Introduction

> *What is crucial . . . is the preservation of states that maintain political cultures based on human rights, democratic political processes, and constitutional limitations, not the preservation of states for their own sake.*[1]

Each of the several related issues I address in this book is located at the interface of human rights theory, political theory, and constitutional theory.

I sketched the outline of the book in December 2013, shortly after returning from Hong Kong and mainland China, where I had been on a lecture tour. My lectures at several law schools were based on – and the follow-up discussion with faculty and students, and occasionally with judges, was focused on – my then-new book, *Human Rights in the Constitutional Law of the United States* (2013).[2] A few months before I arrived in China, the Communist Party of China was emphasizing its disapproval of such "Western" ideas as human rights,[3] democracy, and constitutionalism.[4] Not surprisingly, many of my Chinese conversation

[1] Christopher R. Browning, "A New Vision of the Holocaust," New York Review of Books, Oct. 8, 2015, 41, 43 (reviewing Timothy Snyder, Black Earth: The Holocaust as History and Warning (2015)).

[2] In 2016, a Chinese translation of the book – and a Chinese translation of another of my books, *Constitutional Rights, Moral Controversy, and the Supreme Court* (2009) – were published in China.

[3] Or, more precisely, *certain* human rights, including two widely regarded throughout the world as fundamental: freedom of speech and freedom of the press. See, e.g., Edward Wong, "China Uses 'Picking Quarrels' Charge to Cast a Wider Net Online," New York Times, July 27, 2015; Edward Wong, "China Ranks Last of 65 Nations in Internet Freedom," New York Times, Oct. 30, 2015. See generally Bjorn Ahl, "The Rise of China and International Human Rights Law," 37 Human Rights Quarterly 637 (2015).

[4] See Chris Buckley, "China Takes Aim at Western Ideas," New York Times, Aug. 20, 2013. The Communist Party of China (CPC) has continued its attack on such "Western" ideas. See Chris Buckley and Andrew Jacobs, "Maoists in China, Given New Life, Attack Dissent," New York Times, Jan. 5, 2015; Chris Buckley, "China Warns Against 'Western Values' in Imported Textbooks," New York Times, Jan. 30, 2015; Dan Levin, "China Tells

partners were eager to discuss those very ideas with me. Moved by the questions and concerns of my Chinese interlocutors – questions and concerns that are, for them, at least as much existential as intellectual – I began to think more earnestly about the emergence, in the period since the end of the Second World War, of the now-global political morality of human rights – and about the growing influence of that political morality, even in China.[5] (I explain below what I mean by the term "political morality.") Continuing the to-and-fro with my Chinese interlocutors was one of my principal aims in writing this book, which I dedicate to the several Chinese law students and law professors who in the past decade have studied with me at Emory Law School.

I want to emphasize, here at the outset, that this book is about the *political morality* of human rights; it is not about the *international law* of human rights.

There are, as is well known, serious problems with the international law of human rights,[6] two of which stand out and are related: First,

Schools to Suppress Western Ideas, With One Big Exception," New York Times, Feb. 9, 2015. Cf. Edward Wong, "Chinese Security Laws Elevate the Party and Stifle Dissent. Mao Would Approve," New York Times, May 30, 2015; Xiao Guozhen, "China v. Its Human Rights Lawyers," New York Times, July 31, 2015.

[5] As evidence of that influence, consider Charter 08, www.cecc.gov/resources/legal-provisions/charter-08-chinese-and-english-text. On Charter 08 and related matters, see Evan Osnos, Age of Ambition: Chasing Fortune, Truth, and Faith in the New China 194–206 (2014). For an argument that the influence of the political morality of human rights is in decline, see Makau Mutua, "Is the Age of Human Rights Over?," in Sophia A. McClennen and Alexandra Schultheis Moore, eds., Routledge Companion to Literature and Human Rights 450 (2016).

[6] There is a large literature discussing the efficacy of the international law of human rights. See, e.g., Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009); Emilie M. Hafner-Burton, Making Human Rights a Reality (2013); Eric A. Posner, The Twilight of Human Rights (2014). Simmons's review of Hafner-Burton's book is excellent: Beth A. Simmons, Book Review, 109 American Journal of International Law 442 (2015).

