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Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"

by
BARBARA STARK*

Introduction

The International Covenant on Economic, Social and Cultural Rights¹ (ICESCR or "the Covenant") sets forth an ambitious statement of rights which the parties accept as an affirmative obligation owed their people.² By ratifying the Covenant, a government "commits itself to its best efforts to secure for its citizens the basic standards of material existence" ³ Along with the International Covenant on Civil and Polit-

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1. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]. See also G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (UN Resolution adopting the Covenant).

2. In addition to adequate standards of living, physical and mental health, education, and cultural life, these include rights to self-determination, work, unionization, and social security. ICESCR, *supra* note 1, arts. 11-13, 15, 1, 6, 8, 9. See also *infra* text accompanying notes 51-52.

3. *President Carter Signs Covenants on Human Rights*, DEP'T ST. BULL., Oct. 31, 1977, 586, 587 [hereinafter OCT. 31 BULLETIN] (President Carter's interpretation of the obligation); cf. ICESCR, *supra* note 1, art. 2(1).

See generally *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex (1987), reprinted in Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121 (1987) [hereinafter *Limburg Principles*] (considering the obligations of state parties to the ICESCR). In 1986, a group of distinguished experts in

ical Rights⁴ (ICCPR or "the Civil Covenant"), it is globally recognized as the definitive statement of international human rights law.⁵ Although some commentators claim American origins for ICESCR,⁶ tracing it to the "freedom from want" described by President Franklin Roosevelt in his "Four Freedoms" speech,⁷ and it has been before the Senate since 1978, the United States is the only major industrialized democracy that has not yet ratified the Covenant.⁸

international law synthesized the *Limburg Principles*, which they agreed "reflect the present state of international law unless specifically qualified as a 'recommendation.'" *Id.* at 121.

4. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. See also G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (UN Resolution adopting the Civil Covenant). For essays on civil and political rights, see *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (Louis Henkin ed., 1981).

5. See *Limburg Principles*, *supra* note 3, at 123 ("[T]hese instruments constitute the International Bill of Human Rights."); Louis Henkin, *The Internationalization of Human Rights*, reprinted in LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 981, 983 (2d ed. 1987) [hereinafter HENKIN ET AL., *INTERNATIONAL LAW*] ("The Universal Declaration has achieved universal recognition, and the two principal international covenants [ICCPR and ICESCR] have now come into effect."). The two Covenants develop principles first set forth in the *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948). *Limburg Principles*, *supra* note 3, at 123. The Universal Declaration, however, "is not in terms a treaty instrument." U.N. Secretary-General, 1971 SURVEY OF INTERNATIONAL LAW at 85, U.N. Doc. A/CN.4/245. The "conventional wisdom" is that two covenants evolved from the Declaration "because of the East-West split and a disagreement over the value of socioeconomic rights." David P. Forsythe, Book Review, 8 HUM. RTS. Q. 540, 540 (1986) (reviewing A. GLENN MOWER, *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* (1985)). Professor Harris attributed the division to differences in "the nature of the legal obligations and the systems of supervision that could be imposed." D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 666 (4th ed. 1991). There have been efforts to link, if not reunite, the Covenants. See *infra* note 9.

6. This is "our common usurpation for the inhabitants of the United States," as noted by Louis Henkin in *THE AGE OF RIGHTS* at x (1990) [hereinafter HENKIN, *THE AGE OF RIGHTS*].

7. Eighth Annual Message to Congress (Jan. 6, 1941), in 3 *THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966*, at 2855, 2860 (Fred L. Israel ed., 1966). In his 1944 State of the Union Message, Roosevelt eloquently elaborated on the substance of "freedom from want": "[t]he right to a useful and remunerative job . . . [t]he right to earn enough to provide adequate food and clothing and recreation; . . . [t]he right of every family to a decent home . . . [t]he right to adequate medical care . . . [t]he right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education." Eleventh Annual Message to Congress (Jan. 11, 1944), in 3 *THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966*, *supra* at 2875, 2881. See also Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 33-35 (1982) (discussing the significance of Roosevelt's eighth and eleventh messages to Congress); FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 36, 63 (1990) (same).

8. One hundred and four nations had ratified or acceded to the Covenant as of December 13, 1991. Committee on Economic, Social & Cultural Rights, *Report on the Sixth Session*,

Two basic reasons are usually given for our nonadherence. First, it has been suggested that the rights set forth in the Covenant are "foreign" to our notion of rights. It has been argued that the Covenant represents aspirations, as distinguished from "real," enforceable, civil or political rights.⁹ During the Cold War, the U.S. Department of State viewed ICESCR as a socialist manifesto thinly veiled in the language of rights.¹⁰

U.N. ESCOR, 6th Sess., Supp. No. 8, at 2, 103-12, U.N. Doc. E/1992/23, E/C.12/1991/4 (1992). But see Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69, 71 (1991) (deploring ratification by countries with "neither the intention nor the desire to abide by them"). See generally LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 106 (1978) [hereinafter HENKIN, *THE RIGHTS OF MAN TODAY*] (arguing for wider acceptance of and compliance with human rights norms, through greater adherence to, and greater respect for, human rights instruments).

9. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 352 (1991). See generally Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754, 756-57 (1982). Much has been written about the questionable distinction between "positive" and "negative" rights. See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). For present purposes, "positive rights" refer to explicitly positive rights, as opposed to those implicitly derived from a negative right, such as the government's obligation *not* to prohibit abortion.

In international law, the dichotomy between positive and negative rights resonates in the early arguments between the proponents of the Economic Covenant and those insisting on the primacy of ICCPR. The drafters of the Economic Covenant maintained that political and civil rights could not be effectively exercised unless the basic needs of survival were met. The interdependence of the two Covenants, and the fallacy of asserting the superiority of either, is now well established. See *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989); see also Melanie Beth Oliviero, *Human Needs and Human Rights: Which Are More Fundamental?*, 40 EMORY L.J. 911, 915-16 (1991). But see Michael W. Giles, *Comments on Human Needs and Human Rights: Which Are More Fundamental?*, 40 EMORY L.J. 939, 942 (1991). See generally Russel Lawrence Barsh, *Current Developments: A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192, 199 (1991) (noting a recent "linkage of human rights with the conditions for capitalism").

For an overview on commonly drawn distinctions between civil and political rights and economic, social, and cultural rights, see Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159-60 (1987) [hereinafter Alston & Quinn, *The Nature and Scope of Parties' Obligations*].

10. Paula Dobriansky, *U.S. Human Rights Policy: An Overview*, U.S. DEP'T OF STATE, CURRENT POL'Y No. 1091, at 2-3 (1988); Richard Schifter, *U.S.-Soviet Quality of Life: A Comparison*, U.S. DEP'T OF STATE, CURRENT POL'Y No. 713, at 1 (1985), reprinted in NEWMAN & WEISSBRODT, *supra* note 7, at 388. As Diane Orentlicher has noted, "by the 1950s, U.S. reservations about adherence to human rights treaties had ripened into outright hostility." Diane F. Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 43, 46-47 (1991).

Part of the government's antipathy toward economic rights reflected an arguably well-founded defensiveness. The United States was wary of being held to a more rigorous standard than less affluent countries. As Professor Thomas Franck has observed, the United Nations has employed a double standard with respect to human rights. Thomas M. Franck, *Of Gnats*

It is settled that such rights are not protected under the U.S. Constitution.¹¹

Second, political leaders have maintained that the concerns addressed by ICESCR are within the exclusive authority of the states,¹² and that national adoption would infringe on state sovereignty.¹³ The Supreme Court and most scholars reject the notion that the federal government must defer to the states on social welfare issues as a matter of law,¹⁴ pointing to the New Deal, Medicaid, Social Security, and volumi-

and Camels: Is There a Double Standard at the United Nations?, 78 AM. J. INT'L L. 811, 819-25 (1984).

11. See *Harris v. McRae*, 448 U.S. 297, 318, 323, 326-27 (1980) (finding that indigent women have no constitutional right to federal or state funding for medically necessary abortions); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972) (finding no constitutional guarantee to adequate housing); *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1970) (finding that maximum grant regulation, creating a cap on welfare benefits to large families, did not violate the Fourteenth Amendment). As Henkin has noted, the emergence in the twentieth century of what some have characterized as a welfare state has been accomplished despite the Constitution, rather than because of it. HENKIN, *THE AGE OF RIGHTS*, *supra* note 6, at 122. See also Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991) (reviewing THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990)); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; William H. Clune III, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289. But see Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Protecting the Poor*]; Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (discussing "the derivation of a constitutional right to a decent material basis for life"). Michelman's arguments are not likely to be embraced by the federal judiciary any time soon. See BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* (1990); Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987); cf. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (comparing President Reagan's approach to Supreme Court appointments to that of Franklin Roosevelt).

12. In international law, "state" is commonly used to refer to a *nation*. To avoid confusion, "state" will be used in this Article to refer only to a constituent unit of a federal nation. An exception will be made only when "state" is part of a quotation in which it clearly refers to a nation, such as the cited text of Article 11 of ICESCR. See *infra* text accompanying notes 51-53.

13. President Carter urged the adoption of a reservation recognizing state sovereignty. Transmittal Letter, 13 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978) (referring to Letter of Submittal, Dep't of State, Dec. 17, 1977, reprinted in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 88, 96 (Richard B. Lillich ed., 1981) [hereinafter U.S. RATIFICATION]). The ICCPR has in fact been ratified subject to an understanding of the same import. Senate Committee on Foreign Relations Report on the ICCPR, 31 I.L.M. 645, 652 (1992).

14. See, e.g., Burns H. Weston, *U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights: With or Without Qualifications*, in U.S. RATIFICATION, *supra* note 13, at 27, 32 [hereinafter Weston, *U.S. Ratification of ICESCR*] ("this proposed

nous legislation enacted under the Commerce Clause.¹⁵ Politically, however, neither the federal government nor the states want the federal government to assume responsibility for—or authority over—social welfare issues.¹⁶

In 1990, a refreshing and original analysis appeared in the *American Journal of International Law*. In *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*,¹⁷ Professor Philip Alston criticized some of ICESCR's U.S. proponents for effectively failing to counter either of the arguments against ratification. First, Alston found that rather than addressing ICESCR's "foreignness," these proponents sought to "portray the Covenant as though it did not differ significantly"¹⁸ from treaties dealing with the familiar "negative" civil and political rights.¹⁹ Second, Alston was critical of ICESCR's erstwhile supporters for suggesting that ratification would impose minimal obligations,²⁰ that it would "not oblige us really to do anything,"²¹ rather than grappling with the real difficulties of im-

states' rights reservation constitutes a legal/historical anachronism"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (rejecting the notion that specific areas of competence are reserved to the states); Arthur Rovine & Jack Goldklang, *Defense of Declarations, Reservations and Understandings*, in U.S. RATIFICATION, *supra* note 13, at 54; *cf.* Torture Convention Transmittal Package, U.S. Dep't of State, Action Memorandum, dated May 6, 1988, at 5 (federal-state reservation).

15. See BASIL RAUCH, *THE HISTORY OF THE NEW DEAL, 1933-38* (1944); CHARLES A. & MARY R. BEARD, *AMERICA IN MIDPASSAGE* (1939); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 311-47 (1948); 42 U.S.C. §§ 301-1397 (1988) (Social Security); 42 U.S.C. § 1396 (1988) (Medicaid); *supra* note 7.

In April 1992, legislation was introduced to create a new Works Progress Administration. Jason DeParle, *Nostalgia and Need Conjure Up Thoughts of the W.P.A.*, N.Y. TIMES, May 3, 1992, § 4, at 6.

16. See *infra* notes 67-78 and accompanying text. But *cf.* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990) (Congress delegates to the states when—and only when—it receives more political support for doing so than it would were it to retain the regulatory authority delegated).

17. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990) [hereinafter Alston, *Need for an Entirely New Strategy*].

18. *Id.* at 366.

19. These would include ICCPR, *supra* note 4, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981), and the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1966), opened for signature March 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). On the distinction between positive and negative rights, see *supra* note 9.

20. See Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 366.

21. *Id.* at 378-79. As described *infra* Part II.B, I agree with Professor Alston that the

plementation, including those posed by state sovereignty. After exposing the flaws in both positions, Professor Alston urged those seeking ratification to develop "an entirely new strategy."

There has never been a better time to do so. We²² are rethinking our Cold War aversion to "economic rights" for three major reasons. First, in light of the Soviet empire's collapse²³ and what has been called the "end of history,"²⁴ detractors can no longer link economic rights with Soviet sympathies. Domestic welfare advocacy, similarly, can no longer be attributed to "foreign" influence.²⁵ Second, economic rights are a

United States would incur substantial obligations. The question is whether the costs are outweighed by the benefits and how (and by whom) this is calculated. For a discussion of the difficulties and the limitations of this kind of approach, see Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). In addition to the cost of actual compliance, the United States would incur some administrative costs. There is no extra cost to the parties for the expenses of the Committee on Economic, Social and Cultural Rights, which are absorbed in the regular U.N. budget. Interview with Alexandre Tikhonov, Secretary to the Committee, U.N. Centre for Human Rights, in Palais des Nations, Geneva (June 11, 1991) [hereinafter Tikhonov Interview]. For a description of the Committee, see *infra* note 47. This policy might be reconsidered if the United States were to ratify and each of the fifty states was to submit its own report. See *infra* note 142.

22. A rich and growing body of scholarship explores Martha Minow's recurring problem: "A difficulty here, as always, is who is 'we.'" Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987); see also Judith Resnick, *Complex Feminist Conversations*, 1989 U. CHI. LEGAL F. 1, 7.

A telling variation appears in the literature on economic rights. As Jeffrey Swanson points out in his review of PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* (1989), the book is "address[ed] to an audience that excludes the poor and homeless." 5 MED. HUM. REV. 50, 55 (1991). Swanson criticizes Rossi for referring to "we," his audience, who can rescue "them," the poor. In this Article, "we" is all of us in this country, women and men, people of color and whites, many of whom are (or have been or will be) poor.

23. See Francis X. Clines, *Gorbachev, Last Soviet Leader Resigns; U.S. Recognizes Republics' Independence: Communist Flag is Removed; Yeltsin Gets Nuclear Controls*, N.Y. TIMES, Dec. 26, 1991, at A1; Serge Schmemmann, *The Soviet State, Born of a Dream, Dies*, N.Y. TIMES, Dec. 26, 1991, at A1; Serge Schmemmann, *Declaring Death of Soviet Union, Russia and 2 Republics Form New Commonwealth*, N.Y. TIMES, Dec. 9, 1991, at A1. For a thoughtful analysis, see Seweryn Bialer, *The Death of Soviet Communism*, FOREIGN AFF., Winter 1991-1992, at 166. See generally Graham Allison & Robert Blackwill, *America's Stake in the Soviet Future*, FOREIGN AFF., Summer 1991, at 77; ROBERT CULLEN, *TWILIGHT OF EMPIRE: INSIDE THE CRUMBLING SOVIET BLOC* (1991); VLADISLAV KRASNOV, *RUSSIA BEYOND COMMUNISM* (1991).

24. See Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 3, 4 ("[T]he endpoint of man's ideological evolution and the universalization of western liberal democracy as the final form of human government."); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). See ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* (1991); Thomas L. Friedman, *Peace Now? There's a New Era. Then There's the Mideast*, N.Y. TIMES, July 28, 1991, § 4, at 1 ("The progress in East-West relations in the last five years . . . all derived from a single fact: the triumph of capitalism over communism.").

25. It is beyond the scope of this Article to consider the extent to which such attribution

growing concern²⁶ to the increasing numbers of poor Americans.²⁷ Third, other recent developments, including the economic unification of Europe²⁸ and the unprecedented Gulf War coalition,²⁹ signal a sea change in international law. The United States is becoming more involved in international organizations,³⁰ and more concerned about its

was ever credible, except to note that there were surely times when the charge was leveled wrongly, and times when it was made in good faith, and too often these times were the same. Cf. Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 366 (noting the suspicion of many Americans, who view the ICESCR as "Covenant on Uneconomic, Socialist and Collective Rights"); Stephen Haggard, *Markets, Poverty Alleviation, and Income Distribution: An Assessment of Neoliberal Claims*, 5 ETHICS & INT'L AFF. 175, 176 (1991) (arguing that in the 1980s, unlike previous periods of economic crises, "socialist . . . alternatives to economic management were politically and intellectually discredited").

26. See THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 47, 48 (1990) (noting widespread public support for the Medicare, Food Stamp, and Social Security programs); KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1990) (arguing that the widening gap between rich and poor, along with greater concentration of wealth, is likely to lead, as it did in the 1930s, to a resurgence of populism).

27. See Jason DeParle, *Number of People in Poverty Shows Sharp Rise in U.S.*, N.Y. TIMES, Sept. 27, 1991, at A1; Peter Passel, *America's Position in the Economic Race: What the Numbers Show and Conceal*, N.Y. TIMES, March 4, 1990, § 4, at 4; *The Poorest Americans*, N.Y. TIMES, June 26, 1991, at A14; see also SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN (1991) (second in the world in per capita income, the United States "does not even make it into the top ten on any significant indicator of child welfare"). But see Robert Pear, *U.S. Reports Poverty Is down But inequality Is up*, N.Y. TIMES, Sept. 27, 1990, at A14. See generally MICHAEL HARRINGTON, THE NEW AMERICAN POVERTY (1984) (discussing the impact of the internationalized economy on the poor in America).

