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The Future of the Fourteenth Amendment: International Law and the Black Heritage Trail

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THE FUTURE OF THE FOURTEENTH AMENDMENT AND INTERNATIONAL HUMAN RIGHTS LAW: THE BLACK HERITAGE TRAIL

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> [T]he Amendment was framed by men who possessed differieng views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over the differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved.[1]

> "The 'separate but equal' doctrine, the legal lynchpin of Jim Crow in America, has its origins in the cradle of Liberty, Boston, Massachusetts."[2]

INTRODUCTION

I recently moved to Boston, to a tiny second floor apartment in Beacon Hill, near the corner where Phillips Street crosses Grove Street. Beacon Hill is one of the oldest neighborhoods in Boston and a National Historical District. Historical plaques are everywhere. My street, according to a tastefully low-key sign, is part of the Black Heritage Trail. Two of the buildings on my block have historical plaques relating to Black heritage.

None of the buildings, however, seemed to have any garbage bins, either in the alleys (the size of jet aisles) or in the back yards (the size of small picnic tables). I know that garbage and recycling are local, idiosyncratic affairs, but my apartment cameapartment came with no instructions and my computer did not arrive for another week, so I couldn't check on the web. I tried to pay attention to my neighborhood instead.

Sitting at my front window on the second evening after my arrival, I noticed a plastic bag under the authentic historical lamppost diagonally across the street from me. The next time I glanced out the window, it had been joined by two more plas-

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1. Justice William Brennan, Oregon v. Mitchell, 400 U.S. 112 (1970).

2. Leonard W. Levy, *Introduction* to JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE vii (1974).

tic bags. By 10:30 there were five bags around the lamppost. There was also a figure climbing the steep hill of Grove Street. He moved slowly, and pushed a grocery cart with plastic bags in front of him. I could not tell his age, but I could see that he was Black.

A young white man came out of the apartment directly across the street with two plastic bags, one with cans sticking out of the top. He walked past the Black man, who ignored him, leaning his head back as he drank from a can from his cart. The young white man left both his plastic bags under the lamppost and returned to his apartment. After he shut the door, the Black man crossed the street, added the bag of cans to his cart, and continued on his way.

The politics of this vignette are problematic. The white man had no use for the cans; the Black man did. The white man presumably had other, better, sources of income; the Black man presumably did not. At the same time, however, the white man was supporting the City's recycling program, while the Black man was undermining it; in fact, he was effectively working for its competition.[3]

But the scene disturbed me on a visceral level. Why was a Black man collecting cans on this street at 10:30 p.m.? What Black Heritage Trail was *he* traveling on?

The next day I took the tour to learn the official story.[4] National Forest Service Ranger Jarumi Crooks met our small group at the Shaw Memorial, right across the street from the gold-domed State House. The Black Heritage Trail began with the Black regiment that the white, twenty-five year old Robert Gould Shaw led into the Civil War. Almost a third of them died, including Shaw. The Black soldiers were paid less than their white counterparts.[5]

I learned about the way-stations in Beacon Hill on the Underground Railroad to Canada in the eighteenth century, when slavery was still legal in Massachusetts.[6] A hundred years before the Civil War, the Black struggle was part of a larger, international struggle against slavery. Black Americans understood the importance of local organization, and the need to link the local struggle to the larger global struggle of which it was a part. I learned about the segregated Abiel Smith school in Beacon Hill, and the lawsuit to integrate the public schools a hundred years before *Brown v. Board of Education*.[7] Black Americans understood the importance of

3. *See, e.g.*, Donovan Slack, *Recycler Draws Cartloads of Anger in S. Boston*, BOSTON GLOBE, Aug. 14, 2003 at A1 (describing underlying competition between recyclers, one with a city contract, the other providing carts to homeless people, and the resultant tensions among advocates for the homeless, local residents, and city politicians. "We want to resolve this in a way that's fair to everyone," says Michael Kineavy, Director of the Mayor's Office of Neighborhood Services.)

4. The Trail can be toured online at Black Heritage Trail, *at* http://www.afroammuseum.org/trail.htm (last visited Mar. 6, 2004).

5. JAMES OLIVER HORTON & LOIS E. HORTON, BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH 137 (rev. ed. 1999) (1979) [hereinafter HORTON & HORTON].

6. It was not until 1783 that the Massachusetts Supreme Court held that slavery was unconstitutional under the state constitution. *See infra* note 18.

7. *See* Black Heritage Trail, *at* http://www.afroammuseum.org/site13.htm (last visited Mar. 6, 2004) (discussing a lawsuit brought by Benjamin Roberts in 1848 against the city of Boston under an 1845 statute providing recovery of damages for any child unlawfully denied public school instruction); Brown v. Board of Education (Brown I), 347 U.S. 483 (1954).

what international human rights lawyers call "economic rights" long before those rights were ever codified, or vilified, as "anti-American." I also learned about the valorization of race and non-discrimination and how it could accompany the devaluation of actual Black people—like the Black man with the grocery cart walking the Black Heritage Trail alone, in the dark.

This paper focuses on the Due Process Clause of the Fourteenth Amendment, through which certain guarantees of the Bill of Rights have been applied to the states, and the Equal Protection Clause, through which certain forms of discrimination have been held unconstitutional, from the perspective of the Black Americans who were the Amendment's original intended beneficiaries. My thesis is that while it was a good idea to subject the states to at least some federal standard and to require at least a modicum of formal equality, the history of the Amendment's jurisprudence remains a story of too little, too late. It has never righted the wrongs it promised to address, and it is unlikely, without more, that it will ever do so.[8] Blacks remain economically disadvantaged; the overwhelming majority of Americans live in segregated neighborhoods; and, as Justice Ginsburg noted in her concurring opinion in *Grutter v. Bollinger*,[9] racial bias remains pervasive.[10] There are nice markers now, but the Black Heritage Trail has not led to equality.

Therefore, for the same reason it was a good idea to subject the states to a federal standard, it would be a good idea to subject the United States to an international standard. For the same reason it was a good idea to require a base line of formal equality, it would be a good idea to require courts to apply a contextualized and historicized conception of "equality" in a globalized world. Drawing on international human rights treaties already ratified by the United States, such a conception of equality would recognize racism not only as a factor in colonialism (and neo-colonialism) but also in the ongoing economic subordination of Black Americans.[11]

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8. The actual intentions of those who drafted, debated and ultimately voted for the Fourteenth Amendment is a subject of lively scholarly debate. *See, e.g.*, JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 381 (1996) (noting that, "The history of the Fourteenth Amendment remains clouded, uncertain and subject to varying interpretations"). *Compare* Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (discussing the expansive view of drafters' intent) *with* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (stating that the drafters intended to protect a narrow range of fundamental rights). The extent, if any, to which their intentions matter now is similarly contested. For purposes of this paper, I assume that while few intended to create a society in which race persistently defined a stratum, even fewer ever intended to create a society without stratification.

9. 123 S. Ct. 2325 (2003).

10. "It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals." *Id.* at 2347 (2003) (Ginsburg, J., concurring).

11. Several scholars have been developing a nuanced and sophisticated conception of "human rights" that draws on the insights of critical race theory. *See, e.g.*, Hope Lewis, *Reflections on 'Black-Crit Theory': Human Rights*, 45 VILL. L. REV. 1075, 1076 (2000) (arguing that "Critical Race Theory must engage international law and politics because racism itself is international and domestic, global and local" [and that it] "must adopt a dynamic understanding of racism in its particular cultural and historical contexts."); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L. J. 1, 2 (1999) (focusing on the "relationship between positiv-

This paper draws on the markers of the Black Heritage Trail to situate these arguments in a concrete historical context. Part I begins at the George Middleton house, whose owner was the commander of an all-Black unit in the Revolution, and explains how Black slaves drew on the leverage of the world to secure their freedom in Massachusetts. It then describes how, almost two hundred years later, the Civil Rights movement similarly drew on the leverage of the world to breathe life into the dormant Fourteenth Amendment. This Part concludes by describing how the international human rights movement used the leverage of the world to establish foundational international human rights law, including strong norms against racial discrimination.

Part II begins at the African Meeting House, where the mundane necessities of life were assured for those Blacks in Beacon Hill unable to provide for themselves, including fugitive slaves and orphans. This Part then compares the failure of Fourteenth Amendment jurisprudence to address these needs with their comprehensive treatment under international human rights law.