Simmons's book is, in part, a response – a powerful, but measured, response – to the sort of "realist" skepticism about international human rights law that Posner's book exemplifies. Posner focuses, in his book, on international treaties and treaty-making regarding human rights. Such treaties, argues Posner, are problematic and in any event largely ineffective. Kenneth Roth, Executive Director of Human Rights Watch, criticizes Posner's position in this back-and-forth with Posner: "Have Human Rights Treaties Failed?," New York Times, Dec. 28, 2014. For critiques of Posner's book, see Dinah Shelton, Book Review, 109 American Journal of International Law 228 (2015); Hurst Hannum, Book Review, 37 Human Rights Quarterly 1105 (2015). For an extended critique of the "New Realist" attack on international law, including international human rights law, see Jens David Ohlin, The Assault on International Law (2015).

notwithstanding their status as parties to one or more international human rights treaties, many countries – more precisely, the governments of many countries – do little more than pay lip service to their obligations under the treaties. Second, international human rights treaties are not enforceable against state parties in the effective way that a well-functioning democracy's laws are typically enforceable against those, including government officials, to whom the laws apply. Because of those two problems, the international law of human rights achieves much less than it would if all or even most state parties took their treaty obligations seriously – or, when they violated their treaty obligations, and were met by effective enforcement proceedings and sanctions.

However, that there are serious problems with the international law of human rights, in consequence of which the efficacy of the international law of human rights is undeniably limited, does not entail that ongoing efforts to make the international law of human rights more effective – including efforts to make more effective the institutions, such as the International Criminal Court,[7] that are meant to buttress the international law of human rights – should be abandoned. As Kenneth Roth, Executive Director of Human Rights Watch, has put the point: "The F.B.I. reported about 14,000 homicides and almost 80,000 rapes in the United States in 2013, yet no one suggests repealing the criminal prohibition of murder and rape. . . . Abandoning human rights law because human rights violations persist would be like repealing the criminal code because people continue to commit crimes."[8]

Nor do the problems that afflict the international law of human rights entail that the political morality of human rights is not a significant phenomenon in its own right. Consider this data: Of the 193 countries that are members of the United Nations, 168 (87 percent) are, as of April 2016, parties to the International Covenant on Civil and Political Rights; 164 (85 percent), parties to the International Covenant on Economic, Social, and Cultural Rights; all but one member,[9] parties to the Convention on the Rights of the Child; 189 (98 percent), parties to the Convention on the Elimination of All Forms of Discrimination against Women; 177 (92 percent), parties to the International Convention on the Elimination of All Forms of Racial Discrimination; 158 (82 percent), parties to

[7] Cf. Somini Sengupta, "Omar al-Bashir Case Shows International Criminal Court's Limitations," New York Times, June 16, 2015.
[8] Roth, n. 6.
[9] The United States are not parties to the Convention on the Rights of the Child.

the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; 154 (80 percent), parties to the Convention on the Rights of Persons with Disabilities. Again, notwithstanding their status as parties to one or more international human rights treaties, many countries only pretend to honor – many persist in committing abuses that constitute violations of – their treaty obligations. Nonetheless, the foregoing data makes clear that the political morality of human rights has become so compelling to so many, in the period since the end of the Second World War, that even among countries that do not take human rights seriously, an ever-diminishing number is willing to be seen as rejecting the political morality of human rights – a perception that would weaken their reputational standing among the peoples of the world.[10]

As a practical matter, however, is the political morality of human rights consequential?

Consider what Eleanor Roosevelt said about the foundational human rights document of our time, the Universal Declaration of Human Rights (UDHR), immediately preceding the UN General Assembly's adoption of the UDHR in 1948:

> In giving our approval to the [UDHR] today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all nations.[11]

What Eleanor Roosevelt said about the UDHR we may say about the political morality of human rights: that, as articulated in the UDHR and in the principal international human rights treaties that have followed in the UDHR's wake – treaties to which most countries of the world are parties – the political morality of human rights serves "as a common standard of achievement for all nations."[12]

Consider, too, what Albert Venn Dicey wrote about the French constitution of the time in *An Introduction to the Study of the Law of the Constitution* (1885):

[10] Cf. Ryan Goodman and Derek Jinks, Socializing States: Promoting Human Rights through International Law (2013).
[11] Quoted in Marjorie M. Whiteman, 5 Digest of International Law 243 (1965).
[12] Cf. Martha C. Nussbaum, "Women's Progress and Women's Human Rights," 38 Human Rights Quarterly 589 (2016).