In the aftermath of the Los Angeles riots, commentators pointed out the terrible urgency of these concerns, and that the problems of the inner-city poor affect all of society. Timothy Noah & David Wessel, *Urban Solutions: Inner City Remedies Offer Plans—and Hope, Experts Say*, WALL ST. J., May 4, 1992, at A1; *Routine Wastelands*, N.Y. TIMES, May 3, 1992, § 4, at 16 (editorial).

28. See, e.g., John Temple Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455 (1991); Alan Riding, *Europeans Agree on a Pact Forging New Political Ties and Integrating Economies*, N.Y. TIMES, Dec. 11, 1991, at A1. See generally ALPO M. RUSI, AFTER THE COLD WAR: EUROPE'S NEW POLITICAL ARCHITECTURE (1991); JOHN PINDER, EUROPEAN COMMUNITY: THE BUILDING OF A UNION (1991); Gregory F. Treverton, *The New Europe*, FOREIGN AFF., Winter 1991-1992, at 94.

29. See Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law; UN Police Action in Lieu of War: 'The Old Order Changeth'*, 85 AM. J. INT'L L. 63 (1991); Alvin Z. Rubinstein, *New World Order or Hollow Victory?*, FOREIGN AFF., Fall 1991, at 53, 54 ("For once the concept of collective security as envisioned in the U.N. charter worked."); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991) (authoritative analysis of Charter provisions involved in Security Council decisions); see also *Iraqi Symposium—The Iraqi Crisis: Legal and Socio-Economic Dimensions*, 15 S. ILL. U. L.J. 411 (1991).

30. In 1990, Congress approved full payment of 1990 U.N. dues, plus a 20% downpayment on accumulated arrearage. Steven A. Dimoff, *U.S.-U.N. Funding Update*, INTERDEPENDENT, June-July 1991, at 4; see Frederic L. Kirgis, Jr., *The United States Commitment to*

credibility in the international community.³¹ We are in the process of shaping a new leadership role for ourselves that transcends that of "world policeman." This includes a renewed and expanded commitment to international human rights.³² On April 2, 1992, after fourteen years in committee,³³ the Civil Covenant was ratified by the United States Senate.³⁴ While it would be premature to predict ratification of ICESCR (the "other half" of the "International Bill of Rights"), the possibility

the Norms of the United Nations and Its Related Agencies, 1 TRANSNAT'L L. & CONTEMP. PROBS. 125 (1991).

Renewed participation in international organs has similarly been the subject of recent scholarship. See Richard B. Bilder, *The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 257-63 (1991) (advocating U.S. support of the International Court of Justice); Robert E. Lutz, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World*, 25 INT'L LAW. 675, 686-704 (1991) (describing strategies on reforming the world court and revising the United States' approach to it).

31. Cf. DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS (1990); Phillip R. Trimble, *International Law, Foreign Policy and the Reagan Years*, 85 NW. U. L. REV. 1041, 1043 (1991) (book review) ("The main point of Moynihan's approach is that international law, often associated with fuzzy idealism, is practically important, and the time is now ripe to put elements of Wilsonian idealism into practice."). It has been suggested that the United States may have major image problems. E.g., Edward S. Herman, *The United States Versus Human Rights in the Third World*, 4 HARV. HUM. RTS. J. 85 (1991) (arguing that the United States has repeatedly failed to uphold human rights in the Third World).

It has also been suggested, somewhat cynically, that the United States is more interested in the United Nations because there is no longer any effective opposition to the United States there. Ian Williams, *Why the Right Loves the U.N.*, 254 NATION 478 (Apr. 13, 1992).

32. Letter from President George Bush, 31 I.L.M. 660 (1992) (stating that "ratification would . . . strengthen our ability to influence the development of appropriate human rights principles"); see also Jimmy Carter, *The United States and the Advancement of Human Rights Around the World*, 40 EMORY L.J. 723 (1991). This necessarily implies a commitment to the values that shape international human rights, particularly a deep respect for human dignity. See MYRES S. McDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 367-448 (1980) (describing past trends in international human rights). But cf. Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 775 (1990) [hereinafter Epstein, *No New Property*] (insisting that "the relevant inquiry is always how to maximize human dignity under conditions of scarcity").

33. For a discussion of the background, see 31 I.L.M. 648, 649 (1992).

34. Text of the Resolution of Ratification, 31 I.L.M. 658 (1992). While ratification received scant mass media coverage, it was hailed in the human rights community as a great breakthrough. The preratification hearing before the Senate Committee on Foreign Relations on November 21, 1991 was described as "the first significant investment of effort on the part of a U.S. administration in more than a decade" regarding any of the four major human rights treaties submitted to the Senate by President Carter. ASIL NEWSLETTER, Nov.-Dec. 1991, at 1.

While ratification represents a major step forward, it must be understood in historical and political context as part of an ongoing tradition of domestic implementation of human rights precepts. For a comprehensive and scholarly survey, see Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989).

has never been more real. Indeed, the United States participated in the Copenhagen Conference on the Human Dimension in 1990,³⁵ and in November 1990 signed the Charter of Paris for a New Europe,³⁶ expressly affirming in an international instrument that "everyone . . . has the right . . . to enjoy his economic, social and cultural rights."³⁷

This Article suggests a new strategy to capitalize on these developments, which make the Covenant a timely and pertinent subject for politicians,³⁸ public interest groups,³⁹ those lawyers already citing the

35. For the text of the agreement resulting from the conference, see Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Conference on Security and Co-operation in Europe), 29 I.L.M. 1306 (1991) [hereinafter Human Dimension].

36. For the text of the agreement, see Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 193 (1991).

37. *Id.* at 194. The United States signed the Universal Declaration of Human Rights in 1948. It refers to economic rights, but it was not binding, being neither custom nor treaty when signed. See *supra* note 5. As Professor Alston has pointed out, in 1989 the United States signed the Vienna Declaration, which expressed a similar acceptance of economic and social rights. See Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 365.

These agreements are generally regarded as political, as distinguished from legal, commitments. Lori Fisler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2319 (1991). In international law, however, this distinction is frequently blurred. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 644 (1991) ("The distinction between law and politics, so central to the preservation of the neutrality and objectivity of law in the domestic sphere, does not have quite the same force in international law."). But see Alan Tonelson, *What is the National Interest?*, ATLANTIC, July 1991, at 35, 37 ("[I]nternationalism . . . has led directly to the primacy of foreign policy in American life and to the neglect of domestic problems."). See generally Thomas J. Ehr, *After 40 Years, Let's Ratify U.N. Bill of Rights*, N.Y. TIMES, Jan. 1, 1989, at E10; Paul Savoy, *Time for a Second Bill of Rights*, NATION 797 (June 17, 1991) (advocating the adoption of an economic Bill of Rights).

38. Ratification of ICESCR may well represent a major political coup for the political party able to take credit for it. The Republicans could claim to have enacted a domestic program, while leaving basic responsibility with the states. Cf. Adam Clymer, *Politicians Take Up Domestic Issues: Polls Suggest Why*, N.Y. TIMES, Sept. 15, 1991, § 4, at 5. R.W. Apple, Jr., *Majority in Poll Fault Focus by Bush on Global Policy but Back New Order*, N.Y. TIMES, Oct. 11, 1991, at A8.

The Democrats could show that they can function in an international context and that they are sensitive to charges of "big government" and demands for local control. See, e.g., Adam Clymer, *Democrats Find Potent Issue: Extending Benefits to Jobless*, N.Y. TIMES, July 31, 1991, at A1. See generally Robert D. Hormats, *The Roots of American Power*, FOREIGN AFF., Summer 1991, at 132, 138 (discussing the impact that domestic policy decisions have on United States foreign policy).

39. As Alston has astutely pointed out,

In the U.S. context, the best prospects seem to lie in convincing other groups, such as those dealing with issues like women's rights, homelessness, child abuse, malnutrition and access to education, that their concerns might usefully be pursued under the rubric of economic, social and cultural rights, and that ratification of the Covenant would be a productive step in that direction.

Covenant in state courts,⁴⁰ and those urging a more active U.S. role in international human rights.⁴¹ It proposes that the United States ratify ICESCR and delegate implementation to the states, at least in the first instance.⁴² The first Part of this Article focuses on the critique of eco-

Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 392.

The need for a new approach to these issues, like that offered by ICESCR, has already been recognized by some of these groups' more farsighted advocates. Professor Mary Becker, for example, has already called for "some entirely new standard of review for economic legislation," besides the traditional rights analysis framework, to assure that women receive their "share of the economic pie." Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 171.

The Covenant is similarly generating intense discussion among domestic legal scholars. The theme of the Annual Meeting of the Association of American Law Schools was "Ensuring Social and Economic Justice in a Changing America: Time for a New Bill of Rights?" in ASSOCIATION OF AMERICAN LAW SCHOOLS: 1992 ANNUAL MEETING (1992) (program for plenary session, Jan. 6, 1992). Law professors seemed genuinely surprised when their colleagues in international law informed them that an Economic "Bill of Rights" had already been written. This is understandable since U.S. scholarship on the Economic Covenant is "meager at best" and there is only one book on the subject in English. Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 388. That book is A. Glenn Mower, Jr.'s INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS (1985).

40. See Stephen Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, in NEW DIRECTIONS IN HUMAN RIGHTS 109, 137 (Ellen L. Lutz et al. eds., 1989).

41. See, e.g., Gabriel M. Wilner, *The Process of and Obstacles to United States Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 253 (1990); Louis B. Sohn, *Improving the Image of the United States in International Human Rights*, 82 AM. J. INT'L L. 319 (1988) (editorial comment); Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 MICH. J. INT'L L. 144 (1991) [hereinafter Stark, *Nurturing Rights*]; see also Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 154 (1978) (suggesting U.S. courts give greater weight to international law in human rights litigation).

42. The United States would remain ultimately responsible for compliance under the customary international law of treaties. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, art. 46, 1155 U.N.T.S. 331, 343, reprinted in 63 AM. J. INT'L L. 875 (1969). Although the United States is not a party to the Vienna Convention, the State Department recognizes it as customary international law and therefore binding. BARRY CARTER & PHILIP TRIMBLE, INTERNATIONAL LAW 78 (1991); see also *France v. United States*, 1952 I.C.J. 176; HENKIN, INTERNATIONAL LAW, *supra* note 5, at 137-39; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). See generally Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286, 298 (1988) (Convention largely represents a restatement of customary rules).

For a description of the proposed framework for implementing ICESCR in the states, see *infra* Part II.A. While I have little doubt that the resultant obligation could legally be foisted upon the states under contemporary principles of federalism—and it may be necessary to impose it on some obdurate states—ratification should be understood as something being done for the states, rather than to them. Inducements, including assurances of autonomy and technical support, should be sufficient. Monetary incentives could also be very persuasive. Adherence to ICESCR must be understood as a tool to help the states provide for the welfare of their

conomic rights as "foreign" to U.S. conceptions of rights. It shows that while economic rights are in fact quite different from "negative" rights, they are well-entrenched on the state level. Moreover, it argues that conceptions of economic rights under ICESCR and state constitutions are not only fundamentally compatible, but complementary.

The second Part of the Article outlines a plan for functionally implementing ICESCR.⁴³ It describes the ICESCR compliance mechanisms and shows how they would function in the American system. It then considers how ICESCR's norms would interact with existing domestic economic rights jurisprudence. I emphatically agree with Professor Alston that ratification "entail[s] the acceptance of certain obligations."⁴⁴ I would argue further, however, that once "subjected to the scrutiny they deserve,"⁴⁵ these obligations would be embraced not only by the Covenant's "natural constituenc[ies],"⁴⁶ but by beleaguered state governments as well. Finally, the second Part considers some of the likely consequences of adoption and implementation, for both the United States and the international community.

As part of ICESCR compliance, ratifying nations prepare self-monitoring reports that document their efforts, successes, and failures to "progressively achieve" the goals set out in ICESCR. These "country reports" are reviewed by the Committee on Economic, Social and Cultural Rights (the "Committee").⁴⁷ This Article derives conceptions of

citizens, a task that they have in fact already assumed under their own constitutions and the "New Federalism." See *infra* Part I.A; *The Governors and the Poor*, WASH. POST, Jan. 4, 1991, at A16 (editorial) (describing budget crises affecting majority of states, attributable in large part to rise in "caseloads and spending . . . in all the major open-ended programs for the poor").

It should be noted that this proposal only addresses the allocation of responsibility between state and federal governments. It does not systematically consider allocation among the three branches (executive, legislative, and judicial) of each government system. See *infra* text accompanying notes 107-111.

43. The development here, from conceptual to functional aspects of ratification, draws on Professor Henkin's description of the "movement in international law from 'conceptualism' to 'functionalism,' from logical deduction from abstract principles to pragmatic attention to practical needs." Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS D' ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 1, 19 (1989).

44. Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 368.

45. *Id.*

46. *Id.* at 366 (Alston states that the "human rights community . . . is incorrectly . . . assumed to be [ICESCR's] natural constituency.").

47. The Committee consists of eighteen recognized experts in the field of human rights elected for a term of four years by the Economic and Social Council, from a list of persons nominated by the parties to the Covenant. E.S.C. Res. 1985/17, U.N. Economic and Social Council (1985), reprinted in MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 71, U.N. Doc. HR/PUB/91/1, U.N. Sales No. E.91.XIV.1 (1991) [hereinafter MANUAL ON HUMAN RIGHTS].

economic rights under the Covenant, as well as their practical application, primarily from recent self-monitoring reports of the western industrialized countries⁴⁸ that have ratified ICESCR, and the first five published reports of the Committee.⁴⁹ Domestic conceptions of economic rights will be derived primarily from state constitutional texts and recent decisions of states' high courts.⁵⁰

This Article does not purport to analyze all of the state constitutions, nor does it consider all of the provisions of the Covenant. It is a preliminary exploration, not a full-scale study, which I hope will show the need for deeper and broader inquiry.⁵¹ It is basically limited to Article 11, paragraph 1, which provides "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and

48. The focus here is on western industrialized democracies that are similar enough to ours—economically, socially and politically—to invite productive comparison. Sawyer, *The Western Conception of Law*, excerpted in MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 26 (1985). See also Ranee K.L. Panjabi, *Describing and Implementing Universal Human Rights*, 26 TEX. INT'L L.J. 189, 192 (1991) (reviewing JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989)).

49. Committee on Economic, Social and Cultural Rights, *Report on the First Session*, U.N. ESCOR, 1987, Supp. No. 17, U.N. Doc. E/1987/28, E/C.12/1987/5 (1985) [hereinafter *First Session Report*]; Committee on Economic, Social and Cultural Rights, *Report on the Second Session*, U.N. ESCOR, 1988, Supp. No. 4, U.N. Doc. E/1988/14, E/C.12/1988/4 (1988) [hereinafter *Second Session Report*]; Committee on Economic, Social and Cultural Rights, *Report on the Third Session*, U.N. ESCOR, 1989, Supp. No. 4, U.N. Doc. E/1989/22, E/C.12/1989/5 (1985) [hereinafter *Third Session Report*]; Committee on Economic, Social and Cultural Rights, *Report on the Fourth Session*, U.N. ESCOR, 1990, Supp. No. 8, at 79-94, U.N. Doc. E/1990/28, E/C.12/1990/3 (1990) [hereinafter *Fourth Session Report*]; Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session*, U.N. ESCOR, 1991, Supp. No. 3, U.N. Doc. E/1991/23, E/C.12/1990/8 (1991), reprinted in *MANUAL ON HUMAN RIGHTS*, *supra* note 47 [hereinafter *Fifth Session Report*].

50. The focus on governmental, as opposed to popular, conceptions can be defended on at least two grounds. First, international law remains essentially the law of nations. Nations—not their "people"—are the parties to the Covenant regime. Second, since this Article deals primarily with western democracies, there is presumably some rough correlation between the conceptions of governments and those of their "people." See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990). See generally Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978).

I focus on state constitutions and the judicial decisions interpreting them even though legislation and administrative enactments would also be taken into account under ICESCR. State constitutions provide the closest domestic analog, structurally and substantively, to the Covenant. See *infra* text accompanying notes 57-104.

51. By "inquiry" I mean not only academic research but a public process, which would include widespread dissemination of ICESCR and discussion as well as review and assessment of empirical data. This could contribute to and build on the "republican revival" described by Professors Cass Sunstein, Frank Michelman, and others. See *infra* note 101.

housing, and to the continuous improvement of living conditions.”⁵² The focus is on Article 11 because for the majority of Americans it is probably the most important and, not coincidentally, the most contentious.⁵³

I. Comparison of the General Conceptions of Economic Rights Under ICESCR and State Constitutions

The federal government naturally comes to mind when we think of the United States in an international context. Under the Constitution, the federal government determines foreign policy.⁵⁴ It establishes our image, the public mask we present to the rest of the world. The federal government under the Reagan and Bush administrations has emphasized its hostility toward economic rights, at least until very recently.⁵⁵ This must be understood in the context of the Cold War, during which “economic rights” were often linked with the Soviet bloc, at least by our Department of State.⁵⁶

In the domestic context, however, economic rights have always been at the heart of our state jurisprudence. Notwithstanding the public mask assumed for purposes of foreign policy, we have historically accepted the idea of economic rights on the domestic state level. The “New Federalism” returned substantial welfare responsibilities, assumed by the federal government in response to the Depression, to the states.⁵⁷ Our rejection of economic rights on the federal level is not only consistent with, but arguably necessitates, our support of those rights on the state level. In-

52. ICESCR, *supra* note 1, art. 11, para. 1.

53. See *supra* text accompanying note 25; *infra* notes 76 and 87 and accompanying text. While I hope this Article is of some use to scholars focusing on different clusters of rights, the questions raised by domestic recognition of other ICESCR rights—“cultural rights,” for example—may well require a different analytic framework. See, e.g., Stephen Marks, *UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communication*, 13 TEX. INT’L L.J. 35 (1977).

54. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

55. See *supra* notes 10, 33-38 and accompanying text.

56. Dobriansky, *supra* note 10; see also Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 375; *supra* note 25.

57. See *infra* Part I.A.2. The linkage to be established here, between state constitutional jurisprudence and economic rights, may be profitably compared with the already well-established linkage between federal constitutional jurisprudence and civil and political rights. See, e.g., Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT’L L. 851, 852-53 (1989); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT’L L. 158 (1985); HURST HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 1 (1985); see also Robert J. Martineau, Jr., *Interpreting the Constitution: The Use of International Human Rights Norms*, 5 HUM. RTS. Q. 87 (1983).

deed, skipping over the federal apparatus, we find core structural and substantive similarities between the Covenant and state constitutions. These similarities result in surprisingly similar conceptions of "public welfare."⁵⁸

A. The Notion of Public Entitlement in the States

1. State Constitutional Traditions

State governments have historically been the repositories of the police power. The original colonies assumed responsibility for the welfare of their inhabitants, in part because they had little choice. Colonial constitutions reflected "practices developed during decades of neglect under an antiquated and poorly functioning imperial system."⁵⁹ The earliest form of public welfare in the Puritan colonies was based on the concept of religious community. There was a shared sense of a moral responsibility toward each other that went beyond contemporary notions of charity.⁶⁰ John Locke's social contract supplied the theoretical foundation for other economic rights, such as public education and services to pro-

58. The terms "public welfare," "economic rights," "entitlements," and "social welfare" will be used interchangeably to refer broadly to rights that are essentially "positive," arising out of a recognized affirmative obligation on the part of the state to provide benefits, such as affordable housing. The lack of consistent nomenclature reflects the use by the states and the parties to ICESCR of a variety of terms to refer to the same concept, as well as the use of the same term to refer to somewhat different concepts.

The emphasis here is on functional, rather than theoretical or ideological, conceptions. In practical political terms, for example, the distinction between "communitarian" and "liberal" is often blurred. Social democracies, as well as liberal democracies, draw on both philosophies. See generally STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); Note, *How Communal are Reasonable People?*, 104 HARV. L. REV. 1943 (1991) (reviewing MACEDO, *supra*); Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in *TOWARD A HUMAN RIGHTS FRAMEWORK 1* (Peter Schwab & Adamantia Pollis eds., 1982). For an authoritative clarification of the theoretical distinction between "communitarian" and "liberal," see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

59. Stanley H. Friedelbaum, *Introduction to HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING* at xiii (Stanley H. Friedelbaum ed., 1988) [hereinafter *HUMAN RIGHTS IN THE STATES*]. See also WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* (1980).

Professor A.E. Dick Howard's article, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. LAW 1 (1988) [hereinafter Howard, *Renaissance of State Constitutional Law*], is one of the best and most cogent introductions to state constitutional law. For a guide to the voluminous and burgeoning literature on state constitutions, see *State Constitutional Law Resources*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 317, 317-375 (Bradley D. McGraw ed., 1985).

60. *THE AMERICAN PURITANS* (Perry Miller ed., 1956). In Puritan Massachusetts, for example, John Winthrop summoned the man who had been stealing from his woodpile. Winthrop told the thief to take what he needed for the rest of the winter, saving him not only from the cold, but from sin. *Id.*

mote public health.⁶¹ Through their constitutions states assumed—in varying degrees and with varying success—responsibility for the general welfare of their populations.⁶² The Virginia Constitution, for example, required government to be “instituted for the common benefit, protection, and security of the people” and to establish “an effective system of education.”⁶³ The Massachusetts Constitution similarly mandated that “the legislature ought frequently to assemble . . . as the common good may require.”⁶⁴ Whether explicitly addressed in text, or subsumed in the phrase “general welfare,” the concept of public entitlement was part of state constitutional jurisprudence from its inception.

61. HENKIN, *THE AGE OF RIGHTS*, *supra* note 6, at 46, 47, 88. *See generally* Jackson Turner Main, *The American States in the Revolutionary Era*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY* 1 (Ronald A. Hoffman & Peter J. Albert eds., 1981) (describing record of American states during Revolutionary era with respect to economic affairs and social change).

62. *See* STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (Robert F. Williams ed., 1988) (reviewing state constitutional protection of individual liberties and public education). *But see* THOMAS PAINE, *THE RIGHTS OF MAN*, reprinted in *BURKE AND PAINE: ON REVOLUTION AND THE RIGHTS OF MAN* 248-262 (Robert B. Dishman ed., 1971) (criticizing contemporary welfare policies and urging the adoption of an income maintenance system). *See generally* STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* (1968) (describing origin and development of American radical tradition); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influence on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989) (describing importance of Pennsylvania's 1776 constitution to American law).

This is not to suggest that any form of socialism recognizable by a European ever took root in this country, or that those conditions which enabled socialism to flourish there ever existed here. As George Santayana observed: “When [an American] has given his neighbor a chance he thinks he has done enough for him. It will take some hammering to drive a coddling socialism into America.” GEORGE SANTAYANA, *CHARACTER AND OPINION IN THE UNITED STATES* 106 (1920). *Cf.* PETER BALDWIN, *THE POLITICS OF SOCIAL SOLIDARITY: CLASS BASES OF THE EUROPEAN WELFARE STATE 1875-1975* (1990); CARL LANDAUER ET AL., *EUROPEAN SOCIALISM: A HISTORY OF IDEAS AND MOVEMENTS* (1959). *See generally* VERNON LOUIS PARRINGTON, *THE BEGINNING OF CRITICAL REALISM IN AMERICA* (1927-1930) (historical Americanization of imported ideas).

Indeed, the public welfare provisions of state constitutions were for the most part intended for paupers, incompetents, women, and children. *See* John Stuart Mill, *The Province of Government*, reprinted in VIRGINIA HELD, *PROPERTY, PROFITS AND ECONOMIC JUSTICE* 178, 182 (1980). It should be noted that Mill, unlike most of his contemporaries, rejected the “classing together, for this and other purposes, of women and children” as “both indefensible in principle and mischievous in practice.” *Id.*

63. VA. CONST. art. I, §§ 3, 15.

64. MASS. CONST. pt. I, art. XXII. *See generally* GEORGE L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960) (discussing history of Massachusetts law in the colonial period); DAVID G. ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981) (exploring English influence on Massachusetts laws and customs in the 17th century).

Recent domination by a foreign king left few colonies willing to relinquish their authority to a strong central government. The states therefore retained responsibility for the general welfare of their people even after the formation of the Union.⁶⁵ While the actual provision of economic rights may seem meager by contemporary standards, these early constitutions established the states as the primary source of economic rights.⁶⁶ As constitutional texts they endured despite desuetude and periods of virtual federal preemption, to reemerge as solid foundations for the "New Federalism" two hundred years later.

2. *The "New Federalism"*

The Framers of the Constitution never intended the federal government to assume the public welfare obligations of the states.⁶⁷ Although far-reaching social welfare programs such as Medicaid⁶⁸ and Social Security⁶⁹ have been enacted on the federal level, they have never been con-

65. See James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999 (1976) (arguing that crucial government powers were not provided for in those early constitutions). In any case, the "natural law" theory at the core of the newly formed federal government offered little support for welfare benefits. HENKIN, *THE AGE OF RIGHTS*, *supra* note 6, at 101.

66. They also established the pattern for the division of responsibility between the states and the federal government, by creating a vacuum in the latter. This became self-replicating, requiring states that later joined the Union to similarly assume police power responsibilities. For an ambitious and often persuasive attempt to ground this process in the Ninth Amendment, see Eric B. Schnurer, *It is a Constitution We Are Expanding: An Essay on Constitutional Past, Present and Future*, 1 EMERGING ISSUES ST. CONST. L. 135 (1988).

67. See, e.g., THE FEDERALIST No. 82, at 491 (Alexander Hamilton), No. 45, at 288 (James Madison) (Clinton Rossiter ed., 1961). See generally Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 8 SUP. CT. REV. 341 (1985) (discussing how Framers of Constitution used the concept of state sovereignty in analyzing relation between states and federal government); *infra* note 129 and accompanying text.

I agree, however, with those commentators who have suggested that the federal government could constitutionally do so. As they have noted, ours is a "living" constitution, and it has evolved in response to changing societal needs. See, e.g., Michelman, *Protecting the Poor*, *supra* note 11; Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

68. 42 U.S.C. § 1396 (1988).

69. 42 U.S.C. §§ 301-1397 (1988).

stitutionally required.⁷⁰ The federal government has always been *legally* free to shift these responsibilities back to the states.⁷¹

The most recent movement to do so began in the 1970s.⁷² The term "New Federalism" was first used in the 1970s to describe the protection

70. The Supreme Court has firmly refused to protect affirmative economic rights. See *supra* note 11. Susan Frelich Appleton has argued that "*McRae* and *Zbaraz* unequivocally confirm that governmental protection of the poor . . . is a matter to be resolved democratically, in accordance with majoritarian will." Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 722-23 (1981). For a concise account of the futile efforts in the 1960s and 1970s to "derive a set of positive floors" from the federal Constitution, see Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886 (1989) [hereinafter Neuborne, *State Constitutions*].

71. See, e.g., Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. 23, 95 Stat. 357, 843-60 (1981) (making most "working poor" ineligible for public assistance under Aid to Families with Dependent Children); Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979). It may not be politically feasible, of course, for the federal government to attempt such a shift. See, e.g., *Invest in the Future? Yes, but How?*, N.Y. TIMES, Aug. 11, 1991, at A14 ("The idea of paring payments to the elderly strikes terror into Congressional hearts.").

72. In the last half of the century, "states' rights" have been invoked by those seeking to avoid federally imposed integration and civil rights. Indeed, the almost monotonous cries for "states' rights" among Southern politicians in the 1950s and 1960s have been interpreted as "coded slurs" against blacks by communication experts. Martin Gottlieb, *When High Officials Seem to Speak in Racist Innuendo*, N.Y. TIMES, Oct. 6, 1991, at E18; see Weston U.S. Ratification of ICESCR, *supra* note 13, at 32-33 (objecting to "state sovereignty" reservation in ratification of covenant on civil and political rights for the same reason).

Politicians may be distinguished from judges, however—especially judges with tenure. See JOSEPH GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989). Although the post-Reconstruction constitutions of Southern states "often institutionaliz[ed] Jim Crow," Howard, *Renaissance of State Constitutional Law*, *supra* note 59, at 4, many state courts have staunchly protected rights during the past 20 years, see sources cited *infra* note 76; for a survey, see *Developments in State Constitutional Law: 1989*, 21 RUTGERS L.J. 915, 915-79 (1989). They have needed a solid legal foundation, such as a state constitution, to do so. See, e.g., *supra* notes 59, 62; *infra* notes 75-77 and accompanying text. ICESCR would provide a similar foundation.

This is not to suggest that there would be no attempts to eviscerate economic rights in certain states. There are many ways to check such efforts. See, e.g., *infra* text accompanying notes 119-124 (discussing the notion of a "federal floor"); *infra* text accompanying notes 187-206 (unequivocal Committee guidelines on subsistence and nondiscrimination); *infra* text accompanying notes 80-84 (growth of supportive state constitutional jurisprudence). Nevertheless, the evolution of norms remains a complex and subtle process, subject to unforeseeable mutations. But see *infra* note 214. While states arguably offer the more promising forums for economic rights in the early 1990s, the attractiveness and utility of state tribunals may well shift, depending on the relative attractiveness, utility, and availability of their federal counterparts in a given situation. Cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are more likely than state courts to effectively enforce negative rights).

Finally, the lack of "local control" over economic rights programs has been a major argument of their opponents. The proposal made here, in accordance with the ICESCR scheme, should satisfy those who really mean "local control." Michael Libonati, *Home Rule: An*

of individual rights by state courts under their own constitutions.⁷³ In the 1980s, the term was expanded to include state protection of economic rights previously guaranteed by the federal government. President Reagan consolidated federal programs into block grants, for example, dramatically increasing state discretion and responsibility in social policy spending.⁷⁴

Both aspects of the "New Federalism" have invigorated the conception of public entitlement under state constitutions. The development of a distinctive constitutional jurisprudence of individual rights, tailored to local norms and reflecting local needs, has provided a model for evolving economic rights.⁷⁵ The creative reconstruction of the law of individual

Essay on Pluralism, 64 WASH. L. REV. 51, 54-57 (1989); see *infra* text accompanying notes 102-116, 118-126, 135-153. Those for whom "local control" is a euphemism for exclusion of the poor or people of color would have to scramble for new rhetoric. The distinction between sincere proponents and those seeking to exclude may well be blurred, however, even to members of both groups. See, e.g., Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1606-07 (1988).

73. Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977) [hereinafter Collins, *Toward a Principled Interpretation*]; see Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, vii (1985); cf. Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (suggesting that the decision should be understood as another example of the Court's recognition of state sovereignty). But see Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) (concerns of federalism do not support the kind of liberal state court activism encouraged by Justice Brennan). See generally Jerome B. Falk Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973) (discussing state courts' willingness to read their state constitutions independently of Federal Bill of Rights). For a summary of the arguments against relying on state constitutions to promote individual rights, see Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5 (1989) [hereinafter Collins, *The Once "New Judicial Federalism"*].

74. There has always been a tug-of-war between the states and the federal government. Under the "New Federalism," the federal government dropped the rope; see Ronald Reagan, *State of the Union Address*, 1 PUB. PAPERS 72, 76 (January 26, 1982); Jason DeParle, *The Fight to Save Children Shifts to the Statehouse*, N.Y. TIMES, June 23, 1991, § 4, at 4; Michael de Courey Hinds, *Governors Say Budget Plan Shifts More Burdens to States*, N.Y. TIMES, Oct. 5, 1990, at A1; Martin Tolchin, *States Take Up New Burdens to Pay for New Federalism*, N.Y. TIMES, May 21, 1990, at A1. See generally William L. Webster, *The 1990 Foulston & Siefkin Lecture: The Emerging Role of State Attorneys General and the New Federalism*, 30 WASHBURN L.J. 1 (1990) (describing how states have enjoyed renaissance in administrative and regulatory power); Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 835 (1990) (describing states' substantial regulatory leeway in operating welfare programs).

75. See Neuborne, *State Constitutions*, *supra* note 70, at 898-99 ("the laboratory model of horizontal federalism" is well suited to evolving economic rights); see also *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). See generally Robert F. Utter, *Swimming in the Jaws of*

rights has given lawyers, litigants, and the judiciary a sense of the limitations⁷⁶ as well as the possibilities of the law⁷⁷ for assuring economic rights. The massive cutbacks in some federal programs, and the shift to state management of many of those remaining, have given new urgency to the development of state social welfare programs. At the same time, the lack of adequate models—or methods for devising them—and the drastic reduction of financial support have left many states foundering, desperately seeking new approaches.⁷⁸

Given the states' historic role, and federal abandonment, primary responsibility for public welfare rests with state legislatures and state law. While legislatures and statutory protections may vacillate, state constitutions are a durable source of economic rights.⁷⁹ State courts have, in fact, recognized a broad range of "constitutional" economic rights, finding that their people are constitutionally entitled to free public educa-

the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 TEX. L. REV. 1025, 1045 (1985); DAVID OSBORNE, LABORATORIES OF DEMOCRACY (1988) (discussing state and local experimentation with new solutions to social and economic problems). Hawaii, for example, provides near-universal health care at almost half the cost of other states. Timothy Egan, *Hawaii Shows It Can Offer Health Insurance for All*, N.Y. TIMES, July 23, 1991, at A1.

The practical advantages of tailoring solutions to local circumstances are increasingly being recognized in other nations as well. See, e.g., *Second Session Report*, *supra* note 49, at 39 (describing new focus on local needs in Norway).

76. Former California Supreme Court Chief Justice Rose Bird, for example, lost her seat on the court as a result of her "activism." See, e.g., Paul Alpern, Note, *Judiciary Election—The 1986 Elections for the California Supreme Court*, 9 HARV. J.L. & PUB. POL'Y 751 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

77. See Note, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 59, at 10; MARY CORNELIA PORTER & G. ALAN TARR, *STATE SUPREME COURTS: POLICY-MAKERS IN THE FEDERAL SYSTEM* (1982). But see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (arguing that "contrary to the claims of New Federalism, state constitutional law today is a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements").

78. Michael de Courcy Hinds & Erik Eckholm, *80s Leave States and Cities in Need*, N.Y. TIMES, Dec. 30, 1990, at A1. Funding such programs puts a strain on already pinched state budgets, sometimes resulting in improvident measures. See, e.g., Richard W. Stevenson, *States Seeking Aid on Budgets From Pensions*, N.Y. TIMES, July 21, 1991, at A1.