Part III describes the Abiel Smith School, where the first school desegregation case began. It explains how the "separate but equal" doctrine was grounded in the false dichotomy of negative versus positive rights, and explains how the persistence of that dichotomy has hobbled *Brown*[12] and its progeny.[13] It concludes by describing the fuller, less pinched, understanding of the right to education recognized in international human rights law, an understanding that resonates with the early challenges by Boston's Black community to racial segregation and inequality of schools.

The Black Heritage Trial provides useful metonyms for the larger struggles – against racism, against the denial of economic rights in general, and the denial of the right to education in particular – of which it is a part. It illuminates the relationship among them, showing how, from the beginning, the subordination of economic rights in the United States undermined the right to education and its promise of equality. It also shows how the leverage of world opinion has served as a counterweight to this subordination, thus suggesting possible next steps, out of the neighborhood into the world, out of the past into the future.

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ism and colonialism . . . [and] how positivism sought to account for the expansion of European Empires and for the dispossession of various peoples stemming therefrom"); Ruth Gordon, *Foreword: Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 840 (2000) (discussing the use of Critical Race Theory to "critique a system where we espouse globalization, while relegating large segments of humanity to irrelevancy").

12. *See* Black Heritage Trail, *supra* note 7.

13. *See, e.g.*, Brown v. Board of Education (Brown II) 349 U.S. 294, 299 (1955) (fashioning a "gradual remedy", as the Fifth Circuit characterized the decision in U.S. v. Jefferson County Bd. of Education, 372 F.2d 836, 868 (5th Cir. 1966)); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971) (approving the use of race in assigning students to school when the objective is integration); Regents of the University of California v. Bakke, 438 U.S. 265, 310-11 (1978) (barring "reverse discrimination" against whites).

I. RACISM AND THE LEVERAGE OF THE WORLD

A. The George Middleton House

The George Middleton House is a handsome gray frame house on the south side of Pinckney street.[14] Middleton ran a successful livery service from this house after leading an all-Black regiment during the Revolutionary War. Black participation in the war became a catalyst for the abolition of slavery in Massachusetts. First, it was argued that those willing to die for their country were surely entitled to the full benefits of citizenship.[15] Second, slavery undermined the natural rights arguments of the colonists.[16] As Samuel Johnson pointedly observed, "How is it that we hear the loudest yelps [for] liberty among the drivers of negroes?"[17]

Third, related but distinct, the rhetoric of the Revolution was relied upon by Black slaves who sued for their freedom, reminding their owners and the courts that a war had been fought for precisely the same reason. In 1781, for example, Quok Walker sued his master for his freedom, relying in part on the Massachusetts constitution.[18] In 1783, the Massachusetts Supreme Court held that slavery was unconstitutional.[19]

Thus, Blacks in eighteenth century Massachusetts realized the benefits of linking their personal struggle, their personal freedom, to a larger global struggle, the liberation of the colonies from Great Britain.[20] By situating their own struggle in an international context they gained perspective and political leverage.[21] They adopted as their own the arguments that the United States had used to legitimate its independence, and used international opinion as leverage both to shame the slaveholders and to expose their hypocrisy to the larger world.

B. The Fourteenth Amendment and Desegregation as a Cold War Imperative

Although the Fourteenth Amendment was ratified in 1865, it was effectively eviscerated by the Supreme Court decisions in *The Slaughterhouse Cases*[22] and *The Civil Rights Cases*.[23] The Amendment did not come into its own for another cen-

14. Middleton lived there with his "bachelor friend Louis Glapion, a French mulatto hairdresser." Black Heritage Trail, *at http://www.afroammuseum.org/site2.htm* (last visited Mar. 6, 2003).

15. HORTON & HORTON, *supra* note 5, at 98. Black soldiers returning from World War II had similar standing to make a similar argument.

16. *Id.* at xviii.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* Henry J. Richardson, III, *African Americans and International Law: For Professor Goler Teal Butcher, with Appreciation*, 37 HOW. L. J. 217, 219 (1994) (describing African Americans' historical participation in international race issues).

21. *But see* Gordon, *supra* note 11, at 852 (urging Critical Race Theory scholars to recognize that "the conditions of subordination in the United States are part and parcel of the global structure of dehumanization").

22. 83 U.S. 36, 74 (1873) (rejecting argument that the Privileges and Immunities Clause of the Fourteenth Amendment gives the federal government authority over civil rights).

23. 109 U.S. 3, 11 (1883) (limiting Fourteenth Amendment protections to state or public actions).

tury. Just as the Revolutionary War was a catalyst for the abolition of slavery, the Cold War became a catalyst for desegregation. Just as the natural rights arguments of the colonists were undermined by slavery, the human rights arguments used by the United States against communism were undermined by the denial of basic civil and political rights to American Blacks.

The Soviets broadcast over 1,400 photographs of the American civil rights struggle to an appalled world.[24] As Vicki Goldberg describes the Soviet campaign: "Those pictures of dogs and fire hoses were published in Europe, Africa, India, Japan. Photographs were especially powerful in countries where large parts of the population could not read."[25] As Mary Dudziak has explained:

> At a time when the United States hoped to reshape the post war world in its own image, the international attention given to racial segregation was troublesome and embarrassing. . . . [T]he international focus on U.S. racial problems meant that the image of American democracy was tarnished. . . . U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home. Accordingly, efforts to promote civil rights in the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.[26]

As the Justice Department made clear in the Amicus Brief it submitted in *Brown*,[27] desegregation had become a Cold War imperative.[28]

C. The International Bill of Rights

Just as the Revolution was a catalyst for abolition, and the Cold War was a catalyst for desegregation, World War II was a catalyst for international human rights law.[29] Unlike the rest of international law, which was concerned with the be-

24. Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, at H31.

25. *Id.*

26. Mary Dudziak, *Desegregation as a Cold War Imperative,* 41 STAN. L. REV. 61, 62-63 (1988). *See also* DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 122 (1991) (arguing that human rights is a complex global issue).

27. Brief for the United States Amici Curiae, Brown v. Board of Education (Brown I) 347 U.S. 483.

28. The Cold War was not the only impetus for the decision, of course. For a comprehensive analysis, *see* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987). *See also* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-61 (1994) (describing the cultural and political context of the civil rights movement). Levy, *supra* note 2, at xxxii (describing the "systematic assault on segregated facilities, beginning in the 1930s" by the NAACP, under the "brilliant leadership of Thurgood Marshall").

29. The modern idea of human rights actually may have originated twenty-five years earlier. Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 448 (1992). Burgers tracks declarations drafted twenty-five years before World War II, authored by H.G. Wells and a pair of Russian and Greek lawyer-diplomats. *Id.* Moreover, Burgers shows that the United Nations Charter was signed in San Francisco just a few days after the end of the war, before the extent of the Holocaust was known. Id. at 448. While the Universal Declaration of Human Rights was signed a few years later, it, too, tracks these earlier documents. *Id.* at 448-

havior of nation States[30] toward other nation States, human rights law focused on the conduct of States toward their own people. States endorsed the radical notion of human rights in horrified response to the atrocities of World War II.[31] For the first time in history, States conceded that their own people had rights beyond the rights established under their own domestic law, rights that even the States themselves could not legally abrogate.

Like the American Declaration of Independence, the Universal Declaration of Human Rights was originally intended as an aspirational statement.[32] The United Nations Charter, drafted three years earlier, had similarly adopted a hortatory tone with regard to human rights. While the United States was eager to declare its support for international human rights after World War II (and quickly recognized the need for *other* states to guarantee them), [33] the United States was wary.[34] As David Forsythe has pointed out, "[I]n the 1940s and early 1950s, the United States was opposed to precise and binding obligations in the issue area of human rights. Fear of international scrutiny of its domestic practices, in the south and elsewhere, loomed large in U.S. calculations."[35]

Indeed, it was not until the mid 1960s, and the emergence of former colonies as newly independent States, that the Declaration of Human Rights took legally binding form.[36] It was divided into two more specific instruments, the International Covenant on Civil and Political Rights (the Civil Covenant)[37] and the International

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30. In international law, "State" refers to a "nation State;" rather than a constituent unit of a federal system. In this paper, "State" refers to a nation State, and "state" refers to such a constituent unit.

