Plan to work within the UN / NATO for security agreement.