79. Seventeen states permit constitutional initiatives, which enable voters to amend their constitutions without a constitutional convention. Economic rights have rarely been the subject of these initiatives. Janice C. May, *The Constitutional Initiative: A Threat to Rights?*, in HUMAN RIGHTS IN THE STATES, *supra* note 59, at 162, 168-69.

tion,⁸⁰ welfare,⁸¹ affordable housing,⁸² health benefits,⁸³ and abortions.⁸⁴ The states, in trying to meet these obligations, have created benefit programs and agencies to administer them, which further legitimate and define emerging economic rights.⁸⁵ Because of their traditional responsibilities, and the attendant institutional structures developed to meet them,⁸⁶ the states have become the most promising source of economic rights in the 1990s.⁸⁷

80. See, e.g., *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (scheme similar to that which was upheld in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), overturned as violative of state constitution). For a comprehensive overview, see Note, *supra* note 77, at 1350-1459. See generally Mark G. Yudof, *Effective Schools and Federal and State Constitutions: A Variety of Opinions*, 63 TEX. L. REV. 865 (1985) (reproducing test of state supreme court ruling regarding the legal duty of a school district to incorporate the practices of effective schools); Howard, *Renaissance of State Constitutional Law*, *supra* note 59, at 12 nn.47-48 (illustrating state courts' use of state constitutions in public education litigation).

81. E.g., *Tucker v. Toia*, 390 N.Y.S.2d 794 (Sup. Ct.), *aff'd*, 371 N.E.2d 449 (N.Y. 1977).

82. E.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (assuring the right to an "opportunity" for affordable housing).

83. See GA. CONST. of 1877, art. IX, § III, para. I; MISS. CONST. of 1890, art. XIV, § 262. Here, as in other areas, legislative initiatives may render appeal to the state constitution unnecessary. See generally Timothy Egan, *A State Offers Working Poor Insurance Aid*, N.Y. TIMES, Jan. 3, 1989, at A1 (Washington state helps working poor buy health insurance). Some countries, similarly, meet ICESCR requirements without further measures. See *infra* note 190.

84. E.g., *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (granting state constitutional protection to Medicaid recipients seeking medically necessary abortions); *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

85. The results, predictably, have been mixed. ISAAC SHAPIRO & ROBERT GREENSTEIN, *HOLES IN THE SAFETY NETS: POVERTY PROGRAMS AND POLICIES IN THE STATES 1-3* (1988); see also Rhoda Schulzinger & Paula Roberts, *Welfare Reform in the States: Fact or Fiction?* (pt. 1), 21 CLEARINGHOUSE REV. 695 (1987); cf. *Second Session Report*, *supra* note 49, at 22 (representative from Denmark, which spends more than 50% of its national budget on welfare, housing, labor and education, compared his country's efforts to "security nets through which no one must be allowed to fall").

86. See generally MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986).

87. There are, of course, some conspicuous exceptions. See, e.g., CAL. CONST. art. XIII; see also Note, *Local Taxes, Federal Courts, and School Desegregation in the Proposition 13 Era*, 78 MICH. L. REV. 587 (1980). There is also an emerging "antiwelfare" movement, or at least a growing perception in certain states that existing programs require serious reform. See, e.g., Jason DeParle, *California Plan to Cut Welfare May Prompt Others to Follow*, N.Y. TIMES, Dec. 18, 1991, at A1; Jason DeParle, *The Sorrows, and Surprises, After a Welfare Plan Ends*, N.Y. TIMES, Apr. 14, 1992, at A1 (describing Michigan's termination of \$240 million program for employable adults as perhaps the "most dramatic national standard in a budget cutting season"). Some advocates of program cuts focus on the inefficiency of programs and the lack of accountability of their administrators. Others denounce the demoralizing impact on recipients. Proposals for "workfare" may be seen as efforts to avoid this. See generally Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 462-65 (1987-1988); John Glowacki, *Work and Welfare in America: A Synthesis Approach*, 2 NOTRE DAME J.L. ETHICS

B. Structural Comparisons

There are two major structural similarities between ICESCR and domestic state constitutions. First, both are framed in statements of general principle rather than in the detailed language of regulations or statutes. As a corollary, both act as guiding directives, occupying the highest rank in the hierarchy of law. Second, both function in tandem with another free-standing system of law. State constitutions must be coordinated with federal law, and the Covenant must be coordinated with the domestic law of each party.

A state's constitution sets out the broad precepts under which its people are to be governed. While state constitutions differ widely in terms of specificity,⁸⁸ they generally leave the actual content of rights to be determined by the courts or the legislature. As an international statement of obligations that governments owe their people, the Covenant is similarly indeterminate.⁸⁹ While the Covenant's broad formulations

& PUB. POL'Y 243 (1985) (describing workfare as important element in proposal to eliminate defects of current welfare system).

Welfare cuts may also reflect the absence of an adequate countermajoritarian mechanism, such as ICESCR, to protect the interests of the poor minority. As Neuborne pointed out, "democracy and negative rights may no longer be effective vehicles for dealing with the structural needs of a chronically weak and permanently outvoted underclass." Neuborne, *State Constitutions*, *supra* note 70, at 883; accord Bradley R. Hogen, *Equal Protection, Democratic Theory, and the Case of the Poor*, 21 RUTGERS L.J. 1 (1989); see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

This is obviously a complex and highly charged topic. ICESCR does not prescribe a model, but offers instead a method of mediating priorities, encouraging public discourse and promoting bureaucratic accountability. ICESCR would not halt backlash movements, but it could slow their momentum, particularly when "core" norms were involved. *But see* Handler, *supra* at 515 (describing deleterious political consequences of shifting responsibility for welfare policy from the federal government to the states). See generally *infra* text accompanying notes 187-206.

88. The New York state constitution is among the more detailed. See, e.g., N.Y. CONST. art. 17, § 1. Others merely refer generally to the "promotion of the public welfare." See, e.g., N.J. CONST. art. 1, para. 1.

89. Its drafters, like the drafters of the state constitutions, were more concerned with establishing a workable process for determining the content of these rights. They were also sensitive to issues of cultural relativism. For a carefully constructed argument that a "defensible modern conception of human dignity" would have to include basic economic rights, see Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 747 (1984). See generally RELATIVISM: INTERPRETATION AND CONFRONTATION (Michael Krausz ed., 1989) (critically analyzing relativism); ALLISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS 61-87 (1990) (arguing that the legitimacy of human rights derives from moral authority); David Bidney, *Cultural Relativism*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 542, 543-47 (1968) (explaining cultural relativism as a method in ethnology, a theory of cultural determinism, and a guide to the evaluation of value systems); Allison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human*

have been criticized as vague and merely hortatory,⁹⁰ our state courts have long been required to interpret language at least as open-ended. State constitutions, like the Covenant, already require law makers and decisionmakers to ascertain the substance of nebulous rights.⁹¹

The principles set forth in state constitutions are not only guiding, but controlling. This is true in any legal system providing for judicial review, on constitutional grounds, of legislative acts.⁹² ICESCR similarly requires other state law to conform to its basic precepts, or at least to avoid undermining or contradicting them. We take this mechanism for granted in the United States, but it is far from universal. In South Africa, Great Britain, and Israel, for example, where the constitutions are unwritten, the legislatures can and do override judicial determinations of constitutionality on a regular basis.⁹³

The second major structural similarity between state constitutions and ICESCR is that both must be integrated with other legal systems. Federalism has given us exhaustive experience with this kind of synthesis. ICESCR would be treated essentially like state constitutional law with one important distinction: under the Supremacy Clause,⁹⁴ the Cov-

Rights, 7 HUM. RTS. Q. 514 (1985) (exploring tension between cultural relativism and human rights).

In addition, as Professor Sohn has pointed out, "[O]n the one hand, acceptance of the lowest possible common denominator would assure rapid ratification, but the documents would have no real effect; on the other hand, strict adherence to high ideals might lead states to refuse to ratify the documents, and the instruments would thus be of little value." Sohn, *supra* note 7, at 39.

90. HENKIN, *THE RIGHTS OF MAN TODAY*, *supra* note 8, at 98.

91. Cf. Steven Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1443 (1990) (exploring implications of "situatedness" as applied to development, practice, and "attempted reconstruction of constitutional law"). See generally Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (arguing that law is "a communal language" and urging that it be interpreted in "social contexts in which norms can be generated and given meaning"); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990) (arguing that there is no determinate evidence that the "core meaning" of words is the same to one person as it is to another person).

92. See, e.g., Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229.

93. HENKIN, *THE AGE OF RIGHTS*, *supra* note 6, at 176; A. Leon Higginbotham Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763. In some countries it matters little whether there is a constitution, written or unwritten. Jimmy Carter, *The Rule of Law and the State of Human Rights*, 4 HARV. HUM. RTS. J. 1, 3 (1991) (describing "too many countries [where] the final decisions are made by the government itself, depending on transient circumstances . . . No higher law constrains the State.").

94. U.S. CONST. art. VI, cl. 2. For an analysis of the effect of this clause, see Peter Weston, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511, 514 (1987) [hereinafter Weston, *Foreign Treaties in U.S.*

enant would become the supreme law of the land, subject only to the federal Constitution.⁹⁵ Because ICESCR would not be subordinated to federal statutes,⁹⁶ unlike state constitutions, the federal role would essentially be limited to defining a "floor."⁹⁷ While this would not foreclose debate on the proper scope of federal and state action, it would situate that debate within familiar parameters.

ICESCR has no legally binding precedent, nor does it directly generate any. This major difference between ICESCR and state constitutions is conceptually a complementary one. Although the Committee has developed Covenant "guidelines,"⁹⁸ and a jurisprudence is slowly evolving,⁹⁹ this jurisprudence is slight in comparison to our rich constitutional tradition. Conflicts would probably be few and avoidable. Indeed, the Committee's recent comments suggest that it would welcome an infusion of rigorous rights discourse.¹⁰⁰ The difference in the way precedent is treated is better understood, accordingly, as a further inducement for ratification rather than as an obstacle to it.

The explicit provision in the Committee's Commentary for "public participation" in implementing economic rights presents another structural difference between ICESCR and state constitutions. It suggests

Courts] (Supremacy Clause makes federal law self-executing in state courts, and requires state court judges to hear federal claims and hold federal law superior to conflicting state law).

95. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); see Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988) (U.S. courts will uphold the Constitution even if doing so causes the United States to be in violation of a treaty).

The explicit reservation as to constitutionality (that the United States will uphold its obligations under a treaty except to the extent that those obligations might conflict with the U.S. Constitution) remains hotly debated. While included in President Carter's letter of transmittal to the Senate, the reservation has been criticized as both "superfluous" and "arrogant." See Weston, *U.S. Ratification of ICESCR*, *supra* note 13; Rovine & Goldklang, *supra* note 13. See generally Reservations to the Convention on the Prevention and Punishment of Genocide, 1951 I.C.J. 15 (a nation may be considered a party to the convention even if ratified with certain reservations); Oscar Schachter, *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AM. J. INT'L L. 462 (1979) (questioning whether series of reservations is consistent with purpose of Covenant).

96. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 313 (1992) ("directly applied treaty has the same status as federal laws"). For a discussion of whether ICESCR could be superseded by subsequent federal legislation, see *infra* text accompanying notes 127-130.

97. For a description of the proposed scheme, see *infra* text accompanying notes 119-124.

98. See *Fifth Session Report*, *supra* note 49, at 6, 88; *infra* text accompanying notes 132-151.

99. See *infra* notes 152-154, 190-191, 195-198 and accompanying text. But see *infra* text accompanying notes 210-212 (noting the relative alacrity with which norms regarding economic rights are being articulated and recognized).

100. See MANUAL ON HUMAN RIGHTS, *supra* note 47, at 75-76.

some undefined role for a "public" not limited to potential plaintiffs,¹⁰¹ which may well include those who lack justiciable claims or who simply cannot afford lawyers. Although state constitutions do not so directly trigger what we consider a political function, economic rights issues (such as school desegregation and affordable housing) frequently inspire "town meetings" or public hearings at some stage.¹⁰² Much of this, like economic rights litigation, is in *response* to some catastrophe. Involving the public *prospectively* is a complex problem. By explicitly requiring parties to publicize ICESCR and to describe their efforts to assure a role for the general populace, the Covenant pushes governments to take the critical first step beyond theoretical discussion.¹⁰³

101. See *Limburg Principles*, *supra* note 3, at 124 ("Popular participation is required at all stages, including the formulation, application and review of national policies."). ICESCR resonates with recent American calls for a "republican revival." As Paul Brest has noted, " 'minimum protections' for the necessities of life . . . are preconditions for civic republican citizenship." Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988); see also Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990); *Symposium, The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). But see Richard A. Epstein, *Modern Republicanism—or the Flight from Substance*, 97 YALE L.J. 1633 (1988). See generally Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-19 (1986); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter *Law's Republic*] (suggesting that in the context of a new republican dialogue, constitutional theory can inspire stronger judicial protection of individual rights than can competing theories); Pope, *supra* note 50 (discussing major implications of republican movements and direct popular power for legal doctrine); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (exploring the implications of republicanism for modern public law).

State constitutions, similarly, originated in a "Whig tradition emphasizing direct, active, continuing popular control . . . of government." *Renaissance of State Constitutional Law*, *supra* note 59, at 2; see also DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980).

102. Americans have a vigorous tradition of participatory democracy, surpassing citizens of other industrialized nations in voluntary association membership, especially when such associations are devoted to solving community problems. SIDNEY VERBA ET AL., *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN NATION COMPARISON* (1978) (cited in ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 321 n.1 (1985) [hereinafter *HABITS OF THE HEART*]). This is a long-standing and frequently noted phenomenon. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 523 (J. Mayer ed., 1969). Our cultural heritage seems to predispose us to exactly the kind of involvement ICESCR seeks to promote. For a perceptive and thorough discussion of the twists and complexities that characterize that heritage in contemporary America, and probably devalue it for ICESCR purposes, see *HABITS OF THE HEART*, *supra*, at 167-218. See generally Pope, *supra* note 50 (addressing the problem of popular democracy from the republican perspective). Democratic participation may also conflict with countermajoritarian norms of the Covenant, as it has with such norms in state constitutions. See James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983).

103. While it could be argued that both the indefiniteness of the mandate and its ambiguous legal status leave considerable discretion to the states, these requirements, in conjunction

The structural similarities between ICESCR and state constitutions, in conjunction with the conceptual affinities described above, suggest a niche for ICESCR in our system. While this niche was carved out by state constitutions, it is by no means preemptively occupied by them. I am not suggesting a panacea, or a perfect fit. But there is enough common ground, and there are sufficient similarities in climate and culture, for international conceptions of economic rights to take root and flourish in the United States.¹⁰⁴ Grafted onto our own strong and growing state traditions, they can help us cultivate a uniquely American jurisprudence of economic rights.

II. The Covenant and Our Federal System—Toward Functional Integration

As described above, the states are embracing a conception of economic rights already endorsed by the vast majority of industrialized democracies. This Part explores the possibilities for state participation, within the framework of federalism,¹⁰⁵ in the international economic rights regime. It is a sketch, not a blueprint. To build on the emerging domestic consensus and to best shape the international approach to economic problems to local needs, ratification should be structured so that primary responsibility for implementing the Covenant lies with the

with the possibility of private lawsuits to enforce them, effectively limit that discretion to a choice of means. It would be difficult for a state to argue, for example, that "public participation" required no more than a notice in a newspaper. Cf. FED. R. CIV. P. 23(c)(2) (notice requirements in class action suits). See generally HARRIS, *supra* note 5, at 670.

104. See PARRINGTON, *supra* note 62. Professor Parrington's thesis was that "two rival philosophies contended for supremacy in America; the humanitarian philosophy of the French Enlightenment [epitomized in Jeffersonian democracy] . . . and the English philosophy of laissez faire [finding expression in 'mercantile, capitalist America . . . and Hamiltonian Federalism']." *Id.* at iii. While he felt, writing in the 1920s, that the "finer spirit of the Enlightenment was lost," he exhorted, "[y]et not too hastily should we abandon our earlier faith Jefferson was not as foolish as many of his disciples have been, and Jeffersonian democracy still offers hope." *Id.* at xxvii, xxxii-xxxiii. Professor Henkin not only believes that the tenets of the Enlightenment could in fact thrive here, but through the power of his vision (and more than eighteen published books) has helped ensure that they play a major role in contemporary political and legal discourse. See Barbara Stark, Book Review, 85 AM. J. INT'L L. 733, 733-34 (1991) (reviewing LOUIS HENKIN, *THE AGE OF RIGHTS* (1990)).

Professor Alston, from the unique perspective of one who has actually been a member of the Committee and taught at Harvard as well as law schools in his native Australia, sees ICESCR's potential for focusing a hitherto unwieldy coalition—ICESCR as a kind of trellis which could support and bring together various meandering movements. See Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 392-93.

105. Cf. U.S. CONST. art. 1, § 10 ("No State shall enter into any Treaty"). For a concise discussion of the capacity of constituent states in federations such as Switzerland, Brazil, Canada, India, Mexico, and the USSR to enter into agreements with other nations, see HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 5, at 401-03.

states.¹⁰⁶ After describing the basic framework below, I explain how the integrated system would actually work.