31. Because human rights were in part a response to the Holocaust, the denial of the Holocaust suggests that human rights were in part a response to an illusory threat. *See generally* DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993) (documenting the origins and history of Holocaust denials); PIERRE VIDAL-NAQUET, ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST (1993) (responding to scholars who have denied the Holocaust).

32. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1 at 71, U.N. Doc. A/810 (1948).

33. FORSYTHE, *supra* note 26, at 21 (stating that "[from 1945-1952] the United States was determined to keep Charter language limited to vague generalities, resisting most of the efforts of smaller states and private groups in favor of more specific and demanding obligations.") *Id.*

34. Some scholars in the United States urged participation in the international regime in the early years. *See* Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 650 (1952) (arguing that self executing provisions of the United Nations charter have a modest effect on American law). *See generally* Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 369 (Theodor Meron ed., 1984) (arguing that nations must go beyond simple agreements on human rights and provide for measures of implementation and supervision).

35. FORSYTHE, *supra* note 26, at 122.

36. Both Covenants contain strong affirmations of the right of self-determination and the principle of non-discrimination, reflecting and reinforcing the norms of decolonization. *See generally* Lewis, *supra* note 11, at 1080-81 (describing scholarship of "Third World Approaches to International Law" group).

37. Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter the Civil Covenant]; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (UN Resolution adopting Civil Covenant).

Covenant on Economic, Social and Cultural Rights (the Economic Covenant).[38] These instruments are multilateral treaties under which ratifying states ensure the human rights of their own people. Together with the Universal Declaration, the two covenants comprise the International Bill of Rights, globally recognized as the definitive law of international human rights.[39]

The Civil Covenant addresses negative rights, such as freedom of religion and expression and freedom from arbitrary arrest or detention. These rights are familiar to Americans because they are guaranteed by the Bill of Rights of the United States Constitution.[40] The rights set out in the Economic Covenant, in contrast, have historically been marginalized in this country.

The Economic Covenant addresses positive rights, such as the right to health and the right to education. By ratifying the Economic Covenant, a government "commits itself to its best efforts to secure for its citizens the basic standards of material existence."[41] Although some commentators claim that the Economic Covenant originated in the United States, tracing it to Roosevelt's "freedom from want,"[42] the United States is the only major industrialized democracy that has not ratified it.[43] The United States' refusal to ratify the Economic Covenant can be attributed both to the historical antipathy toward economic rights in the United States

38. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter The Economic Covenant]. *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 Economic Covenant); A. GLENN MOWER, JR., INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS 15-18 (1985) (discussing the need for and development of a separate covenant on economic and social rights); 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, 388 n.102 (1990) (discussing the limited scholarly American work on economic, social and cultural rights). Americans' lack of familiarity with the Economic Covenant is likely to make them that much more skeptical about it. *Id.* For a discussion of the extent to which the rhetoric of the Economic Covenant is compatible with the United States rhetoric, see Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 99-103 (1992).

39. *See* The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/1, Annex (1987), *reprinted in* Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 122-35 (1987) (considering the obligations of state parties to the Economic Covenant).

40. *See, e.g.*, U.S. CONST. amend. I (limiting Congress' ability to pass laws bearing on religion and expression); U.S. CONST. amend. IV (protecting citizens against unreasonable searches and seizures); U.S. CONST. amend. V (requiring due process for all U.S. citizens); U.S. CONST. amend. VI (protecting the rights of citizens in criminal prosecutions).

41. President Carter Signs Covenants on Human Rights, Oct. 31, 1977, Dep't St. Bull., Jul. 4-Dec. 26, 1977, at 587.

42. HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: *LAW, POLITICS, MORALS: TEXT AND MATERIALS* 243 (2d ed. 2000) [hereinafter STEINER & ALSTON].

43. The Economic Covenant has been ratified or acceded to by 146 states as of Nov. 5, 2003. http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/Treaty4.asp. *But see* Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69, 71 (1991) (deploring ratification of the Economic Covenant by states with "neither the intention nor the desire to abide by them"). *See also* Philip Alston, *Economic and Social Rights*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 149 (Louis Henkin & John Hargrove eds., 1994) (describing international neglect of economic social and cultural rights).

and to global politics during the mid-1960s, when the covenants were drafted. Most scholars agree that the two covenants evolved from the Declaration of Human Rights "because of the East/West split and a disagreement over the value of socio-economic rights."[44]

The bifurcation of rights into two covenants was further justified by differences in "the nature of the legal obligation and the systems of supervision that could be imposed."[45] While it is a mistake to overstate the distinction between positive and negative rights, law that prescribes and law that prohibits, usually require different approaches. The states accordingly agreed to "recognize" economic rights, which would be achieved through "progressive realization," while at the same time agreeing that the civil and political rights set out in the Civil Covenant were amenable to immediate implementation.[46]

The United States, however, refused to ratify even the Civil Covenant until the end of the Cold War.[47] While the executive branch was concerned about the international reaction to domestic practices,[48] Congress was more concerned about the domestic reaction to international lawmaking. An excerpt from the debate in the U.S. Senate Foreign Relations Subcommittee on the Genocide Convention reveals both Congress' general distrust of international human rights law[49] and its more specific concern about the possible impact of that law on domestic civil rights:

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44. 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)); *see also* JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 144 (1984) (discussing the decision that there would be two covenants, economic and social).

45. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 666 (4th ed. 1991).

46. *See* The Limburg Principles, *supra* note 39, at 125-26 (describing steps that should be taken by states "towards full realization of the rights contained in the Covenant.").

47. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1170 (1993).

48. Goldberg, *supra* note 24, at H31.

49. "Senator Joseph McCarthy and his cohorts were deeply suspicious of internationalism. The international human rights community of scholars was still reeling from McCarthy's attacks." Barbara Stark, *Urban Despair and Nietzsche's "Eternal Return:" From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT'L L. 185, 238 n.105 (1995). Columbia Law School Professor Philip Jessup, for example, had been called before the House Un-American Activities Committee because of his analysis of whether China should be recognized as a state under international law. Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 887-88 (1986). The statement that, if circumstances changed and certain conditions were met, it would be "in the national interest and in accord with international law to extend recognition" to China was enough for some to brand him a communist. *Id.* at 888. It is ironic that Richard Nixon later achieved renown for opening the door to China, a door he and his colleagues earlier had so firmly hammered shut. *Cf.* Dudziak, *supra* note 26, at 65 ("As was true in so many other contexts during the Cold War era, anti-communist ideology was so pervasive that it set the terms of the debate on allsides of the civil rights issue."). As Professor Forsythe has explained: "Initially [the United States] was too concerned to shield its own human rights record in race relations, and then it was caught up in the hysteria of Brickerism (and McCarthyism). Thus domestic politics prevented a leadership role in [the human rights] area of international affairs." FORSYTHE, *supra* note 26, at 127. *See also* LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 932-34 (1973) (containing an excerpt from the Genocide Convention before the United States Senate in 1950 and discussing the applicability of United Nation. human rights treaties in the domestic arena).

> The traditional concept of international law was that of the relation of states to each other-as Hamilton put it, the relation of sovereign to sovereign. A determined effort is now being made, following the Nuremberg Trials, to change that concept to the relations of states and individuals in the states, thereby imposing individual liability for international law and creating unknown individual rights. The concept has been broadened also in the nature of the subjects to be covered. For instance, human rights have never been considered to be international in scope . . . This means that if domestic questions are made the subject of a treaty, they thereby become part of the structure of international law. . . .
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> If there is to be a succession of treaties from the United Nations dealing with domestic questions, are we ready to surrender the power of the States over such matters to the Federal Government? Is that the road to peace, domestic or foreign? . . . The report of the Civil Rights Committee appointed by the President, after considering the division of power over civil rights between the Federal Government and the States, in two places refers to the added power which may be given to Congress in the field of civil rights if the human-rights treaty is ratified and approved.[50]

Many in Congress were emphatically not "ready to surrender the power of the states over [civil rights] to the federal government"—and certainly not to the United Nations. They supported Senator Bricker's proposed amendment to the United States Constitution, which would require an Act of Congress before any human rights treaty could become law in the United States.[51] As Louis Sohn and Thomas Buergenthal have pointed out: "[T]he defeat of the proposed constitutional amendment was due in large measure to the vigorous lobbying by the Eisenhower administration and its concomitant undertaking . . . not to adhere to human rights treaties."[52] Although the Civil Rights movement was able to use international opin-

50. *The Genocide Convention, Hearings Before A Subcomm. of the Senate Comm. on Foreign Relations*, 81st Cong., 2d. Sess. 202, 206-08 (1950) (statement of Carl B. Rix, Vice Chairman of Special Comm. on Peace and Law Through United Nations of the American Bar Association). For an excellent overview of the efforts to apply the human rights provisions of the United Nation Charter in state and federal United States courts from 1946 to 1955, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 902 (1984).