> The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion.[13]

What Dicey said about the constitutional norms to which he was referring we may say about the norms that constitute the political morality of human rights: that they are (whatever else they are) "maxims of political morality" that serve, among the peoples of the world, as fundamental grounds of political-moral judgment, grounds that derive their strength from being formally inscribed in the international human rights treaties to which most countries of the world – the vast majority of them – are parties.

A world in which there was, among the peoples of the world, few if any such fundamental grounds of political-moral judgment would be, for purposes of international political-moral argument and critique, a World of Babel. But the world that has emerged in the period since the end of the Second World War is one which there *are* internationally recognized grounds of political-moral judgment: The political morality of human rights is a *global* political morality, and as such, it serves a valuable function, as Kenneth Roth has emphasized:

> Human rights treaties . . . may not always provide definitive answers – any text requires interpretation – but they codify a widely endorsed set of principles from which the conversation can begin. Would we really be better off . . . if each discussion of governmental behavior started from scratch – if, rather than debating what constituted a violation of, say, the right to a fair trial, we had to begin by discussing whether people should be given fair trials?[14]

Moreover, and relatedly, because it is global, the political morality of human rights is available to be leveraged by national and local groups in their efforts to challenge the abuses being committed by their own governments. Such leveraging is more readily available, of course, in a country that is a party to the relevant treaty or treaties.[15] Roth has

[13] Quoted in James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harvard Law Review 129, 130 (1893).
[14] Roth, n. 6.
[15] On the sort of domestic political environments in which such leveraging is most readily available and most likely to make a meaningful difference, see Simmons, Mobilizing for Human Rights, n. 6.

drawn on his experience as Executive Director of Human Rights Watch to make the point:

> Treaties are effective even when courts are too weak to enforce them because they codify a public's views about how its government should behave. Local rights groups, working with their international partners like Human Rights Watch, are able to generate pressure to respect these treaties by contrasting a government's treaty commitments with any practices that fall short. The shame generated can be a powerful inducement to change.[16]

So, again, the political morality – the *global* political morality—of human rights, which is what this book is centrally about, is a significant phenomenon in its own right; it *is* consequential, notwithstanding the problems that impede the efficacy of the international law of human rights. Listen, in that regard, to Beth Simmons:

> It is hard to imagine a world in which the UDHR had never been written – a world devoid of authoritative agreements that individuals have rights that their governments must not trample on or the provision of which can be indefinitely ignored. It would indeed be a world of very different priorities than the one we inhabit today. As Martin Luther King, Jr., said, "The arc of history is long, but it bends towards justice." International human rights treaties have helped to nudge the human race in the right direction.[17]

This book consists of three parts and seven chapters. Each part is preceded by an introductory note. The following overview of the book is drawn from the three introductory notes. I have omitted here the footnotes that appear in the introductory notes.

[16] Roth, n. 6.

[17] Simmons, Mobilizing for Human Rights, n. 6, at 380. There is, however, a dark side to the story of the emergence of the morality of human rights as a global political morality – a dark side that we who affirm that emergence should not discount: A predictable but nonetheless greatly troubling consequence of the emergence of the morality of human rights as a global political morality is that increasingly both state and nonstate actors seek to justify their violence and oppression in the name of human rights, just as countless believers in the Abrahamic God – in particular, Christians and Muslims – have sought to justify their violence and oppression in the name of God. For a powerful discussion of the phenomenon, see Nicola Perugini and Neve Gordon, The Human Right to Dominate (2015). See also Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," 41 Metaphilosophy 464, 477 (2010).