It is beyond the scope of this Article to address the allocation of responsibility for economic rights among the three constituent branches of government on either the state or federal level, except for three brief observations. First, a threshold premise here is that there is (or could be, if ICESCR is properly promoted)¹⁰⁷ the political will and popular consensus to subscribe to the basic tenets of the Covenant.¹⁰⁸ Reflecting that consensus, it is assumed that all three branches would cooperate to effec-

106. *But see* Richard B. Steward, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 337 (1990) [hereinafter Steward, *Madison's Nightmare*] ("As theorists of fiscal federalism have shown, there are grave structural impediments to providing [welfare and social services] through a system of decentralized government."). *See generally* Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View From California*, 18 INT'L LAW. 61, 61 (1984) ("focus[ing] on the use of international human rights law . . . to provide specific content to broad norms such as equal protection or due process of law . . .").

107. *See* Alston, *Need for an Entirely New Strategy*, *supra* note 17. *See generally* Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311, 330-38 (1990) (describing constituencies for ratification).

108. This is more than wishful thinking. Support for this premise may be found throughout this Article. *See for example*, *supra* note 26 (concerns about increasing poverty); Egan, *supra* note 83, and Milt Freudenheim, *On Health Insurance, Some States Are Going Back to Basics*, N.Y. TIMES, Apr. 26, 1992, at A5 (the increasing clamor for basic health care, especially among the middle class); *supra* note 80, and *infra* note 158 (growing concern about access to quality public education); *supra* notes 35-37 and accompanying text (endorsement of these tenets by the Bush administration in international instruments); *supra* notes 23-25 and accompanying text (fact that even the most fanatical can no longer link espousal of economic rights to Soviet influence); Alston, *Need for an Entirely New Strategy*, *supra* note 17 (growing demand for economic rights by groups identified by Alston); and *supra* notes 74, 78 and accompanying text (increasing burden on states to meet the basic needs of their people, especially the most vulnerable segments of their populations). In short, while it is beyond the scope of this Article to empirically prove this premise, an ample and credible foundation has been established for what remains a relatively modest proposition.

Ratification of the Covenant under the scheme outlined here simply represents legal adherence to general principles, many (if not most) of which are already familiar to many (if not most) state governments. The clarification, as well as specific methods of implementation, of these principles is basically left to the states. Adherence to ICESCR triggers, rather than determines, the process. The states would still have to devise their own particular solutions, including formal legal solutions as well as ad hoc measures, to their own particular problems.

This would be similar to the process through which international adherence to various hortatory declarations has historically developed into "hard" treaty law. The Treaty on Principles Governing States in the Exploration and Use of Outer Space, for example, first took the form of "soft" accession to general principles. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (recalling G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, at 15, U.N. Doc. A/5515 (1963), and G.A. Res. 1884, U.N. GAOR, 18th Sess., Supp. No. 15, at 13, U.N. Doc. A/5515 (1963)). *See generally* Christine Chinkin, *The Challenge of Soft Law: Develop-*

tuate the purposes of the Covenant. Indeed, they would be required to do so as a matter of law. Second, as a general principle, ICESCR does not specify any particular means of implementation, nor impose any limitations.¹⁰⁹ These matters are left to be determined domestically.¹¹⁰ Third, to some extent the ongoing debates about "judicial activism" and "countermajoritarian checks" reflect serious concerns about governmental accountability and participation in the design of programs—if not actual control by—those they are intended to benefit. It is precisely because it addresses such concerns, on a practical and mundane level, that the ICESCR process holds such great promise for many Americans.¹¹¹

A. A Framework for ICESCR in the States

I propose that the United States ratify the Covenant¹¹² with two important understandings.¹¹³ First, we must acknowledge that it is a self-executing treaty.¹¹⁴ This means that no further domestic legislation

ment and Change in International Law, 38 INT'L & COMP. L.Q. 850, 856-59 (1989) (discussing transformation of "soft" law treaties into "hard" law in economic areas).

This may be a long-term process, especially where human rights are involved. *See infra* text accompanying note 210. The Universal Declaration, originally "aspirational," "hardened" into treaty law in the Covenants. It is "now widely accepted as an authoritative interpretation of the human rights clauses of the U.N. Charter." NEWMAN & WEISSBRODT, *supra* note 7, at 664. The principles of the Universal Declaration continue to gain legitimacy and clarity through domestic implementation and international protocols. Enforcement of the Universal Declaration, like that of any human rights treaty, depends primarily on domestic enforcement. Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 420-24 (1979).

109. *See infra* note 134 and accompanying text.

110. Nor does ICESCR expressly contemplate or favor any particular theory or approach. *See infra* note 134 and accompanying text. Our current domestic crisis, and the lack of any coherent consensus as to its cause or solution, has generated wide-ranging scholarship and commentary. *See, e.g.*, CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1992); LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992); sources cited *supra* note 26. The ICESCR process is intended to neutrally facilitate whatever program is adopted, as long as that program does not violate ICESCR's explicit norms. *See infra* text accompanying notes 187-188. ICESCR offers little guidance in selecting among alternative theories or programs, although the Committee Reports serve an educational or clearinghouse function, alerting parties to approaches adopted by similarly situated states dealing with similar problems. *See infra* text accompanying notes 151-154.

111. *See infra* text accompanying notes 114-133; *see also infra* note 204.

112. *See* Craig H. Baab, *The Process for United States Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 265 (1990).

113. *See* Vienna Convention on the Law of Treaties, *supra* note 42, art. 31(4) ("A special meaning shall be given to a term [of a treaty] if it is established that the parties so intended.").

114. Wedgewood, ASIL PROC. (Amer. Soc'y Int'l L., Washington, D.C.), Apr. 19, 1991; *see* Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV.

would be required to give it the status of law. Second, we must stipulate that responsibility for compliance would initially repose in the states. The United States would ultimately be accountable under international law, but delegation to the states as a threshold matter is well within the scheme of the Covenant.¹¹⁵ It is also permissible under established principles of domestic federalism.¹¹⁶

524, 533 (1987) (Treaties should be considered "self-executing whenever the character of the undertaking permits."); Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 644-46 (1951) (A treaty should be considered self-executing unless it explicitly provides otherwise or "the power to deal with [its subject matter] is vested solely in the legislature."). *But see* Transmittal Letter, *supra* note 13 (Covenants are not self-executing.); Alfred de Zayas, *The Potential for the United States Joining the Covenant Family*, 20 GA. J. INT'L & COMP. L. 299, 304 (1990) ("[I]t is intrinsic in a covenant that is to be implemented progressively that it is *not* self-executing"). Under U.S. constitutional practice, "treaty-making officials, as a unilateral matter, will control the determination of 'self-executing' in the domestic legal system." Jackson, *supra* note 96, at 329. *See generally* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (examining the history of the judicial distinction between "self-executing" and "non-self-executing" treaties and analyzing its continuing implications).

It should be noted that American courts have held human rights provisions of the U.N. Charter non-self-executing. *See, e.g.,* *Frolova v. U.S.S.R.*, 761 F.2d 370, 374 n.5 (7th Cir. 1985); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952); Charles W. Stotter, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem*, 25 BUFF. L. REV. 773, 773 (1976).

Although some parties, such as Portugal, have incorporated the Covenant into their national law, Alston and Quinn have observed that "an obligation to incorporate cannot be deduced from the text of Article 2 and no such proposal was even considered during the drafting of the Covenant." Alston & Quinn, *Nature and Scope of Parties' Obligations*, *supra* note 9, at 166. For a more detailed discussion, see *id.* annex at 223-29 (legislative drafting history of Article 2(1)). Under parliamentary systems, legislative enactment is necessary for incorporation of the Covenant. In Sweden, for example, despite executive ratification, the Covenant has never been incorporated into domestic law.

Prior to ratification, however, pertinent Swedish legislation had been submitted to a careful review in order to ascertain to what extent it was in conformity with the Covenant. No major adjustments had then been deemed necessary. Subsequent to ratification, any proposals for new legislation falling within the area covered by the Covenant must likewise be submitted to a corresponding review before their adoption as law in order to guarantee compatibility.

Second Session Report, *supra* note 49, at 26.

115. Such delegation has been accepted in connection with other federal states. *See, e.g.,* United Nations, Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights, Federal Republic of Germany, U.N. Doc. E/1986/4/Add.10 (1986) and Canada, U.N. Doc. E/1984/7/Add.28 (1984) [hereinafter Canadian Report]. *See generally* Daniel Turp, *Le Contrôle du Respect du Pacte International Relatif aux Droits Economiques, Sociaux et Culturels*, in MÉLANGES MICHAEL VIRALLY (1990); AUSTRALIAN FEDERALISM (Brian Galligan ed., 1989); Andrew Byrnes & Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT'L L. 622 (1985); H. Burmester, *The Australian States and Participation in the Foreign Policy Process*, 9 FED. L. REV. 257 (1978); Stephen A. Scott, *Constituent Authority and the Canadian Provinces*, 12 MCGILL L.J. 528 (1966-1967).

116. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *cf. RESTATE-*

Upon ratification, the Covenant would become directly binding on the states.¹¹⁷ State courts would decide whether state governments were meeting their obligations under ICESCR, and the substantive norms of the Covenant would basically be interpreted as if they appeared in the text of the state constitution. In some states, ICESCR would build on state constitutional jurisprudence, particularly in the areas of public education, welfare, and housing in which state courts have been most active.¹¹⁸ State constitutions and the Covenant would be construed *in pari materia* and claimants could rely on either or both.

Federal jurisprudence would be limited to the articulation of a minimal standard below which a state could not fall without jeopardizing national compliance with the Covenant,¹¹⁹ and, of course, handling chal-

MENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES introductory note to pt. I, ch. 2, at 41 (1986) (During the reign of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), a state's determination of customary law was not subject to removal jurisdiction. This changed after *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938)).

117. As explained *supra* note 14 and accompanying text, and *infra* note 129, it is widely accepted that the federal government can bind the states with respect to social welfare programs. This does not preclude the argument that the delegation proposed here exceeds Congress's powers. *But see* Louis Henkin, *The Constitution, Treaties and International Human Rights*, 116 U. PA. L. REV. 1012, 1017 n.28 (1968). *See generally* Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960) (considering whether states have a constitutional obligation to enforce federal rights).

An essential premise is that the states could be persuaded, rather than compelled, to accept this delegation. Many states would immediately realize, and others could probably be convinced, that it was in their own best interest. *See supra* note 42. Of course, the possibility of protracted litigation against a determined federal government could be a significant factor. For a critical discussion of federal interference with states' freedom to allocate resources, see Kaden, *supra* note 71, at 868-83; *see also* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 970-73 (1985) (reexamining the constitutionality of conditional grants).

118. Mary P. Galie, *Social Services and Equalitarian Activism*, in HUMAN RIGHTS IN THE STATES, *supra* note 59, at 98. In many cases, this would involve an expansion of an already recognized right. To the extent it requires a normative shift, political friction would be reduced through the ICESCR process. *See supra* text accompanying notes 101-103; *infra* note 138. The only inflexible norms are those against discrimination, already well established in our law, and the requirement that subsistence be provided for the "most vulnerable"; that is, that we remove the commitment to keep our own people alive from the rough-and-tumble of local politics. *See infra* text accompanying notes 187-206; *cf.* RICHARD B. LILICH, ABA STANDING COMMITTEE ON WORLD ORDER UNDER LAW, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 16-18 (1985) (considering how international human rights law could "infuse" domestic standards).

119. The Supreme Court has endorsed the concept of a federal floor in the context of state and federal constitutional law. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("A state is free as a matter of its own law to impose greater restrictions on police activity than those [required by] federal constitutional standards [b]ut . . . a State may not impose such greater restrictions as a matter of federal constitutional law when [The Supreme Court] specifically refrains from imposing them."); *Lego v. Twomey*, 404 U.S. 477, 484 (1972) (concerning the required burden of proof in the use of coerced confessions in state criminal trials). Standards could be determined on a state by state basis or a national standard could be articulated. A

lenges under the federal Constitution.¹²⁰ Absent a preliminary showing of state violation,¹²¹ there would be no removal jurisdiction because there

hybrid scheme with a "floating" floor would also be possible. See Carol F. Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 178-84 (1981) (recommending "sliding scale scrutiny" for Supreme Court review of state court resolution of conflicting federal and state rights). But see Peter S. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium On the Resolution in State Constitutional Law*, 13 VT. L. REV. 13, 25 (1988) (noting possibility that Court would use "the recent resurgence in state constitutional law as a justification for lowering the basic floor of [civil liberty] protections available at the national level"). See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing constitutional claims which the federal judiciary declines to uphold for such "institutional" concerns as Federalism and judicial competence).

Aid provided through federal assistance programs would be taken into account, and could be part of the remedy if the state were found in violation. For a critical analysis of attaching conditions to federal grants to the states, see Kaden, *supra* note 71, at 893-97.

For an overview of the ways in which human rights law has already affected domestic jurisprudence, see Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983). See generally Farooq Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?*, 5 HUM. RTS. Q. 68, 69 (1983) (suggesting that Tenth Circuit's reliance on international norms in *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), "usher[ed] in new vistas for the domestic protection of internationally recognized human rights" through incorporation into federal common law). See also Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 233 (1985) ("For a country like the United States. . . [t]he domestic enforceability of international human rights instruments must . . . rest on a theory which makes their enforceability independent of any treaty obligation.").

120. The federal constitution remains supreme law. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1562 (1984); cf. *The Once "New Judicial Federalism," supra* note 73, at 6 (arguing that reliance on state law is illegitimate to the extent it insulates certain constitutional decisions from federal review).

This does not mean that by declaring a provision of the treaty unconstitutional, the United States could avoid its obligations under international law. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 135 cmt. (b) (1986) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."); accord *Unites States v. Alvarez-Marchain*, 112 S. Ct. 2188, 2196 (1992) (noting that even though U.S. abduction of noncitizen did not violate extradition treaty and was valid under U.S. law, it may well have been a "violation of general international law").

121. Such a showing is analogous to the EEOC right-to-sue letter required prior to the initiation of proceedings in federal court under Title VII, § 706 of the Civil Rights Act of 1964. Like the Title VII enforcement mechanisms, state remedies would have to be pursued first. See generally THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 704-14 (1981); James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241 (1981) [hereinafter Kirby, *The Case For Realism*] (arguing that challenges to state economic regulations under the federal constitution are extremely rare). For a review of developments in substantive due process under state constitutions, see James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW,

would be no "federal question."¹²² Where there was a preliminary showing that state benefits failed to meet ICESCR's requirements, it would be the task of the federal court to establish a federal "floor," just as it has historically set a constitutional "floor." Removal would probably be rare under this scheme, particularly in view of the traditional federal court deference to "surer-footed" state courts¹²³ in matters of state law.¹²⁴

State courts would remain free to articulate a higher standard, reflecting local needs and resources, just as they are free, for example, to interpret the "equal protection" provisions of their own constitutions to require more than the same language in the Equal Protection Clause of the Federal Constitution.¹²⁵ The leeway built into the Covenant to ac-

supra note 59, at 94, 110-25. Consideration of the potential roles of administrative agencies in this scheme is beyond the scope of this Article.

122. Section 25 of the Judiciary Act of 1789 provides for Supreme Court review of treaty applications by the states. This does not preclude limiting review as suggested here. The Constitution explicitly provides that the appellate jurisdiction of the federal courts shall be subject to regulation by Congress. U.S. CONST. art. III, § 2. Under my proposal, Congress would authorize federal jurisdiction where it was claimed that a state failed to meet its minimum obligations under ICESCR. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). States held to a higher standard than the "federal floor" by their own courts would depend on the political process, rather than the federal judiciary, for relief.

123. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (examining judicial discretion stemming from legislative grants and common-law history).

124. For a cogent overview of the tension between "[t]he autonomy principle," which "licenses state courts as the final, independent arbiters of state law," and "the supremacy principle" which "affirms the primacy of federal law over state law as a basic constraint on state autonomy," see Note, *supra* note 77, at 1332. This tension has emerged in a variety of legal and political contexts, all of which may be instructive for present purposes. Federal courts in the *Lochner* era used the due process clause to declare "a wide range of state social and economic legislation . . . [void, until] the court jettisoned its earlier doctrines of substantive due process." Norman Dorsen, *State Constitutional Law: An Introductory Survey*, 15 CONN. L. REV. 99, 101-02 (1982) (citing as examples *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924)); see also *supra* Part I.A.2 (the "New Federalism"); *infra* notes 129-130 and accompanying text (Tenth Amendment); cf. Kirby, *The Case for Realism*, *supra* note 121 (substantive due process under state constitutions). The common source of these continuing struggles may be found in the original division of responsibilities between the colonial states and the federal government. See *supra* Part I.A.1.

125. See Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 1 (1981) (state charters have an important role to play in the American constitutional process); cf. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*] ("Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal constitution and constitutional federal laws."). See generally Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts*, 59 NOTRE DAME L. REV. 1118 (1984).

commodate the demands of cultural relativism in an international context would serve equally well here.¹²⁶

As an international treaty ICESCR would not be treated exactly like state constitutional law with respect to federal statutes enacted after its ratification. Under one scenario, Congress might enact legislation inconsistent with ICESCR. There has been considerable debate regarding the status of such statutes.¹²⁷ It is beyond the scope of this Article to resolve that debate in this context, but two points are clear. First, it would be incumbent upon the courts to attempt to reconcile such legislation with ICESCR, a task facilitated by the Covenant's extremely broad language. Second, a statute that could not be reconciled with the Covenant would probably indicate congressional intent to renounce the treaty. To date, however, none of the parties to ICESCR has withdrawn from the treaty regime. There is no reason to think that the United States would be the first to do so.