51. LOUIS HENKIN ET AL., INTERNATIONAL LAW 208 (3d. ed. 1993).

52. SOHN & BUERGENTHAL, *supra* note 49, at 964-65. *See, e.g.*, Arthur E. Sutherland, Jr., *Restricting the Treaty Power,* 65 HARV. L. REV. 1305, 1337 (1952) (reviewing and arguing against amending the Constitution to restrict the treaty-making power of the U.S. government); Symposium, *Should the Constitution be Amended to Limit the Treaty-Making Power?*, 26 S. CAL. L. REV. 347, 349-95 (1953) (containing four essays presented at a round table discussing whether the Constitution should be amended to limit the treaty-making power of the United States). For early arguments, see Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 904-05 (1959) (discussing the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920) and Congress' power to enact legislation in areas covered by international treaties); Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 72-77 (1949) (describing the opposition within the United States to the United Nations International Covenant of Human Rights).

ion as leverage in pushing toward its agenda and promoting the Civil Rights Acts of 1964,[53] and 1968[54] and the Voting Rights Act of 1965,[55] conservatives in Congress were able to keep international human rights from becoming domestic law.[56]

Internationally, however, the "human rights idea" has swept across national and cultural boundaries; it has contributed to the downfall of powerful governments in South Africa and Eastern Europe.[57] Although they address different kinds of rights, both Covenants forcefully affirm the principle of non-discrimination.

Thus, the rhetoric of rights has been fueled by international conflict, as each side has claimed the moral high ground.[58] Following the American Revolution, the Cold War, and World War II, this rhetoric was incorporated into powerful laws against racism, from the elimination of slavery in Massachusetts, to the repudiation of "separate but equal" in the United States, and the establishment of anti-discrimination as a foundational norm of human rights law.

The Civil War, in contrast, only *threatened* to become an international war - it would have been if the South had won. The rhetoric of human rights grew during the war, culminating in the Emancipation Proclamation and, it could be argued, the promise of Reconstruction. That promise was not realized within the United States. It was not until the leverage of the world was applied, through human rights non-discrimination norms after World War II in conjunction with Soviet efforts to embarrass the United States during the Cold War, that the Fourteenth Amendment was revived. As many commentators have observed, however, this revival was half-hearted, anemic, and incomplete.[59] The reasons for this are complicated. But a major, often neglected, factor was that the economic rights missing in American rights jurisprudence from the beginning were still missing, as explained in the next Part.

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53. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1994) and scattered sections of 42 U.S.C.).

54. 42 U.S.C. §§ 3601-3619 (1994).

55. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)). The Voting Rights Act of 1965 and the Civil Rights Act of 1964 have been described as the "two most sweeping civil rights statutes ever written into American law." John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect – An Introduction*, 71 N.C. L. REV. 1289, 1297 (1993).

56. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, reptr. n. 2 156. The view that the United States could not be bound by treaties addressing domestic issues, including human rights, has long since been abandoned. *Id.* In fact, the United States ratified a few relatively minor (at least in terms of scope and visibility) human rights treaties during the Kennedy administration. STEINER & ALSTON, *supra* note 42.

57. *See* LOUIS HENKIN, THE AGE OF RIGHTS *passim* (1990) (describing the global explosion after World War II of the "human rights idea").

58. *See* Tawia Ansah, *War: Rhetoric and Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 808-12 (2003) (analzying the role of rhetoric in war).

59. *See* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 3-25 (Jack M. Balkin ed., 2002) (collecting legal experts' rewrites of the opinion). For earlier assessments, see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 65 (1955) (noting that the Court had rendered "a decision based on the moral and material state of the nation in 1954, not 1866."); Alexander Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 193 (1964) (noting range of increasingly sober assessments of the decision).

II. ECONOMIC RIGHTS

A. The African Meeting House

Economic rights were never part of the American heritage in the same way that civil and political rights were. The Constitution is grounded in John Locke, not Jean-Jacques Rousseau.[60] But Boston's Black community met at the African Meeting House in the eighteenth century to address their mundane, common needs.[61] Food, shelter, and the other necessities of life were assured for those who would otherwise be destitute, including fugitive slaves[62] and orphaned children.[63] This was not simply charity but a basic recognition that the most vulnerable had claims against the community. This recognition can be traced to African cultural traditions,[64] the denial of legal rights by the larger community,[65] and the fact that Blacks remained the poorest of the poor.[66]

Boston's Blacks understood and coped with the reality that in America, the have-nots had no legal claim against the haves. Indeed, in the interstate context such claims were not only *outside* the law, but *against* the law. Under the Fugitive Slave Act of 1850, it was illegal to harbor Blacks fleeing slavery from other states.[67]

B. The Fourteenth Amendment and Economic Rights as a Communist Threat

In the postwar U.S., similarly, the have-nots had no legal claim against the haves. Just as it was a crime to give a fugitive slave a bed and a meal, supporting economic rights in an *international* context was treated by many in power as a violation of law during the Cold War. During this period, Senator Joseph McCarthy and his committee treated the recognition of economic rights as a communist inspired threat to national security, transforming Americans' historical distrust of economic rights into a ruthless crusade.[68] The purges and blacklists used against

60. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 22-27, 44-47 (1999) (explaining Locke's emphasis on civil and political rights, in contrast to Rousseau's recognition of economic and social rights).

61. HORTON & HORTON, *supra* note 5, at 28 (describing activities of the African Society, established in 1796, which met at the Meeting House). The Meeting House was home to other activities, including those of abolitionists who met there in 1832, as well. *Id.* at 1.

62. *Id.* at 111-12.

63. *Id.* at 19.

64. *See, e.g.*, Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 778 (2003) (explaining "that African traditions more fully encompass. . . the saliency of human needs").

65. HORTON & HORTON, *supra* note 5, at 19 (noting that Boston's orphanages did not admit blacks).

66. *Id.* at 11 (noting that "[o]n the eve of the Civil War, per capita property holding [among blacks] was $91. In comparison, the per capita wealth of the entire population of Boston was $872.").

67. *Id.* at 111-12. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 221-22 (2d ed. 1985) (discussing the fugitive slave acts and southern laws against owners freeing slaves); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1492-PRESENT 176-77 (rev. 1995) (1973). In the *Dred Scott* case, Scott v. Sanford, 60 U.S. (19 How.) 393, 464-65 (1857), the Supreme Court found that Congress could not prohibit slavery in areas acquired by the present Federal Government, by treaty or conquest, from a foreign nation.

68. STEINER & ALSTON, *supra* note 42, at 142. This fear of communism survived well into the

purported communists in the 1950s left few advocates for economic rights.[69] Third World expropriations during the 1960s, moreover, outraged members of the United States Congress.[70]

The subordination of economic rights, like slavery, could have been eliminated by another interpretation of the Fourteenth Amendment, but it was not. Although several imminent United States legal scholars have made compelling arguments for the protection of economic rights under the United States Constitution, the courts have been unreceptive.[71] The Supreme Court has consistently refused to find economic rights in the Equal Protection guarantees of the Amendment.