Part I: Chapters 1 and 2

The overarching subject of Part I is the morality of human rights, which has become, in the period since the end of the Second World War, a global political morality. By a "political morality," I mean: (a) a set of norms about how government – whether a particular government or group of governments, a particular kind of government, or every government – should act toward the human beings over whom it (or they) exercises power; a set of norms, in particular, about what government should not do to and what it should do for the human beings over whom it exercises power; and (b) the rationales that warrant, or are thought to warrant, the norms. As I explain in Part I, although the morality of human rights is not just a political morality, it is a political morality – indeed, the first truly global political morality in human history.[18]

I begin, in Chapter 1, by addressing this question: What are "human rights"? Despite its ubiquity in contemporary political-moral discourse, the term "human rights" has no canonical meaning. As British philosopher James Griffin has observed, "[t]he term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly – and not just among politicians, but among philosophers, political theorists, and jurisprudents as well." John Tasioulas has claimed that the term has an "orthodox" meaning, which Tasioulas endorses: "rights possessed *by all human*

[18] It bears mention here that the history of human rights is now a greatly controversial subject. The controversy was precipitated mainly by this book: Samuel Moyn, The Last Utopia: Human Rights in History (2010). See also Samuel Moyn, Human Rights and the Uses of History (2014); Jan Eckel and Samuel Moyn, eds., The Breakthrough: Human Rights in the 1970s (2014). One of the first critiques of Moyn's *The Last Utopia* remains one of the most powerful: Gary J. Bass, "The Old New Thing," New Republic, Nov. 11, 2010, 35. A more recent powerful critique: Sarita Cargas, "Questioning Samuel Moyn's Revisionist History of Human Rights," 38 Human Rights Quarterly 11 (2016). On the controversy, see Richard J. Wilson, Book Review, 36 Human Rights Quarterly 915 (2014) (reviewing the Eckel and Moyn collection); Christopher McCrudden, "Human Rights Histories," 35 Oxford Journal of Legal Studies 179 (2015).

Moyn has recently added fuel to the controversy about the history of human rights with a new book: Christian Human Rights (2015). For commentary by several scholars on Moyn's argument in the new book, along with Moyn's response, see, at the blog titled The Immanent Frame, "Christian human rights," http://blogs.ssrc.org/tif/christian-human-rights/. See also these vigorously critical reviews: P. MacKenzie Bock, "Did the Christians Ruin Rights?," The New Rambler, Feb. 15, 2016, http://newramblerreview.com/book-reviews/history/did-the-christians-ruin-rights; John Witte, Jr., Book Review, Books & Culture: A Christian Review (forthcoming), also available at www.johnwittejr.com/uploads/5/4/6/6/54662393/moyn_review_-_books_and_culture_-_october_2015.pdf.

beings simply in virtue of their humanity." However, in the context of the principal contemporary discourse about human rights – discourse about international human rights – the orthodox meaning is mistaken, as I explain in Chapter 1. I also explain in Chapter 1 both the sense in which some human rights are *legal* rights and the sense in which some human rights are *moral* rights.

Then, in Chapter 2, I pursue this inquiry: What reason (or reasons) do we have – if indeed we have any – to take human rights seriously; more precisely, what reason do we have, if any, to live our lives in accord with this imperative, which is articulated in the very first article of the foundational human rights document of our time, the UDHR, and which is the very heart of the morality of human rights: "Act towards all human beings in a spirit of brotherhood." Of course, and as Chapter 2 makes clear, not all of us who have reason to live our lives in accord with that imperative – and, in so doing, to do what we reasonably can to get not only our own government but every government to conduct its affairs in accord with the imperative – have the same reason. Those of us who are religious believers may have one or another theological reason. But what reason do those of us who are not religious believers have, if any, to live our lives in accord with the "in a spirit of brotherhood" imperative? Probably the best known response to that question relies on one or another secular version of the idea of "human dignity." It is far from clear, however, as I explain in Chapter 2, that any such response works as a reason to take seriously the morality of human rights. For one who is neither a religious believer nor persuaded by any secular "human dignity" rationale, is there a reason to embrace the "in a spirit of brotherhood" imperative? I conclude Chapter 2 by addressing that question.

Part II: Chapters 3 and 4

The second term in the subtitle of this book is "democracy." In Part II, I pursue the implications of the morality of human rights for democracy. As I explain in Chapter 3, a commitment to the morality of human rights – a commitment, more precisely, to what I describe in Chapter 2 as the heart of the morality of human rights, namely, the "act towards all human beings in a spirit of brotherhood" imperative – not only supports but requires a commitment to democracy – "democracy" in the broad modern understanding of the term. The three pillars of such democracy, as I explain in Chapter 3, are the human right to democratic governance, the human right to intellectual freedom, and the human right to moral equality.