A second, more likely, scenario involves the enactment of federal welfare legislation, intended to further ICESCR goals, that interferes with pre-existing state mechanisms.¹²⁸ A state might contest such legislation on the grounds that it interferes with the state's ability to comply with ICESCR. A state cannot challenge a federal statute on the ground that it violates the state's own constitution. It can argue, however, that such legislation usurps a state function in violation of the Tenth Amendment.¹²⁹ The extent to which delegation of the Covenant's obligations to

126. See *supra* note 89 and accompanying text; cf. MOWER, *supra* note 39, at 9 (citing argument that "any attempt to develop international norms should be limited to the regional level, where the higher degree of homogeneity facilitates both the definition and [the] implementation of standards").

127. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854 (1987) (treaties should not be subordinated to subsequent statutes). But see Weston, *Foreign Treaties in U.S. Courts*, *supra* note 94, at 512 (lawful treaties are "lexically superior to statutes and . . . binding on the political branches of government").

128. For a careful study and critique of federal-state interaction in connection with one benefits program, see Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855 (1990). See generally Freudenheim, *supra* note 108 at A5 (In response to splintering of national pool into small groups unable to spread financial risks, many states are requiring insurers to offer all applicants essentially the same rates.).

129. The feasibility of such a challenge is highly questionable since *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-47 (1985) (holding that Congress contravened no affirmative limit on its power under the Commerce Clause by affording the employees of the public mass-transit authority in San Antonio, Texas protection under the Fair Labor Standards Act). After changing course four times this century, most recently reversing itself within a period of nine years, the Court seems to have settled on an approach that debilitates the Tenth Amendment. Thomas H. Odom, *The Tenth Amendment After Garcia: Process-*

the states would affect Congress's power to enact national social welfare legislation would depend, analogously, on the scope of the delegation. Framing a delegation provision that neither penalizes states that already have programs in place nor precludes later federal action would require careful drafting. Conflicts would ultimately have to be resolved in the federal courts on a case-by-case basis.¹³⁰

B. Implementation of Economic Rights Under This Proposal

The preceding section describes the basic, static framework for integration of ICESCR. This section will describe how it might actually operate. Compliance under the integrated system would be promoted through two basic mechanisms: 1) the preparation and submission of self-monitoring reports; and 2) the operation of our domestic court system, particularly the state courts.¹³¹

1. Compliance Mechanisms of ICESCR

The monitoring provisions of the Covenant require the submission of reports "on the measures which [adhering states] have adopted and the progress made in achieving the observance of the rights recognized [therein]."¹³² As Professor Alston has noted, "the principal obligation of

Based Procedural Protections, 135 U. PA. L. REV. 1657, 1666-67 (1987); see Rapaczynski, *supra* note 67 (discussing Federalism after *Garcia*); Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) (arguing that the constraint on congressional power should be abandoned); Amar, *Of Sovereignty and Federalism*, *supra* note 125, at 1518 ("Congress enjoys no *explicit* power to preempt state remedies for unconstitutional federal conduct."). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (holding prior to *Garcia* that 1974 amendments to Fair Labor Standards Act were beyond congressional authority so far as they displaced the States' ability to structure employer-employee relations in areas of traditional governmental functions).

130. Cf. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1591 (1977) (analyzing "[p]olitical branches as judges of the scope of their own [constitutional] power"). See generally Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) (discussing the situations in which federal courts respect state separateness).

131. Justice Brennan has observed that "[a] truly meaningful implementation of rights must . . . include at least three elements: stability, enforceability, and adaptability." William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 4 (1991). Our courts have shown that they can provide some "stability" and some "enforceability" in connection with economic rights, but they are hard-pressed to assure all that is needed, or much "adaptability" at all. As described *infra* Part II.B.1, ICESCR mechanisms could help compensate for this lacuna in our jurisprudence.

132. ICESCR, *supra* note 1, art. 16(1). See also Philip Alston, *The Purposes of Reporting*, in *MANUAL ON HUMAN RIGHTS*, *supra* note 47, at 13 [hereinafter Alston, *The Purposes of Reporting*]; John P. Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31, 37-38 (1978) (discussing the implementation of the Covenant on

States parties to the Covenant is to implement its provisions at the national level. The obligation to report to an international body . . . is essentially a means of promoting the implementation of that obligation."¹³³ ICESCR contemplates a limitless array of compliance mechanisms, depending on the parties' needs, resources, pre-existing structures, and creativity.¹³⁴

The reporting process promotes domestic implementation in several ways.¹³⁵ First, it fosters the development of a coherent but flexible program. Second, monitoring generates problem-solving measures before housing or food shortages, for example, become full-blown crises.¹³⁶ As a corollary, monitoring also shifts the burden of production from potential plaintiffs (those who claim a violation of their economic rights) to the states. The state must affirmatively show that these rights are protected, rather than requiring the poor—those least able to use the legal system to their advantage—to prove that they are being denied. Third, the reporting requirement encourages public participation in the process.¹³⁷ Fi-

Economic, Social and Cultural Rights). For a description of the original reporting system, see MOWER, *supra* note 39, at 31-46. See also *infra* note 135 (for sources describing functions served by reporting); *infra* note 144 (for sources describing roles of other international agencies and nongovernmental organizations).

133. Alston, *The Purposes of Reporting*, *supra* note 132, at 39. The Committee also uses the reporting process "to demonstrate a consistency of approach from one report to another." *Id.* at 40. This has not always been effective. See Forsythe, *supra* note 5, at 541 (East Europeans resisted Committee review prior to collapse of Soviet bloc); REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 189 (1986) (same).

134. "No particular economic or political system is required for the realization of those rights." *Fifth Session Report*, *supra* note 49. The idea of protecting rights through such a patchwork is familiar to American jurists. For a compelling account of the "myriad ways in which constitutional 'public law' protections are intricately bound up with—indeed, presuppose—a general backdrop of 'private law' protections defining primary rights of personal property," see Amar, *Of Sovereignty and Federalism*, *supra* note 125, at 1507. See also Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1411-34 (1991) (describing models of current remedial decisionmaking).

This flexibility may be particularly apt now. See David E. Rosenbaum, *Concern, Cash, But No Accord on Urban Woes*, N.Y. TIMES, May 10, 1992, at A1 (despite continuing absence of consensus among politicians and academics about "the best ways to lift people out of poverty," "locally organized [programs that] might not be applicable nationwide" are "bright spots"); see also *supra* notes 72, 75, 89.

135. See Alston, *The Purposes of Reporting*, *supra* note 132, at 13, 14-15 (describing seven specific functions: initial review, monitoring, policy formulation, public scrutiny, evaluation, acknowledging problems, and information exchange).

136. See *supra* note 87, and *infra* note 165; see generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing oral hearing of a welfare recipient facing a reduction of subsidy).

137. See sources cited *supra* note 101; Ed Sparer, *Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Legal Studies Movement*, 36 STAN. L. REV. 509, 560-67 (1984).

nally, it enables the states parties to draw upon a global database as well as the considerable expertise of the Committee itself. Dialogue among members of different but overlapping communities is crucial at each phase of the process.¹³⁸

A brief description of the salient features of the reporting requirement may clarify how reporting would enable the states to promote economic rights. Article 16 requires the parties to submit "reports on the measures which they have adopted and the progress made" to the Secretary-General of the United Nations.¹³⁹ The procedure has been reformed and the reports are now submitted to the Committee.¹⁴⁰ Under the guidelines set out in the *Fifth Session Report*, parties are required to submit a "country profile," including descriptions of the land and people, general political structure, economic, social and cultural characteristics,

138. See Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129, 130 (1988) ("[C]ommunities are formed and improved through the promulgation, transformation, and criticism of cultural texts, including legal texts . . . it is our texts which . . . define, generate and preserve, as well as reflect, shared community values . . ."). The Covenant functions as the "community" text on two discrete levels, the domestic and the international. It provides the framework through which a country clarifies and annotates its own text. When a party submits its Report to the Committee, it joins in "form[ing] and improv[ing]" the international community through the process of interpreting the Covenant. For an insightful application of interpretive theory in the context of international treaties, see Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991). See Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2458 (1989) ("[P]ersuasion starts by creating a relationship . . . mak[ing] people aware of the connections they already have. The relationship changes who one is . . . [and] clarifies what one really thinks. In this way, we may redefine our values."). See generally INTERPRETING LAW AND LITERATURE, A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988) (discussing legal and literary theories of interpreting texts). This is part of the process through which those seeking to implement economic rights generate and change political discourse. As John Payne observed in connection with the *Mt. Laurel* affordable housing litigation:

The lasting achievement of *Brown*, I believe, was not desegregated schools, but the stimulus it provided to a public discourse about equality, a discourse that in time produced the Civil Rights Acts of 1964, 1965 and 1968. In its more modest compass, Mount Laurel . . . is having . . . a similar effect . . . It has . . . changed the nature of the discourse and has made it impossible not to think about economic discrimination as a social problem.

John M. Payne, *Title VIII and Mt. Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361, 374 (1988).

139. ICESCR, *supra* note 1, art. 16(1)-(2).

140. The reports were originally transmitted to the Economic and Social Council. For a full account of the reasons for the change, and its consequences, see Philip Alston & Bruno Simma, *Second Session Report of the U.N. Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603, 608 (1988). See generally MOWER, *supra* note 39. For present purposes, it is sufficient to note that the formation of an independent monitoring organ represented both the acknowledgement of the inadequacy of the original system and a renewed commitment to economic rights on the part of the U.N.

and the general legal framework for the protection of human rights.¹⁴¹ Some of this information would be identical for all fifty states and could be drafted by the federal government. States could file supplemental reports reflecting their particular circumstances. The Covenant does not specify a reporting scheme for federations and it is not my purpose here to offer one, except to suggest that any arrangement be devised by the state governors in consultation with the President. I assume that, except for the "country profile," each of the fifty states would prepare its own report.¹⁴²

The remainder of the report required by Article 16 addresses specific rights. The guideline on the right to food under Article 11, for example, requires parties to prepare a comprehensive study, including "a general overview of the extent to which the right to adequate food has been realized in your country . . . [focusing on] the situation of especially vulnerable or disadvantaged groups . . . urban poor, children, elderly people, and other especially affected groups."¹⁴³

We already collect much of the data required under ICESCR.¹⁴⁴ We also convene many of the public hearings and meetings, establish the

141. *Fifth Session Report*, *supra* note 49, at 88-89. A "country profile" is similarly required for other international treaties. An objective here, of considerable concern to most parties, is the reduction of "duplication of information requested by the various treaty bodies." *MANUAL ON HUMAN RIGHTS*, *supra* note 47, at 40. Since the United States is not a party to many other human rights treaties, this would not be an immediate concern. For a list of the treaties to which the United States has adhered, see *NEWMAN & WEISSBRODT*, *supra* note 7, at 400-01.

142. The states could be seen as mini-sovereignties, cooperating as a non-coercive, horizontal system within federalism just as their international counterparts do in the global system. *See generally* Note, *To Form a More Perfect Union? Federalism and Informal Interstate Cooperation*, 102 *HARV. L. REV.* 842 (1989) (discussing guidelines promulgated by the National Association of Attorneys General aiming at reformed cooperation among state governments). The role of the federal government will be left open. Options include a separate report, with or without a synthesis of the state reports. *Cf.* Canadian Report, *supra* note 115; Turp, *supra* note 115, at 465.

The federal government could also assume a mediating or coordinating role to address concerns among states, such as the "influx of the needy" from neighboring states. *Cf.* Steward, *Madison's Nightmare*, *supra* note 106, at 337 (characterizing federal government as a "command and control" system). *See generally* PAUL E. PETERSON & MARK C. ROM, *WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD* (1990) (discussing state welfare systems and the establishment of a national welfare standard); Richard B. Steward, *Federalism and Rights*, 19 *GA. L. REV.* 917, 975-79 (1985) (urging a system of "horizontal income transfers" among states and localities, the recipients to be given broad discretion with respect to their use).

143. *MANUAL ON HUMAN RIGHTS*, *supra* note 47, at 60.

144. In addition to federal and state information gathering machinery, international agencies and nongovernmental organizations might be helpful. For an in-depth discussion of the roles of the International Labour Organization and other U.N. specialized agencies in implementing ICESCR, see *MOWER*, *supra* note 39, at 67-143.

task forces, prepare the studies, and in general do much of what ICESCR requires. This would make our task that much easier. Nevertheless, we do not carry out these functions with much consistency. Liberals point to the deteriorating standard of living of the poor to argue that we do not do enough.¹⁴⁵ Conservatives cite the gains of the black middle class¹⁴⁶ and recent election returns, and retort that we already do (and spend) more than we should. Those eschewing a liberal-conservative dichotomy¹⁴⁷ suggest (with growing exasperation) that we should do neither more nor less of what we have been doing, but consider something else entirely.

It is difficult to move beyond polemics without a coherent framework in which to assess the problem. A major function of the reporting process is to provide a real sense of the overall impact of our efforts. The Covenant does not require onerous centralized planning, and the Committee recognizes that an ad hoc, responsive system may be quite effective. Coordination and accountability are essential, however. A major purpose of reporting is to help a nation achieve both.¹⁴⁸

Each party is supposed to submit its first report within two years of ratification and at five-year intervals thereafter.¹⁴⁹ In order to assure public involvement in the preparation of a report, each party is required to describe the manner and extent of public dissemination of ICESCR and to state whether "its content has been the subject of public debate."¹⁵⁰

145. See *supra* note 26.

146. See *Study Finds Gains for Black Middle Class*, N.Y. TIMES, Aug. 10, 1991 at A25 (reporting that proportion of affluent blacks—those with family incomes greater than \$50,000—doubled in the 1980s, although poor, largely urban blacks remain socially and economically isolated from the American mainstream); see also Isabel Wilkerson, *Middle-class Blacks Try to Grip a Ladder While Lending a Hand*, N.Y. TIMES, Nov. 26, 1990, at A1.

147. See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

148. For a thoughtful vision of a welfare system of relative legal informality, decentralized enforcement structure, and greater professionalism among caseworkers, see William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

149. Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in *MANUAL ON HUMAN RIGHTS*, *supra* note 47, at 39, 40 [hereinafter Alston, *ICESCR*]. For a description of the parties' recalcitrance in the early rounds of reporting, see Forsythe, *supra* note 5.

150. *Fifth Session Report*, *supra* note 49, at 89. See *supra* note 101. See generally Howard Tolley, Jr., *Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting*, 11 HUM. RTS. Q. 561 (1989) (discussing techniques by which a nongovernmental organization can influence national governments to adopt international law and procedures tending to limit state power).

Discussions among Committee members and country representatives give governments another perspective on domestic problems. Tikhonov Interview, *supra* note 21; cf. Hormats,

The reports are submitted to the Committee, which meets with country representatives after its review. During this meeting, which is open to the public, the Committee typically asks for further information or clarification.¹⁵¹ The meeting usually ends with comments by Committee members.¹⁵² The aim is neither to censure¹⁵³ nor to sanction, but to enable each party to better achieve its own objectives. This final step in the process becomes the first stage in the next cycle. A reporting country not only benefits from the Committee's expertise but adds to it, contributing its own experience and innovations. Under the recently adopted Guidelines, countries are asked to note any measures specifically undertaken pursuant to ICESCR's mandate.¹⁵⁴ This should facilitate domestic as well as international assessments of ICESCR's usefulness.

2. *Economic Rights in Domestic Courts*

Much of our domestic litigation on economic rights, on both state and federal levels, has grappled with the very existence of such rights.¹⁵⁵ Ratification of the Covenant would affirmatively and conclusively resolve that issue. Even more of our domestic litigation has plunged us into the quagmire of implementation. Many of these cases would similarly be pre-empted by the ICESCR mechanisms described in the preceding section. What would remain for our courts? What additional burdens would be placed on them? Would our traditional jurisprudence suffice? If not, what would replace or supplement it?¹⁵⁶

supra note 38, at 148 ("[New economic] goals should be established through a dialogue between the president, Congress and the nation's governors . . . after a focused public discussion involving the private sector.").

151. Countries are accordingly encouraged to send knowledgeable experts to these meetings. Tikhonov Interview, *supra* note 21.

152. Fausto Pocar & Bernard, *National Reports: Their Submission to Expert Bodies and Follow-Up*, in *MANUAL ON HUMAN RIGHTS*, *supra* note 47, at 25, 26.

153. The Committee indicates when a report, or the activity reported, fails to satisfy ICESCR. Tikhonov Interview, *supra* note 21; see also Zayas, *supra* note 114, at 304 ("[D]iscussions have been serious, well-focused, and non-political . . . [and] the Committee has encouraged but not pressured states parties."). For an example of relatively vigorous questioning, see *Third Session Report*, *supra* note 49, at 34 (France questioned about right to housing).

154. The Committee also prepares "general comments" which are not limited to specific countries. As set forth in Annex III of the *Third Session Report*, "The committee endeavors, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation." *Third Session Report*, *supra* note 49, at 87.