In the late 1960s through the 1980s, a series of lawsuits attempted to ground these rights in the Federal Constitution with little success.[72] In *Dandridge v. Wil-*

1960s. For example, before the riots in Newark the police director had warned of "'leftist' influences in the civil rights and anti-poverty organizations." TOM HAYDEN, REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE 15 (1967). According to Ann Fagan Ginger, "[f]rom 1947 or 1948 until about 1965, people actively working for civil rights . . . and supporters of the United Nations . . . . were frequently called to testify . . . before the House Committee on Un-American Activities . . . [and] the Senate Internal Security Subcommittee." Ann F. Ginger, *Human Rights and Peace Law in the United States*, 6 TEMP. INT'L & COMP. L.J. 25, 26 (1992). As Professor Ansley reminds us, this concern is a living legacy for the Civil Rights movement: "Anti-communism particularly affects the Civil Rights movement. The fear that the movement's program would be vulnerable to attack from the right as somehow. . . communist-inspired, and the frequent efforts to head off any such attacks by preemptive disavowals and self-censorship have seriously inhibited the movement." Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1075 (1989). *See generally* THOMAS C. REEVES, THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY *passim* (1982) (tracing McCarthy's personal crusade to rid the United States of communists); RICHARD M. FREELAND, THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM 334-60 (1972) (finding that President Truman was aware in 1948 that anti-communist sentiment had reached excessive levels and that "popular hostility toward communists turned into a distrust of all dissent").

69. For vivid descriptions of the personal experiences of some who lived through this difficult time, see Ginger, *supra* note 68, at 26-30 (describing her experience as a lawyer representing witnesses); DALTON TRUMBO, THE TIME OF THE TOAD: A STUDY OF INQUISITION IN AMERICA BY ONE OF THE HOLLYWOOD TEN 8-10 (1972) (discussing "blacklisted" Hollywood writers); LILLIAN HELLMAN, SCOUNDREL TIME 51-111 (1976) (describing her preparation for and eventual testimony in front of the House Un-American Activities Committee).

70. For example, in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court declined to rule on the validity of a Cuban expropriation of United States-owned sugar plantations, correctly observing that international law was unsettled on the issue: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.* at 428. Congress responded in 1964 by enacting the Second Hickenlooper Amendment, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1994)), which explicitly overruled the *Sabbatino* case and requires courts to hear cases involving expropriations absent an executive directive to the contrary.

71. *See, e.g.*, Frank I. Michelman, The Supreme Court, 1968 Term, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11 (1969) (discussing the Equal Protection Clause of the Fourteenth Amendment as naturally lending itself as the possible basis of claims of the poor for public aid); Charles L. Black, Jr., *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"); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) ("'minimum' protections for the necessities of life . . . are pre-conditions for civic republican citizenship").

72. For a cogent account of these suits, see Burt Neuborne, *State Constitutions and the Evolution of*

liams,[73] the Court held that there was no right to welfare.[74] In *Clark v. Community for Creative Non Violence*,[75] it held that the Equal Protection Clause of the Fourteenth Amendment did not require welfare payments to equal the total need of an eligible family since state resources are scarce. In *Clark v. Community for Creative Non Violence*, it held there was no right to sleep in public places.[76] In *Harris v. McRae*,[77] it held that there was no right to Medicaid funding for abortion.[78] In *Lindsey v. Normet*,[79] the Court held that there was no constitutional right to "adequate" housing.[80]

While federal programs such as Social Security, Medicaid, and Food Stamps impose affirmative obligations on the State, these obligations are not *rights* and they can be rescinded. Nor do these federal programs purport to meet a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . ." as required under the Economic Covenant.[81] Under the Economic Covenant, in contrast, the State must assure basic safety nets. Once a particular level of protection has been achieved, moreover, the State cannot withdraw it "unless fully justified by reference to the totality of rights provided for in the covenant and in the context of the full use of the maximum available resources."[82]

Positive Rights, 20 RUTGERS L.J. 881, 886-93 (1989) (tracing the attempt to use the Federal Constitution to authorize judicially enforceable rights). *See also* Mary E. Becker, *Politics, Difference and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 190 (suggesting that "some entirely new standard of review for economic legislation" could correct the enduring economic and political problems of women). For a persuasive argument that the political process has not worked for the poor, see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1309 (1993).

73. 397 U.S. 471 (1970).

74. *Id.* at 483-87.

75. 468 U.S. 288 (1984).

76. *Id.* at 294-95.

77. 448 U.S. 297 (1980).

78. *Id.* Although *McRae* involved a fundamental right under the due process provision of the Fourteenth Amendment—reproductive choice—the Court noted that the state was not denying the petitioner the right to have an abortion, only the right to have a *free* abortion. *Id.* at 316-18.

79. 405 U.S. 56 (1972).

80. *Id.* at 74. As I have explained elsewhere, we have had sometimes vigorous, if not uneven, jurisprudence of economic rights at the domestic state level. *See* Stark, *Economic Rights in the United States*, *supra* note 38, at 91-103 (comparing provisions of economic rights from state constitutions to the structure provided by the International Covenant on Economic, Social and Cultural Rights (ICESCR)). For an argument that states' provision of economic rights was undermined by the Social Security Act of 1935, *see* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 9 (1993) ("By dividing responsibility for welfare between the federal and state governments, the Social Security Act . . . allowed both the states and Federal government to abdicate leadership and responsibility for administering welfare programs fairly.").

81. UNITED NATIONS CENTRE FOR HUMAN RIGHTS & UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS at 45, U.N.Doc. HR/PUB/91/1 (1991). *See generally* Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991) (book review) (discussing America's social welfare efforts, as outlined in two books).

82. MANUAL, *supra* note 81, at 45.

C. The Economic Covenant

While the United States viewed economic rights as socialist propaganda hiding behind the language of rights,[83] the Economic Covenant was championed by the formerly colonial Third World States. They insisted that civil and political rights were meaningless without the recognition of economic rights necessary to satisfy basic human needs—food, health care, shelter, and education.[84] In order to assure their people these rights, Third World States argued that they needed aid from wealthier States.[85] They felt that not only did the industrialized States have a moral obligation to provide aid, but they also owed the Third World compensation for their prior exploitation and the benefits they still reaped from it:

> The question of compensation for expropriated property takes us, in

83. *See* FORSYTHE, *supra* note 26, at 122 (discussing the United States' historical view on international human rights as contrasted with the United Nations); s*ee also* Alston, *supra* note 36, at 366 (noting "suspicion by many Americans, who [view the Economic Covenant] as [a] 'Covenant on Uneconomic , Socialist and Collective Rights'"). As I have described elsewhere, American antipathy toward economic rights is overdetermined. For other factors contributing to this antipathy, see Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, *passim* (2000) (discussing the Framers' blindness to the needs of blacks, white women and indentured white men); Barbara Stark, *supra* note 49, at 189 (discussing the persistence of racism); Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: 'A Miracle for Breakfast,'* 33 VA. J. INT'L L. 433, *passim* (1993) (discussing the continuing appeal of the rhetoric of opportunity). At the same time, paradoxically, human rights were regarded in the East as capitalist propaganda, an attempt by outsiders to undermine state policy-making. Notably, although the Universal Declaration of Human Rights was adopted by the General Assembly in 1948, by a vote of forty-eight to zero, the eight Soviet Bloc states abstained. HENKIN ET AL., *supra* note 51.

84. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY IX (1980). The indivisibility of the two Covenants, their necessary interdependence, and the fallacy of asserting the primacy of either, is now well-established in international law, at least in theory. *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). For a concise discussion of the shift in international priorities represented by this resolution, see Peter Meyer, *The International Bill: A Brief History*, *in* THE INTERNATIONAL BILL OF HUMAN RIGHTS xxiii, xxxv (P. Williams ed., 1981). *See also* Louis Henkin, *Preface*, of AGENDA, *supra* note 43, at xv ("It is necessary to reaffirm what should never have been questioned—that human rights are indivisible and interdependent . . ."). Some lawyers' groups in the United States have recognized the link. While the American Civil Liberties Union (ACLU) has not endorsed the rights set forth in ICESCR, for example, it has "recognized that there may be links between economic status and civil liberties. Accordingly, the ACLU has insisted that government action may not cause or perpetuate poverty. . ." Nadine Strossen, *What Constitutes Full Protection of Fundamental Freedoms?* 15 HARV. J.L. & PUB. POL'Y 43, 48-49 (1992).

85. "[E]very state had duties to aid all those states where people were less materially advantaged." Craig N. Murphy, *What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology*, *in* THE POLITICS OF INTERNATIONAL ORGANIZATIONS: PATTERNS AND INSIGHTS 226, 228 (Paul F. Diehl ed., 1988). Because of their numbers, the developing states, or "Group of 77," were able to pass resolutions in the General Assembly over the objections of the Western industrialized States. *See, e.g.*, Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR 2d Comm., 29th Sess., 2315th mtg., U.N. Doc. A/9946 (1975) (adopting the Charter of Economic Rights and Duties of States); U.N. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Sess. (Special), Supp. No. 1, at 3, U.N. Doc. A/9556 (1974) (discussing the establishment of a new international economic order).