A commitment to the morality of human rights also requires, as I explain in Chapter 4, a commitment to certain limitations on democracy: certain limitations both on what democratic government may do to the human beings over whom it exercises power and on what it may refrain from doing for such human beings. I elaborate and discuss one such limitation – a profoundly important one – in Chapter 4: the human right to religious and moral freedom.

Part III: Chapters 5, 6, and 7

The third term in the subtitle of this book is "constitutionalism," by which I mean this twofold norm: A democracy should both entrench in its fundamental law most, if not all, of the human rights to which it is (or professes to be) committed and authorize its courts to protect the rights by enforcing them. Thus understood, constitutionalism so strongly complements the political morality of human rights that we may fairly regard it as an integral part of that morality. Moreover, constitutionalism, like the rest of the political morality of which it is part, is now truly global. In the period since the end of the Second World War, the constitutional entrenchment of (many) human rights and the judicial protection of those rights have become widespread among the democracies of the world.

In Part III, I pursue the implications of the morality of human rights – the implications, in particular, of the twofold commitment to democracy and to the limitations on democracy – for certain constitutionalism-related questions. I begin, in Chapter 5, by bringing the political morality of human rights to bear on the American practice of judicial review; I elaborate and defend the approach to rights-based constitutional adjudication that the Supreme Court of the United States, *pursuant to the morality of human rights,* should follow. Then, in Chapter 6, I illustrate some of the "real world" implications of the approach elaborated and defended in Chapter 5. I do so by means of five opinions drafted by an imaginary justice of the Supreme Court of the United States: Justice Nemo. Each of Justice Nemo's five opinions addresses a different constitutional controversy; the controversies concern, respectively, capital punishment, race-based affirmative action, same-sex marriage, physician-assisted suicide, and abortion. Because Justice Nemo is committed to, and in her opinions follows, the approach to rights-based constitutional adjudication defended in Chapter 5, the five opinions in Chapter 6 serve to illustrate the implications of that approach for the five constitutional controversies.

Although I focus in Chapters 5 and 6 on the United States, I hope that what I say in those two chapters will nonetheless be of interest to many outside the United States – not least, to law students, legal scholars, and judges in China, where questions about the role courts should play, if any, in protecting constitutionally recognized human rights are greatly controversial.

I conclude Part III (and the book) by pursuing, in Chapter 7, the implications of the political morality of human rights – which, again, includes the twofold constitutionalism norm articulated above – for how a democracy should respond to the poverty in its midst. ("Poverty," said Gandhi, "is the worst form of violence.") Human rights of a particular sort – welfare rights – are my main concern in Chapter 7. By a "welfare right," I mean a right designed to secure the right-holders' access to one or more of the following resources in the amount required if one is to be able to live a minimally decent life: food, clothing, shelter, health-care, and education. The principal inquiry I pursue in Chapter 7 is constitutionalism-related and has two parts: Should a democracy *constitutionalize* welfare rights; that is, should it entrench welfare rights – *even* welfare rights – in its constitution. And if so, or assuming so, should a democracy go even further and *judicialize* welfare rights; that is, should it authorize its courts to enforce the rights?

Most of the issues that engage me in this book have engaged me since the very beginning of my scholarly career. (The title of my first book, published thirty-five years ago: *The Constitution, the Courts, and Human Rights* (1982).) I hope that in this book I have succeeded in addressing the issues more adequately than I have addressed them in the past.[19] If I have succeeded, it is due in significant part to the help I have received over the years from many conversation partners – including, not least, my students. I am especially grateful to the following scholars, each of whom provided me with extensive written comments on the penultimate draft of this book: Rob Kar, Cathy Kaveny, and Rick Kay.

In the last few years, I was privileged to deliver lectures drawing on material that now appears in this book. I am indebted, for their generous interest and their discerning, incisive questions and comments, to the audiences in those venues: Buechner Institute, King College, Bristol,

[19] Parts of this book – Chapters 1, 2, 4, and parts of Chapter 6 – are revised versions – clearer and stronger versions, I hope – of material published elsewhere in the last several years.