155. See federal cases cited *supra* note 11. For state cases, see Neuborne, *State Constitutions*, *supra* note 70, at 895-98 nn.83, 86, 87 & 94-96; Note, *supra* note 77; Galie, *supra* note 118, at 114-20.

156. See generally Ignaz Seidl-Hohenveldern, *Transformation or Adoption of International*

These questions can only be definitively answered over time, by the courts themselves. The following section discusses some of the factors they might consider. The focus is on state courts, where most cases would be litigated, but much of the discussion is equally applicable to federal courts.¹⁵⁷ First, I set forth the courts' basic options and suggest how they might decide among them. Second, I explain how certain key norms of the Covenant would probably be interpreted under traditional rights analysis.

a. Traditional Rights Analysis and Economic Rights

Justiciability is an open question under the Covenant.¹⁵⁸ Under the proposal here, it would be decided on a case-by-case basis in state courts.¹⁵⁹ A state court would have three basic options when presented with a claim for economic rights.¹⁶⁰ One, it could adjudicate the case. Two, it could defer to existing ICESCR mechanisms—such as administrative agencies or task forces—or even order the parties to devise an appropriate mechanism. Three, it could combine the first two by structuring dual roles for itself and the ICESCR process, referring the matter for agency action while retaining jurisdiction or bifurcating the proceeding. This threshold decision should take into account the strengths and weaknesses of traditional rights analysis in the context of economic rights.

Traditional rights analysis has often been a dead end for economic rights. While it is easy to overstate the distinction between positive and

Law into Municipal Law, 12 INT'L & COMP. L.Q. 88 (1963) (discussing this transformation in Germany and Austria).

157. This is not to suggest that federal and state court jurisdiction are coterminous in this context. See *supra* text accompanying notes 119-124. See generally KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 102-26 (1990) (discussing U.S. civil litigation involving human rights violations and terrorist acts committed outside the United States).

158. Cf. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 873-74, 916-23 (1976) (describing large body of state constitutional law dealing with public education). But see *Fifth Session Report*, *supra* note 49, at 84 (suggesting that articles dealing with the right to an education, among others, "would seem to be capable of immediate application by judicial organs"). See generally sources cited *infra* notes 162, 164, 166.

159. The standard for review of a determination by the highest state court that a particular claim was not justiciable could be the same as the standard for review of a decision on the merits, i.e., that it violated ICESCR. See *supra* text accompanying notes 119-124.

160. I attempt no more here than a delineation of functional alternatives. See *supra* note 43. For a fully developed theoretical analysis, see Sturm, *supra* note 134, at 1359 (suggesting "a normative framework to guide the practice and evaluation of the evolving public remedial practice").

negative rights,¹⁶¹ it remains far simpler for courts to prohibit than to prescribe. Even where an affirmative obligation is specific and discrete, courts may be reluctant to order relief. When they do, the result is often a judicial nightmare, as exemplified by the school desegregation cases.¹⁶²

Even after a standard is articulated and remedial measures drafted (both of which may take years), some kind of ongoing participation in the implementation process is necessary.¹⁶³ Courts are plainly unsuited for this function.¹⁶⁴ They were never intended to serve in ongoing supervisory roles, and they generally lack the resources, institutional support, and expertise to do so. Reliance on the judiciary to implement economic rights also imposes an enormous burden on plaintiffs, who must continually apply to the courts for enforcement and revision of existing orders.¹⁶⁵ Some commentators have suggested that economic rights litigation may even be self-defeating.¹⁶⁶

161. The fallacies of the negative and positive rights dichotomy have been ably demonstrated by other commentators. See *supra* note 9. Most critics focus on the affected rights-holder. It makes no difference to a poor woman, for example, whether she is unable to obtain an abortion because of legal prohibition or because she cannot afford one. Cf. Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (describing "victim" versus "perpetrator" perspectives in the context of antidiscrimination law).

162. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954). State courts have found themselves in a similar morass. See, e.g., *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975). For an illuminating analysis of some of the difficulties, see Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984).

163. See, e.g., William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777, 779 (1990) (explaining why legislators who endorse substantive welfare rights might not create effective enforcement mechanisms); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) (arguing that the traditional conception of civil litigation as dispute resolution between private parties fails to account for the increasing number of statutory and constitutional issues being decided in civil cases).

164. ROBERT M. COVER ET AL., *PROCEDURE* 227-35 (1989) (case study of judicial supervision of school desegregation). See generally MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 297-98 (1977) (there is a limit to the institutional capacity of courts to effectuate social policy).

165. There is also always the question of meaningful access to the courts. See, e.g., Herbert A. Hirte, *Access to the Court for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany*, 40 INT'L & COMP. L.Q. 91 (1991) (discussing difficulties encountered by indigents in their efforts to gain access to the courts). See generally Talbot D'Alemberte, *Alexis de Tocqueville, Atticus Finch, and Legal Services for the Poor in the Nineties*, 7 GA. ST. U. L. REV. 397 (1991) (discussing unequal access to the judicial system).

166. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing the role of courts in desegregation litigation); Freeman, *supra* note 161; Raneta J. Lawson, *The Child*

Notwithstanding the patent inadequacies of rights discourse in this context,¹⁶⁷ it retains an undeniable cachet. Professor Sylvia Law has pointed out that "[o]urs is a culture that values rights, and poor people share the values of our culture Vulnerable people have good reason to prefer the harder edge of rights to the hope that others whose lives are very different will be able to empathize with them."¹⁶⁸ On the international level, ICESCR's proponents have similarly insisted that the Covenant be treated with the same deference accorded ICCPR,¹⁶⁹ which guarantees the "liberal" rights, such as the right to a fair trial and freedom of speech, familiar to us from our own Bill of Rights.¹⁷⁰ Although it has always been understood that economic rights do not fit precisely into the same mold as civil and political rights, ICESCR's advocates have argued that the Covenant would be debased were it subject to a less demanding standard.¹⁷¹

There are also more tangible reasons for the persistent appeal of rights, apparent in our own state constitutional jurisprudence. The rights analysis historically employed by state courts in adjudicating economic rights is more muscular than ICESCR's general mandates. Similarly situated persons *must* be treated similarly, under the equal protection guarantees of most state constitutions.¹⁷² If the law confers a

Seated Next to Me: The Continuing Quest for Equal Educational Opportunity, 16 T. MARSHALL L. REV. 35, 54 (1990).

167. See generally Becker, *supra* note 39; Amy Bartholomew & Alan Hunt, *What's Wrong with Rights?*, 9 LAW & INEQ. J. 1 (1990).

168. Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 816 (1990). See also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

169. See *supra* notes 5, 9; *infra* text accompanying note 171; *Limburg Principles*, *supra* note 3, at 123.

170. Philip Alston & Bruno Simma, *First Session of the U.N. Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747, 747 n.5 (1987) [hereinafter Alston & Simma, *First Session*]; see also Theo Van Boven, *Address at the Opening of the Third Committee of the General Assembly at its Thirty-Second Session Sept. 28, 1977*, in PEOPLE MATTER: VIEWS ON INTERNATIONAL HUMAN RIGHTS POLICY 16 (1982). For a forceful argument on the need to work for both types of rights in the United States, see Sparer, *supra* note 137.

171. See U.N. GAOR, 3rd Comm., 6th Sess., 358th-72d, 411th mtgs. at 67, 67-150, 399-499, U.N. Docs. A/C.3/SR.358-72, A/C.3/SR.411-17 (1951-1952). The decision resulting from these debates is contained in the *Report of the Third Committee*, U.N. GAOR, 6th Sess., Annexes, Agenda Item 29, at 37, U.N. Doc. A/2112 (1952), cited in David M. Trubeck, *Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Rights Programs*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 211 n.17 (Theodor Meron ed., 1984); see also A.M. Capotori, *Human Rights: The Hard Road Towards Universality*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE, AND THEORY 986, 989 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

172. While equal protection is probably the most useful provision for those claiming eco-

benefit on one group, it *may not* arbitrarily deny that benefit to another group. Benefits *may not* be denied without due process of law.¹⁷³ Once a court determines that a claimant's right to a particular benefit is "fundamental," the court will "strictly scrutinize" any state action¹⁷⁴ affecting that entitlement. The state must show that it has a compelling interest in the proposed measure and that it cannot be achieved by less restrictive means.¹⁷⁵

omic rights in state courts, it does not always trigger strict scrutiny in this context. See Note, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. REV. 1547, 1547 (1984). Nor have efforts to expand it generally been successful. See, e.g., Hogin, *supra* note 87, at 57-64.

173. This parallels federal constitutional jurisprudence. Due process has been held to require notice and a hearing before termination of benefits. *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970); Brest, *Further Beyond the Republican Revival*, *supra* note 101, at 1627-28; cf. Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 733 (1990) (arguing "that in a centrally managed economy . . . the due process clause gives every person in America a constitutional right to minimum subsistence and housing, to child care, education, employment, health insurance, retirement, and to a clean and healthy natural environment"). The *Goldberg* court was inspired, in part, by Professor Reich's articles, *The New Property*, 73 YALE L.J. 733 (1964), and *Individual Rights and Social Welfare: Emerging Legal Issues*, 74 YALE L.J. 1245 (1965), both cited in the decision, *Goldberg*, 397 U.S. at 262 n.8, 265 n.13. But see Epstein, *No New Property*, *supra* note 32, at 749 (termination of welfare benefits should not be subject to due process constraints on the ground that such benefits are "property"); Paul R. Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365 (1990) (criticizing the "Reichian" approach as ignoring the societal imperative to ration resources).

174. See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). See generally Paul A. Freund, *The State Action Problem*, in *Symposium on Human Rights in the United States*, 135 PROC. AM. PHIL. SOC'Y 3 (1991); Comment, *State Court Approaches to the State Action Requirement: Private Rights, Public Values, and Constitutional Choices*, 39 KAN. L. REV. 495 (1991); James M. Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986).

Whether non-state action would be considered under the Covenant is an open question. It should be noted that activities of "private" citizens providing for their own needs are routinely taken into account. See, e.g., *Second Session Report*, *supra* note 49, at 17 (construction of residences by private citizens in Mongolia); *id.* at 21 (visits by priests to the sick in Romania). State support of such private efforts is also regularly taken into account. But see Stark, *Nurturing Rights*, *supra* note 41, at 151 (women's work in the private sphere is generally not considered). See generally Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) (discussing human rights instruments that affirm individual duties). For an argument against rigid "state action" analysis in the state constitutional context, see David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985).

175. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking one year residency requirement as violative of Equal Protection Clause after finding no compelling state interest); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (if a statute significantly interferes with the exercise of a fundamental right, it must be supported by sufficiently important state interests and be closely tailored to effectuate only those interests); see also Martha I. Morgan, *Fundamental*

In *Tucker v. Toia*,¹⁷⁶ for example, the key to the New York court's decision was its characterization of the right to subsistence as "fundamental to the relationship between the individual and the State."¹⁷⁷ The court applied traditional rights analysis to the "fundamental" right that it had identified, and held that an amendment to the state constitution restricting those benefits was unconstitutional under a strict scrutiny standard. Finding that no compelling state interest was served by distinguishing between needy children living with relatives "enumerated" under an independent federal statute (to whom the amendment did not apply), and those *not* living with such relatives (to whom it did), the court held that the amendment also violated state equal protection requirements.¹⁷⁸ Because the right in issue was *fundamental*,¹⁷⁹ moreover, the court held that it could not be abrogated by the state even if there was a "fiscal emergency."¹⁸⁰ The *Tucker* holding must be credited not only to the substantive provision of the New York constitution, but to the vigorous constitutional framework in which such provisions are analyzed as well.¹⁸¹

Finally, and critically, traditional rights analysis permits courts to play a countermajoritarian role. Economic rights, like civil and political rights, may clash with the will of the majority, or the public officials who represent it. As the *Tucker* court observed, "It is the essential character of constitutional documents and the rights they secure to be immune from the expediency which often recommends the infringement of indi-

State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review, 17 GA. L. REV. 77 (1982).

176. 390 N.Y.S.2d 794 (Sup. Ct.), *aff'd*, 371 N.E.2d 449 (N.Y. 1977).

177. *Id.* at 799. For a discussion of the methods used by state courts to determine whether a right is fundamental, see Morgan, *supra* note 175, at 96-102.

178. *Tucker*, 390 N.Y.S.2d at 802.

179. For a description of the contexts in which state courts have applied strict scrutiny based on a finding of a fundamental right, see Galie, *supra* note 118, at 101-04. *See also supra* text accompanying note 177.

180. *Tucker*, 390 N.Y.S.2d at 803. In doing so, the court upheld language remarkably similar to that of the Covenant. The extension of benefits may well have been disallowed under ICESCR's "maximum available resources" standard. Similarly, if the provision relied on in *Tucker* had been a mere statute, rather than part of the state constitution, it would have been harder to extend benefits to those denied them by operation of the amendment. The court probably would have had to concede the state's fiscal emergency argument, assuming it could be proved.

181. As Judge Jon Newman has pointed out, once a liberty or property interest has been "authoritatively defined by state courts, [it] become[s] subject to fourteenth amendment protection against deprivation without due process of law." Jon O. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 27 (1982) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)).

vidual rights in response to the crisis of the hour.”¹⁸² This is particularly critical for the poor, who usually lack meaningful access to the political process. At the same time, remedies for economic rights often require some kind of expenditure, which is difficult to obtain through judicial edict. Efforts to do so may well backfire.

Traditional rights analysis, invaluable at some stages in establishing economic rights, may be less useful or even counterproductive at others. Nancy Fraser suggests a continuum for analyzing economic rights, or “needs claims,” ranging from “‘thin’ needs such as food or shelter *simpliciter*” to “‘thick’ needs; ‘What specific forms of provision are implied once we acknowledge . . . very general, thin needs?’”¹⁸³ Traditional rights analysis can quite effectively compel the initial acknowledgement of “thin” needs, both symbolically and in terms of broad resource allocation.

Its utility diminishes progressively, however, as the issues get “thicker.” Even where enforcement is feasible, due process essentially only provides procedural safeguards and equal protection only guarantees benefits equal to those received by others “similarly situated.” Neither assures a substantive standard nor provides a method for formulating one. While the *Tucker* court expressly referred to a “*minimal* level of health, nutrition and security,”¹⁸⁴ this language provides little foothold for subsequent suits brought on that ground.

Domestic courts might use Fraser’s continuum to decide whether, or how much, to rely on ICESCR. Adjudication would be appropriate in cases involving “thin” claims while deferral to ICESCR mechanisms would be more appropriate where “thick” claims were raised, because ICESCR is more conducive to problem-solving and consensus building. The process gives all those with an interest in the outcome the opportunity to air their objections and to co-opt each other.¹⁸⁵

182. 390 N.Y.S.2d at 805.

183. Nancy Fraser, *Talking About Needs: Interpretive Contests as Political Conflicts in Welfare State Societies*, 99 ETHICS 291, 292-93 (1989). Cf. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974-85 (“Questions of abstract morality are by nature general and enduring. In contrast, questions of instrumental strategy are sensitive to elements in their target environment, and hence highly variable.”). See generally THE RIGHT TO FOOD (Philip Alston & Katarina Tomasevski eds., 1984).

184. 390 N.Y.S.2d at 805 (emphasis added). Cf. JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 51-52 (1987) (arguing that “minimally . . . good li[ves]” should be the focus of human rights). See generally *infra* text accompanying notes 188, 202, 206.

185. For those conversant with the methods and rhetoric of alternative dispute resolution, much of this will seem familiar. This should not be surprising, since ADR has its genesis in

Considerable litigation on "thin" questions should be pre-empted by ICESCR's unambiguous articulation of basic rights. Much, if not most, of the remaining caseload would probably involve or eventually reach some "thick" questions. These might be addressed through bifurcated proceedings, drawing on the respective strengths of ICESCR and traditional rights analysis.¹⁸⁶

b. Norms of the Covenant

This section considers the interpretation of two specific ICESCR norms by domestic courts: One, the requirement that the rights set out in ICESCR be enjoyed without discrimination,¹⁸⁷ and two, the affirmation of a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."¹⁸⁸ Both of these norms would probably be considered justiciable by domestic courts.

international law. See generally ROGER FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969); ROGER FISHER & WILLIAM J. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); INTERNATIONAL MEDIATION IN THEORY AND PRACTICE (Saadia Touval & I. William Zartman eds., 1985); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); Richard B. Bilder, *International Third Party Dispute Settlement*, 17 DENV. J. INT'L L. & POL'Y 471 (1989); United Nations: Draft Rules for the Conciliation of Disputes Between States, 30 I.L.M. 229 (1991); Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, 30 I.L.M. 384 (1991).

186. This contemplates multi-level and even overlapping efforts, rather than a neat bifurcation of responsibility. Cf. Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 863 (1990) (The *Kelly* decision, "[r]ather than dictating a single, authoritative meaning to a passive audience . . . seems to invite readers to bring their own creativity into an open-ended, deeply pluralistic project of 'authorship' of our constitutional norms."). See generally Leopold Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 J. CONFLICT RESOL. 2 (1967).

In some circumstances, a court could probably provide adequate coordination for this "pluralistic project." In the *Mount Laurel II* litigation, for example, the New Jersey Supreme Court appointed three judges to oversee the implementation of its affordable housing mandate. While this scheme was ultimately superseded by the enactment of the Fair Housing Act, its abandonment was a function of the political process. Many local politicians in effect criticized the judicial administration for being all too competent. See John M. Payne, *Housing Rights and Remedies: A "Legislative" History of Mount Laurel II*, 14 SETON HALL L. REV. 889, 927-32 (1986).