> many respects, to the heart of the relationship between the developed capitalist countries and the Third World. . . . [W]ho has compensated the African peoples for the millions seized and killed in the service of the European slave trade, or for the land, cattle, and minerals expropriated by European colonization and the millions who died in the process? . . . [T]he immiserizing [sic] poverty . . . of Third World peoples today in most cases can be traced back to the destructive effects of the European impact and to . . . the systems erected to service the European interest.
>
> What bolsters the Third World's case for compensation is the consideration that this destruction of life, expropriation of the resources and [other exploitation] also can, in large measure, be held responsible for the present affluence of the developed world.[86]

Not all Third World States demanded such reparations. Some, like Ethiopia, had not been colonized. Moreover, some industrialized States had not been colonial powers, which arguably absolved states such as Norway from any obligation.[87] In general, the developed States rejected arguments for compensation. The Economic Covenant, which affirmed rights of individuals against their own States without mentioning any rights of the Third World states against the industrialized States, provided a formulation on which almost all the States—with the notable exception of the United States—could agree.

The global have-nots have no legal claim against the global haves. Although international human rights law, like eighteenth century Black Bostonians, recognizes the links between the denial of economic rights and racism and xenophobia,[88] "self-help," in the form of expropriation, is a violation of international law, unless the foreign owner of the expropriated property is adequately compensated.[89]

Since the end of the Cold War, the United States' rejection of economic rights has shaped the world. Economic rights have been increasingly marginalized.[90]

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86. Norman Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, *in* 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 149, 149-52 (1975). *See also* Roger C. Wesley, *A Compensation Framework for Expropriated Property in the Developing Countries*, 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3 (discussing compensation for purchases of natural resources by multinational firms in Third World countries); R.P. Anand, *Attitude of the Asian- African States Toward Certain Problems of International Law*, 15 INT'L. & COMP. L. Q. 55, 55 (1966) (discussing international law and world public order and the increasing involvement of Asian and African states); *cf.* Fred R. Harris, *The American Negro Today*, 10 WM. & MARY L. REV. 550, 562 (1969). This systematic downgrading of the Negro was also made more socially acceptable throughout the country by the growth of American imperialism, marked by the Spanish-American War, which began in 1898 and resulted in American jurisdiction over the colored peoples of Cuba, Hawaii, and the Philippines. Imperialistic national policy was openly justified by many of its proponents in the North, where it was strongest, on grounds of racial superiority. *Id.*

87. Murphy, *supra* note 85, at 234.

88. *See infra* text at Part III (discussing the racial impact of the 18th Century denial of internatinally recognized economics rights to Black Bostonians).

89. Murphy, *supra* note 85, at 234.

90. *See, e.g.*, Report of the U.N. High Commissioner for Human Rights to the Economic and Social Council, U.N. Doc. E/1999/96 ¶ 4-6, *reprinted* in STEINER & ALSTON, *supra* note 42, at 239 (noting growing economic polarization, in which the poorest increasingly lose ground). A detailed account of the ways in which the subordination of economic rights at home has exacerbated their subordination

Former Soviet-bloc States have embraced capitalism and slashed safety nets. During the mid-1990s, less developed countries ("LDCs"), desperate for foreign investment, accepted Structural Adjustment Programs ("SAPs") that left their most vulnerable populations destitute.[91]

The costs, especially for these vulnerable populations, have been astronomical.[92] The impact of growing economic polarization on global peace and security, moreover, is a growing concern in the international human rights community. In its submission to the Preparatory Committee for the World Conference Against Racism, the Committee on Economic, Social and Cultural rights urged the Conference to recognize the links between the denial of basic economic rights and racism and xenophobia:

> The World Conference recognizes that conditions of poverty resulting in deprivation of an adequate standard of living, including the rights to food, housing, health and education, constitute a denial of human rights and serve to fuel racism, racial discrimination, xenophobia and related intolerance.[93]

Like the Boston Blacks who gathered in the African Meeting House to ensure the basic needs of the poorest among them, the Committee understands the ways in which racism and the denial of economic rights mutually reinforce each other.

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abroad is beyond the scope of this paper. *See generally* Barbara Crossette, *The 'Third-World' is Dead, but Spirits Linger*, N.Y. TIMES, Nov. 13, 1994, § 4, at 1 (describing the death of a "fraternal third-world" envisioned by the world leaders at the 1955 Afro-Asian Conference, as "a gathering full of post-colonial promise, with dreams of self-sufficiency, solidarity among newly independent nations and commitment to an anti-superpower international policy that became known as nonalignment"). Citing the United Nation Human Development Index for 1994, Crossette notes the "arresting picture of unprecedented human progress and unspeakable human misery, of humanity's advances on several fronts mixed with humanity's retreat on several others. . . ." *Id.* The Pacific Rim states, "a number of them boosting higher living standards than some European nations," have little in common with the poor states of Africa. *Id.* Yet the United Nations Index focuses on "big military spenders," noting a clear correlation between such spending and lack of development. *Id.* Those states that focused instead on economic rights—education, health, providing their people with opportunities to work—have in fact fared far better. *Id. See also* Ali A. Mazrui, *Development or Recolonization? The Message of Rwanda: Re-colonize Africa?* 11 NEW PERSP. Q. 18, 18 (Fall 1994) (stating that "[m]uch of contemporary Africa is in the throes of decay and decomposition. . . . While Africans have been quite successful in uniting to achieve national freedom, we have utterly failed to unite for economic development and political stability. War, famine and ruin are the post-colonial legacy for too many Africans.").

91. *See, e.g.*, JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 18 (2002) (explaining how SAPs have left countries like Bolivia worse off).

92. Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference. A/CONF.189/PC.3/2, (July 12, 2001), *at* 92.Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference. A/CONF.189/PC.3/2, (July 12, 2001), *at* http://www.unhcr.ch/huridoca.nsf/(Symbol)/A.ConF.189.PC.3.2.En?Opendoc (last visited Sept. 9, 2003).

93. Review of Reports, *supra* note 92.

III. THE RIGHT TO EDUCATION

There is probably no domestic context in which the interdependence of economic and civil rights is better recognized than in the context of education. The right to education, as understood both in eighteenth century Boston and in international human rights law, includes at least two specific kinds of education. First, it includes the right to learn the skills necessary to function as a productive member of society, to earn a living[94] and thus assure food, clothing, and shelter for yourself and your family.[95] Second, but equally important, it includes the right to learn how to participate in civil and political life, to actively participate in democracy.

Before the Revolution, education was haphazard for all children.[96] For slave children, any education was rare,[97] although "[a]s early as the 1750s, Samuel Davies found the slaves eager pupils when he sought to teach them to read as part of his campaign to win converts."[98] After the Revolution, public education became an important priority. It was well-recognized at the time that a participatory democracy required an educated populace.[99] As Thomas Jefferson observed:

> [It is] expedient for promoting the public happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education . . . able to guard the rights and liberties of their fellow citizens, and without regard to wealth, birth or other accidental condition or circumstances [should be] educated at common expence [sic] of all.[100]

Democracy depended on the consent of the governed, and the governed must be educated so that their consent would be intelligent and informed.[101] In addition,

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94. *See* Economic Covenant, *supra* note 38, at art. 6, ¶ 1 (recognizing that the right to work is an economic right).

95. *See id.* at arts. 11-12 (recognizing a right to an adequate standard of living "including adequate food, clothing and housing, and the right to the highest attainable standard of physical and mental health").

96. *See* MARY BETH NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800, 256 (1980) (discussing the colonial American approach to the education of girls and women). *But see* BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY 21-45 (1960) (noting that formal education increased significantly in pre-Revolutionary America).

97. *See, e.g.*, EUGENE D. GENOVESE, ROLL, JORDAN ROLL: THE WORLD THE SLAVES MADE 561-66 (1974) (discussing education of slaves and "[t]he laws against teaching slaves to read and write").

98. *Id.* at 565. *See also* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 72 (1972) (noting that "[t]he Anglican church . . . establish[ed] schools in Charleston, South Carolina and Williamsburg, Virginia to teach young slaves to read" after the Great Awakening of the 1740s).