This is not to underestimate the real risks, especially to vulnerable populations, of ad hoc coordination, or delegation, without appropriate accountability. See, e.g., *DeShaney v. Winnebago*, 489 U.S. 189, 194-203 (1989) (failure of social services agency to protect child where six separate incidents of child abuse were reported was not actionable under 42 U.S.C. § 1983 because state had no affirmative obligation to protect child from "private actor," i.e., his father). Ratification of ICESCR under the scheme sketched here would arguably impose such an affirmative obligation.

187. ICESCR, *supra* note 1, art. 2(2).

188. MANUAL ON HUMAN RIGHTS, *supra* note 47, at 45 (text of general comment 3, para. 10).

Under the analysis suggested in the preceding section, both involve "thin needs" claims and are therefore well-suited to judicial action, at least in the first instance. Both, moreover, have been addressed extensively in state constitutional jurisprudence.

Assuming a court asserted jurisdiction over a case raising either of these norms,¹⁸⁹ how would it then proceed? While our courts would certainly be free to draw upon the reasoning of foreign courts,¹⁹⁰ they would not be bound by other countries' interpretations of the Covenant.¹⁹¹ The precise legal significance of the Committee's Report, including its Commentary, would be an open question.¹⁹² Domestic courts are already bound by the Vienna Convention on the Law of Treaties,¹⁹³ however, which provides in part that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose."¹⁹⁴ The

189. Even if "adjudication is not interpretation," as asserted in the title of Robin West's article, see Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 203 (1987), there is a persuasive counter-argument that "[i]nterpretation is a central feature of adjudication of any sort," Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 767 (1982). For a discussion of the interpretive function in the treaty context, see Johnstone, *supra* note 138.

190. See Rosenbaum, *supra* note 40, at 111 ("Legal services' objectives can be enhanced through the use of international law in domestic legal arenas."). The Committee has begun to request information from the parties as to ICESCR's application in their domestic courts. This should help make foreign decisions more readily available. But see Implementation of the International Convention on Economic, Social and Cultural Rights, U.N. ESCOR 58th Sess., 17625th mtg. at 1, U.N. Doc. E/1986/4/Add.21 (1986) (Norway's report). Since Norwegian law is more specific than the Covenant, the international instrument is not relied on. In Sweden, similarly, the more detailed Swedish law is cited and ICESCR has not even been enacted domestically. See *Second Session Report*, *supra* note 49, at 26-27.

191. But see Jackson, *supra* note 96, at 327 (considering argument that "international interpretations [of a treaty] are binding on the domestic legal institutions, including the courts").

A concern for autonomy, or "local control," on the interstate as well as intrastate level, somewhat paradoxically appears to be universal. See, e.g., *supra* note 66; LOCAL GOVERNMENT IN THE THIRD WORLD (Philip Mawhood ed., 1983); Libonati, *supra* note 72, at 55 (describing the "rediscovery of the values of decentralization of power and localism in [former] socialist bloc countries").

192. See Brudner, *supra* note 119; see also Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 Hous. J. INT'L L. 1, 4-5 (1981). To the extent that Committee Reports purport to set forth customary law, their pronouncements would probably be accepted as authoritative. A review of the Reports, however, indicates that the Committee does not claim to do so very often. As Alston, Quinn, and others have noted, the jurisprudence of economic rights is not as developed on the municipal level as the jurisprudence of civil and political rights. Alston & Quinn, *Nature and Scope of Parties' Obligations*, *supra* note 9, at 183-84. There is, accordingly, considerably less of a consensus on which to build. See generally Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991).

193. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 5, at 387.

194. Vienna Convention on the Law of Treaties, *supra* note 42, art. 31.

Committee's Reports should arguably be accepted as authoritative clarification of the Covenant's "object and purpose."¹⁹⁵ Our courts are also, of course, bound by international law.¹⁹⁶ The Committee's declaration that the prohibition against discrimination is not subject to the "progressive realization" standard is consistent with established international norms.¹⁹⁷

Domestic courts would retain considerable discretion to shape emerging economic rights.¹⁹⁸ Neither international law nor ICESCR itself requires that its norms be construed in accordance with our own

195. See Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 42-48 (1978); *Limburg Principles*, *supra* note 3; *supra* text accompanying notes 47-49, 148-150. See generally Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281 (1988); MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

196. *The Paquete Habana*, 175 U.S. 677, 700 (1899). The Supreme Court's recent decision in *Alvarez-Machain* seems to be inconsistent with this hitherto well-established rule. See *supra* note 120. Since the Court prudently limited its holding to the scope of the extradition treaty, it may be inferred that it still considers *The Paquete Habana* decision good law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. at 700 (emphasis added). The Court's failure to apply international law in *Alvarez-Machain* may be attributed to either a "controlling executive act" or, inexplicably, because of some imagined dearth of customary law on point.

In the alternative, it may be argued that the Court has made a grievous error, as Professor Henkin persuasively suggests:

During its past term, the U.S. Supreme Court had one of its infrequent opportunities to take international law seriously and to assure that the Executive Branch takes international law seriously. The Supreme Court failed . . . Chief Justice Rehnquist's opinion is hard to believe; "monstrous," dissenting Justice Stevens called it The judicial-executive distortion of standard extradition treaties is remediable, and our treaty partners will no doubt find their remedies. In reaction to general outrage, the United States will—at least—have to disown that interpretation if it is to maintain its network of extradition treaties, as important to the United States as to any state in the world.

Louis Henkin, *Will the U.S. Supreme Court Fail International Law?*, NEWSLETTER (Amer. Soc'y Int'l L., Washington, D.C.), Aug.-Sept. 1992, at 1, 1.

197. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt n & rep. note 10 (1986). Indeed, the norm against racial discrimination is one of a handful of "peremptory [universal] norms" generally acknowledged under international law. Jiménez de Aréchaga, *supra* note 195, at 64. See also E.V.O. Dankwa & Cees Flinterman, *Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations*, 9 HUM. RTS. Q. 136, 141-42 (1987) (nondiscrimination).

198. With respect to state constitutional jurisprudence, it has been suggested that state courts consider four factors when interpreting state court constitutions. We may dispense with the first, "similarity of the state and federal provisions" since there is only one text, the Covenant, to be considered here. The three remaining are pertinent: one, the "[e]xistence of state precedents"; two, "[u]nique local conditions"; and three, the "position taken by the United

constitutional jurisprudence. As discussed above, however, because of both the historic domestic treatment of economic rights (once they are recognized as rights) and the international insistence that economic rights be accorded the same status as civil and political rights, domestic courts would probably locate these particular ICESCR norms within our constitutional framework.

The particular situs of a norm within that framework would remain an open question. Unlike the federal and some state constitutions, for example, ICESCR does not textually distinguish between gender and racial discrimination. White women might rely upon this to challenge legislation under which they were held to a different standard than people of color.¹⁹⁹ It is arguable, however, that ICESCR triggers something less than "strict scrutiny." While remaining within constitutional parameters, courts could hold that the Covenant merely requires that a state have a "rational basis" for discriminating among groups in the provision of economic rights.²⁰⁰ This would leave the states free to impose a higher standard of scrutiny for racial discrimination.²⁰¹

States Supreme Court." Johansen, *Toward a Principled Interpretation*, *supra* note 73, at 318-19.

199. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. See also Burke et al., *supra* note 119, at 326-27. See generally GEOFREY R. STONE ET AL., CONSTITUTIONAL LAW 624-25 (1986) (heightened scrutiny would be called for only if it were clear that women's interests were politically "undervalued").

Pitting one disadvantaged group against another is among the most disturbing consequences of applying traditional rights analysis to entitlement issues. Again, ICESCR mechanisms provide a safety valve, an alternative to a "zero-sum game," a way of mediating competition for always-limited resources. See JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 102-08 (1989).

200. For example, it could still be argued that there was a "rational basis" for distinguishing between subsidizing child birth and subsidizing abortion. Under the right to health set out in Article 12, however, a woman seeking funding for an abortion would have an important additional ground for argument. See Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 719-26 (1992).

201. While it is obviously impossible to predict the Committee's reaction to hypothetical U.S. court decisions, international consensus on gender discrimination is notably problematic. For a comprehensive and insightful analysis, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621-34, 638-43 (1991). See generally Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779 (1990); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990). Prohibitions against racial discrimination, in contrast, are generally recognized as customary international law, even peremptory norms. See, e.g., *supra* note 197 and accompanying text; Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICES 15, 15-17 (Hurst Hannum ed., 1989).

The situs of the right to subsistence would raise similar issues. Again, a domestic court would probably place the right somewhere in our constitutional framework. If the Commentary were deemed binding, or if the court found it persuasive, some or all of the cluster of subsistence rights might be considered "fundamental rights."²⁰² As *Tucker v. Toia* demonstrated, such rights may not be abrogated. Not even New York's "fiscal emergency" excused it from providing benefits fundamental to the relationship of the citizen to the state.²⁰³

This leads to the sensitive question of state spending under ICESCR.²⁰⁴ The Covenant does not explicitly require expenditures. Rather, the question under ICESCR is one of the allocation of "the maximum of *available* resources."²⁰⁵ The issue would not be whether a court could order state spending, but the circumstances under which a court-ordered shift in resource allocation would be justified. As the Commentary makes clear, however, even extremely poor countries are expected to meet the subsistence needs of their inhabitants.²⁰⁶ A U.S. claim of "inadequate resources" would likely meet with considerable skepticism on the part of the Committee. This issue would most constructively be addressed on a practical, case-by-case basis, rather than as an abstraction. Here, again, the courts and the parties might profit by ICESCR mechanisms, both to address the "thicker" questions involved in setting priorities and to defuse political tensions by promoting full discussion and cooperative problem-solving among affected groups.

202. In the alternative, the court could find such rights equivalent to "liberty" or "property" interests. For a critical analysis of federal court efforts to determine whether a deprivation of life, liberty or property has occurred when government benefits are denied, see Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

203. 390 N.Y.S.2d. 794, 799 (S.Ct.), *aff'd*, 371 N.E.2d 449 (N.Y. 1977).

204. This question is sensitive not only because of the specter of increased taxes, but because it may put that possibility beyond the direct control of the legislature, tilting the balance of power under federalism. The constitutional limitation on domestic courts' power to require legislative expenditures is unsettled. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (court "could have authorized or required [school] district to levy property taxes at rate adequate to fund desegregation remedy; [however] remedial powers of equity . . . are not unlimited . . . [and the court must respect the] function of local government institutions"); see Ron Combs, Note, *Schoolbooks In the Missouri River? A Possible Response to Missouri v. Jenkins*, 56 MO. L. REV. 389 (1991). The tension here reflects the conflict between majoritarian and countermajoritarian norms in the context of the spending power, historically entrusted to a majoritarian political process. If countermajoritarian norms are accepted as "rights," however, the balance shifts. If the majority becomes persuaded that it benefits by assuring subsistence, of course, these norms lose their countermajoritarian character. See *supra* note 161.

205. ICESCR, *supra* note 1, art. 2(1) (emphasis added).

206. *Fifth Session Report*, *supra* note 49, at 45.

Conclusion

There is core compatibility between state constitutions and ICESCR. This was fostered by the "New Federalism," which has increased the states' responsibility for the basic welfare of their inhabitants. Ratification of ICESCR would facilitate and expedite a progression that is not only increasingly urgent but perhaps already inevitable.

At the same time, ratification would allow us to assume a constructive new role in international affairs.²⁰⁷ The collapse of the Soviet Union leaves us with no excuse for snubbing ICESCR. Nor can we afford to stand aloof if we want to participate fully in the European Community and other global markets.²⁰⁸ Ratifying ICESCR would reassure the rest of the world that we have basic values in common.²⁰⁹ It would also enable us to contribute to the development of international law. American notions of due process and equal protection would bring new rigor to international conceptions of economic rights.

Our domestic experience with evolving economic rights has been frustrating. As Professor Panjabi reminds us, "Western civilization did not leap in one bound from Locke to the Universal Declaration of Human Rights. Centuries of adjustment, tension, compromise, resistance, re-evaluation, and structuring were required to bring about the cur-

207. As Alston correctly noted, this cannot be the major ground for urging adherence. Alston, *Need for an Entirely New Strategy*, *supra* note 17, at 393. Neither, however, should the United States ignore the consequences of non-ratification.

208. There can be no serious doubt that such participation is critical to our economic well-being, if not survival. See, e.g., David Gergen, *America's Missed Opportunities*, 71 FOREIGN AFF. WINTER 1991-1992, at 16 ("Over 40 percent of U.S. economic growth in the past four years . . . [is] attributable to increases in U.S. exports.").

209. For more theoretical justifications for ratification, see Jerome J. Shestack, *The Jurisprudence of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 69, 75-101 (Theodor Meron ed., 1984). While we would incur no direct responsibilities by ratification, participation in the ICESCR process could also lead us to reconsider the nature of our obligations toward the rest of the world. "As is not the case with civil-political rights, however, another state can help give effect to some economic-social rights . . . without forcible intervention, merely by financial aid to the local government." HENKIN, *THE AGE OF RIGHTS*, *supra* note 6, at 45; cf. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (discussing the evolution of the U.S. tradition of predicating constitutional rights on "membership" in the domestic polity, and alternatives to that model in an international context). But see Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 588 ("economic rights are especially unsuitable for international protection by one state against another or by the international community as a whole"). See generally Dominguez, *Assessing Human Rights Conditions*, in ENFORCING GLOBAL HUMAN RIGHTS (1979); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 162-202 (1989); MOWER, *supra* note 39, at 145-80 (discussing "global efforts to [address] problem of available resources"); NICKEL, *supra* note 184, at 120-30; Kai Nielsen, *On the Need to Politicize Political Morality: World Hunger and Moral Obligation*, in ETHICS, ECONOMICS AND THE LAW 253 (J. Roland Penock & John W. Chapman eds., 1982).

rent sense of commitment.”²¹⁰ From this perspective, the achievements of the Covenant regime in its brief existence are astounding. Recent Committee reports²¹¹ suggest, moreover, that it is getting into high gear.²¹² If we are concerned about meeting the needs of our own people, there is no better guide than ICESCR and the procedures established by the Committee.²¹³

There is far more to learn and to gain from participation in ICESCR than administrative techniques or analytical tools. As the United States considers the awesome responsibilities of world leadership, we would do well to ask ourselves where it is we hope to lead. The text of the Covenant provides normative guidance, and through the ICESCR process we could contextualize evolving norms and give them substance. As a Committee member once remarked, “[T]he amount of assistance provided to the disadvantaged in society is considered a good measure of civilization”²¹⁴ Eleanor Roosevelt put it more eloquently, in envisioning “an awakening sense of responsibility for [our] brothers[:] . . . if we hope to see the preservation of our civilization, if we believe that there is any-

210. Panjabi, *supra* note 48, at 193.

211. The guidelines may be seen as later, more developed articulations of the objectives set forth in the *Second Session Report*, *supra* note 49, the general observations regarding the submission of reports set forth in the *First Session Report*, *supra* note 49, at 48-49, and the suggestions and recommendations adopted in *id.* at 51-53. The Committee’s continual efforts to improve, clarify, and make the country reports more useful is a constant theme running throughout the Session reports. At the same time, rigor must be tempered with tact and diplomacy so as to avoid alienating the parties. Tikhonov Interview, *supra* note 21.

212. Its efforts to clarify the language of Article 2(1), for example, demonstrate the Committee’s determination to put teeth into the Covenant. See *Fifth Session Report*, *supra* note 49. While it might be argued that it is precisely the slow, incremental creation of norms that assures their validity, here the response must be terse: There is not time. As Edward Sparer reminded us, “[t]oo many people [are] too poor.” Sparer, *supra* note 137, at 540. See also Tolley, *supra* note 150, at 582-85 (comparing strategies of U.S. interest groups with those of international human rights organizations).

213. “States have much to learn in this reporting process, both from comments by members of the council and from the reports of other countries.” *Third Session Report*, *supra* note 49 (quoting Australian representative).

214. *Second Session Report*, *supra* note 49, at 26. As Brian Barry has observed, “[T]here is a virtuous circle in which the existence of redistributive institutions and beliefs in the legitimacy of redistribution are mutually reinforcing and have a strong tendency to become more extensive together over time.” Brian Barry, *Humanity and Justice in Global Perspective*, in *ETHICS, ECONOMICS AND THE LAW*, *supra* note 209, at 219, 240. See also THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 16 (1990) (describing how “a rule or rule-making institution . . . itself exerts a pull towards compliance on those addressed normatively”).

thing worthy of perpetuation in what we have built thus far, then our people must turn to brotherly love, not as a doctrine but as a way of living."²¹⁵

215. A.E. ROOSEVELT, *THIS TROUBLED WORLD* 45-46 (1938). This is an enduring message, as we were reminded during the Los Angeles riots: "[W]hat, as a nation, did we really expect? The residents of our inner cities have for many years now been unable to lay claim to our national sense of common humanity and simple decency. On what basis can we expect to suddenly lay claim to theirs?" *The Talk of the Town*, *NEW YORKER*, May 11, 1992, at 27.