99. *See* STEPHANIE GRAUMAN WOLF, AS VARIOUS AS THEIR LAND: THE EVERYDAY LIVES OF EIGHTEENTH-CENTURY AMERICANS 245-46 (1993) (discussing "democracy's need for an educated citizenry").

100. *Id.* at 246 (alteration in original).

101. *See* FREDERICK EBY & CHARLES FLINN ARROWOOD, THE DEVELOPMENT OF MODERN EDUCATION: IN THEORY, ORGANIZATION, AND PRACTICE 542 (1934) (describing the philosophy of education held by the leaders of the American Revolution, including their shared belief "that education

education would produce a more highly skilled workforce, better able to contribute to the growth of the new Republic.[102] As historian Gordon Wood sums up, "[P]rojected public educational systems would open up the advantages of learning and advancement to all."[103]

While education in general was recognized as a benefit—conducive to democracy and useful to the Republic—education for slaves and white girls in particular was problematic. For slaves, education was generally prohibited, except when it served a particular slave owner's particular needs.[104] The literacy gap between white men and white women closed sometime between 1780 and 1850.[105] This reflected the popular consensus that women should be educated, but not in a way that would interfere with their responsibilities in the private sphere.[106] Rather, it was accepted that educating girls was important to the nation because, as Dr. Benjamin Rush explained in a lecture in 1787, they would later pass on their knowledge to their sons.[107] In addition, education would make white girls more marriageable.[108]

Since slave girls were not going to be mothers of future citizens,[109] there was no analogous justification for their education. Education was therefore generally forbidden.[110] Those slaves who nevertheless learned to read were often forced to

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is the principal means by which governments can procure the welfare of the people").

102. These factors were explicitly noted by the California Supreme Court, in holding that education was a fundamental right. "[E]ducation is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life." Serrano v. Priest, 487 P.2d 1241, 1255-56 (1971).

103. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 72 (1969). *But see* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 7 (1990) (stating that the Federalists "wanted the elite to rule. They treated the ability to govern as essentially fixed (rather than as a capacity that could be developed) and as class-based. Thus they were not concerned with expanding or enhancing the people's competence and involvement in public affairs.").

104. *See, e.g.*, RICHARD NEWMAN & MARCIA SAWYER, EVERYBODY SAY FREEDOM: EVERYTHING YOU NEED TO KNOW ABOUT AFRICAN-AMERICAN HISTORY 26-27 (1996) (describing the slave's "catechism," in which slave owners attempted, with decidedly mixed results, to impress upon slaves the inevitability of their servitude).

105. *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 at 15 (1977) (noting that women's literacy doubled between 1780 and 1840).

106. *See, e.g.*, COTT, *supra* note 105, at 119 (discussing Emma Hart Willard's proposal for a female seminary in 1819, which "would differ as much from a school for men as women's character and duties differed from men's").

107. *See* LINDA GRANT DE PAUW & CONOVER HUNT, REMEMBER THE LADIES: WOMEN IN AMERICA 1750-1815 97 (1976) (noting that women need to be educated because they will educate their children based on this knowledge); BENJAMIN RUSH, THOUGHTS UPON FEMALE EDUCATION, ACCOMMODATED TO THE PRESENT STATE OF SOCIETY, MANNERS, AND GOVERNMENT IN THE UNITED STATES OF AMERICA (1787), noted in COTT, *supra* note 105, at 105 n.8.

108. *See, e.g.*, COTT, *supra* note 105, at 110-11 (describing a character in a school graduation play in 1800 who learns that "education might help her acquire a better husband," to show that education of girls was linked to upward social mobility).

109. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 39 (1984) (discussing the female slave's role in supplying a "permanent labor force").

110. *See* GENOVESE, *supra* note 97, at 562 (describing how restrictions grew worse over time).

do so surreptitiously, sometimes at considerable risk.[111] In the late 1850s, for example, Susie King Taylor was sent with other children to the house of a free widow, with "books wrapped in paper to prevent the police or white persons from seeing them."[112] Some children attended "midnight school[s]," in which Black women would teach from eleven or twelve at night until two o'clock in the morning.[113]

A. The Abiel Smith School

It was different in Boston. Most Blacks born in Massachusetts were literate by the nineteenth century, in sharp contrast to those born elsewhere.[114] In Boston, education was a priority for the Black community as early as 1787, when Prince Hall petitioned for Black public schools to be established.[115] In 1834, with a contribution from the white businessman Abiel Smith, the Smith School was constructed.[116] But the Smith School, with its all-Black student body, received inadequate support from the City of Boston. By 1849, the physical facility "had deteriorated beyond the point of usability and safety."[117] This became a growing source of acrimony and then protest among the Blacks and their abolitionist friends on Beacon Hill.[118] When the city ignored them, they boycotted the Smith School, which was overcrowded, unheated, and far below par for Boston.[119]

In 1849, Benjamin Roberts sued the city for denying his daughter Sarah an education.[120] Roberts retained Charles Sumner, a leading lawyer and well-known abolitionist and Robert Morris, one of the first Black lawyers in the Commonwealth.[121] They argued that requiring Sarah to walk a mile to the Smith School, instead of allowing her to attend the better-maintained white schools that she passed along the way, denied her right to equality.[122]

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111. *See* 1 HARPER, American Literature at 515, 537 (1994) ("Women and blacks made significant gains as writers and readers during the years between 1776 and 1836. For blacks, a class deliberately kept uneducated in the new Republic, learning to read and write was largely a matter of fortitude.")

112. Susie King Taylor, *Reminiscences of My Life In Camp With The 33rd United States Colored Troops* at 5-6, *reprinted in* BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 28 (Gerda Lerner ed., Vintage Books, 1992) (1972); *see also* GENOVESE, *supra* note 97, at 565 (describing slaves being whipped for trying to learn to read). Josephine White, trained as a "'sewing girl[,]' . . . began to sit in the room with the white children and thus learned to read" at the age of nine. Taped interview with Claudia White Harreld (Jan. 1952), *in* BLACK WOMEN IN WHITE AMERICA, *supra*.

113. Laura S. Haviland, *A Woman's Life Work, Labors and Experiences* 300-01, *reprinted in* BLACK WOMEN IN WHITE AMERICA, *supra* note 112, at 32.

114. *See* HORTON & HORTON, *supra* note 5, at 13 (noting that by 1860 only eight percent of blacks were illiterate).

115. *Id.* at 70.

116. Black Heritage Trail, *supra* note 4, at site 13.

117. HORTON & HORTON, *supra* note 5, at 72.

118. *Id.*

119. *Id.*

120. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 198-200 (1849). *See* HORTON & HORTON *supra* note 5, at 78-79. For a rich and thought-provoking perspective on the case, see George Dargo, *The Sarah Roberts Case in Historical Perspective*, 3 MASS. LEGAL HIST. 37 (1997).

121. HORTON & HORTON, *supra* note 5, at 55-56, 72.

122. *Id.*

As Earl Maltz has argued, the decision in *Roberts* was grounded in a deeply dichotomized understanding of "equality," reflecting and reinforcing a similarly dichotomized understanding of rights.[123] There were two kinds of rights: one, natural rights, which were "inalienable" and innate, and two, legal rights, which were created by law and could be modified or even rescinded by law.[124] As Professor Maltz paraphrases the *Roberts* court:

> All men—Black or white—are equally entitled to protection of the laws to enforce their legal rights; but unless a particular interest can be classified as a natural right, the legislature may withhold that interest from any class at will. Since public education is not a natural right, the legislature would not violate the principle of limited absolute equality even if Blacks were totally excluded.[125]

Thus, grounding its decision in a dichotomized understanding of rights in which fundamental rights such as liberty were privileged and merely *legal* rights such as the right to education could be ignored, the *Roberts* court held that there was no violation when Black children like Sarah Roberts were provided with "separate but equal" facilities.[126] As explained above,[127] this dichotomized understanding has become a deep schism in American law, between "fundamental" civil and political rights and "other," lesser, subordinated rights, including the economic rights recognized in international law.

B. The Fourteenth Amendment and Diversity as an Imperative of Globalization

In *Plessy v. Ferguson*,[128] the Supreme Court, like Justice Shaw in *Roberts* one hundred years earlier, held that equality was satisfied by "separate but equal facilities."[129] It took another hundred years before this was repudiated in *Brown*.[130] But *Brown's* promise of relief from segregation with "all deliberate speed"[131] proved

123. Earl A. Maltz, *The Concept of Equal Protection of the Laws–A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 513 (1985).

124. *Id.* at 512-13.

125. *Id.* at 513. For Charles Sumners' argument on equality under the Massachusetts Constitution and the Declaration of Independence, see JIM CROW IN BOSTON, *supra* note 2, at 180-82.

126. *See* Pace v. Alabama, 106 U.S. 583 (1883) (upholding anti-miscegenation law).

127. *See* Part II, *Economic Rights*.

128. 163 U.S. 537 (1896) (discussing the segregation of railroad cars).

129. *Id.* 540. As Professor Dargo has pointed out, the *Plessy* holding was applied to public schools in Cumming v. Richmond Cty. Bd. of Education, 175 U.S. 528, 529, 545 (1899) (finding no complete disregard of person's rights so the federal authority should not interfere) and Gong Lum v. Rice, 275 U.S. 78, 86 (1927) (finding that separating schools based on race is a valid legal power) (1927). Dargo, *supra* note 120, at 44.

130. Brown v. Board of Education (Brown I), 347 U.S. 483 (1954).

131. Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955). A survey of the vast body of scholarship analyzing *Brown II* is beyond the scope of this paper. Oft-cited examples include: Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (finding no complete disregard of person's rights so authorities should not interfere); Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964). For a thoughtful and provocative challenge to *Brown*, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*,

illusory.

Brown and its progeny have been hobbled by the same false dichotomies that derailed the courts in *Plessy* and in *Roberts*. While *Brown* recognized a right to equal education, the refusal to recognize economic rights in general, and to recognize the right to education as an economic right in particular, effectively precluded real relief. "Rights trump[],"as Ronald Dworkin has aptly observed.[132] If education were recognized as an economic *right* there would be a basis for trumping the other interests which have undermined *Brown*.

In *San Antonio Independent School District v. Rodriguez*,[133] for example, Mexican-American parents challenged the Texas system of financing public education, claiming that it discriminated against school children residing in districts having a low property tax base.[134] If education were recognized in U.S. law as a right, it might well have trumped other interests.[135] Instead, as the *San Antonio* Court opined, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[136] This is the crucial move, as Justice Marshall argues in his eloquent dissent: "I [therefore] cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself."[137] But the Court situates the right to education in the subordinated, "other" category of interests, just as the *Roberts* Court did a hundred years earlier. Once it has done so, as Justice Marshall well knows, the right to education is at the mercy of the legislature.

The refusal to recognize economic rights, moreover, leaves the right to equal education fatally abstracted. It is not grounded, as economic rights are in international law, in the concrete circumstances of the lives of poor Americans, who remain disproportionately Black. Thus, in *Regents of the University of California v. Bakke*,[138] the Court held that reverse discrimination violated whites' right to equal

93 HARV. L. REV. 518 (1980). As Professor Amar observes "There are probably as many different legal academic perspectives on *Brown* as there are legal academics: if you laid all the law professors in America end to end, they would not reach a conclusion." Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1, 1-2 (2000).

132. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, xi (1977).

133. 411 U.S. 1 (1973).

134. *Id.* at 4-5.

135. The specific relief would remain to be crafted. One possibility, which has emerged in state constitutional litigation, would be to:

open[ ] the way to a crucial shift of focus, away from educational equality and toward educational adequacy. Adequacy arguments, instead of asking comparative questions about the differences in the resources or opportunities available to children in different districts, look directly at the quality of the educational services delivered to children in disadvantaged districts and ask evaluative questions about whether those services are sufficient. . . .

Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 108-09 (1995).

136. *San Antonio*, 411 U.S. at 35.

137. *Id.* at 99 (Marshall, J., dissenting).

138. 438 U.S. 265.

protection.[139] Even the *Bakke* Court recognizes the weight of the norm against discrimination,[140] however, and the Court concedes that race may be a factor in admissions.[141]

The Supreme Court's recent decision in *Grutter*,[142] which cites the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[143] affirms the importance of both the norm and international opinion.[144] As the Court explains:

> Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the law school has a compelling interest in attaining a diverse student body.[145]

Just as desegregation was a Cold War imperative, diversity is an imperative of globalization.

C. The Right to Education in International Human Rights Law

Articles thirteen and fourteen of the Economic Covenant address the right to education. The Covenant explicitly recognizes the right as a prerequisite to the enjoyment of civil as well as other economic rights. Article thirteen requires States to "recognize the right of everyone to education . . . directed to the full development of the human personality and the sense of its dignity, and . . . [to] enable all persons to participate effectively in a free society."[146] More specifically, Article 13.2 provides: "[P]rimary education shall be compulsory and available free to all [and] secondary education . . . shall be made generally available and accessible to all . . .

139. *Id.* at 265. *Bakke* generated voluminous commentary. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?* 47 STAN. L. REV. 855 (1995) (describing that one's minority status may only be used as a plus).

140. "The State certainly has a legitimate and substantial interest in ameliorating . . .the disabling effects of identified discrimination." *Bakke*, 438 U.S. at 307.

141. *Id.* at 265.

142. Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

143. G.A. Res. 2106 (xx), U.N. GAOR, 20th Sess., 1406th plen. Mtg., at 143, U.N. Doc. A/6014 (1965). The U.S. ratified the CERD in 1994. In *Grutter*, Justices Ginsburg and Breyer, concurring, begin by citing "the international understanding of the office of affirmative action." 123 S. Ct. at 2347 (Ginsburg & Breyer, JJ., concurring).

144. *Grutter*, 123 S. Ct. at 2347.

145. *Id.* at 2329 (citations omitted).

146. Economic Covenant, *supra* note 38, 993 U.N.T.S. at 8. (arguing that Article 13 only requires the State to "recognize" or "respect" rights, and Article 14 does not refer to rights at all). *See* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 363-64 (1995) (quoting Articles 13 and 14).

[and] higher education shall be made equally accessible to all, on the basis of capacity[.]"[147]

Article fourteen refers more particularly to those States which have "not been able to secure . . . compulsory primary education, free of charge[.]"[148] This had been the situation in the colonies. Articles thirteen and fourteen, mandating education,[149] considered in conjunction with Articles two and three, which explicitly prohibit discrimination in education,[150] would have been invaluable tools for eighteenth century Boston's Blacks.[151]

Like the deprivation of economic rights in general, the deprivation of the right to education has been devastating to LDCs, especially the girls and women who comprise the majority of the world's illiterates. The impact on larger issues of peace and security, similarly, has been noted.[152] The Committee on Economic, Social and Cultural Rights, for example, recently reiterated the centrality of the right to education in connection with eliminating racism:

> In this regard, it is important to recognize the right to education enshrined in [A]rticle 13 of the International Covenant on Economic, Social and Cultural Rights and in particular that education should be directed to the full development of the human personality and the sense of its dignity and strengthen respect for human rights and fundamental freedoms. The World Conference urges States to reinforce the anti-discrimination component of the school curricula and to improve educational materials on human rights, in order to shape attitudes and behavioral patterns based on the principles of non-discrimination, mutual respect and tolerance.[153]

While education is a prerequisite to the enjoyment of both civil/political rights and economic rights, in short, it also requires both kinds of rights for its realization.

CONCLUSION

Part I of this paper, *Racism and the Leverage of the World*, showed the central role of the rhetoric of rights for the United States in international conflict and the impact of that rhetoric on the law. Thus, the Revolution and its rhetoric of freedom

147. Economic Covenant, *supra* note 38, 993 U.N.T.S. at 8.

148. *Id.* at 9. *See generally* EBY & ARROWOOD, *supra* note 101, at 532-33 (describing the "dame schools," the primary schools in New England which prepared pupils to enter grammar schools where they would study reading and writing); HISTORICAL DICTIONARY OF WOMEN'S EDUCATION IN THE UNITED STATES (1998) (providing a collection of essays on the history of women's organizations and reform efforts).

149. *See* Economic Covenant, *supra* note 38, 993 U.N.T.S. at 8-9 (noting that primary eduaction is compulsory and should be made free of charge).

150. *See* Economic Covenant, *supra* note 38, 999 U.N.T.S. at 5 (describing that all people will have equal enjoyment to all economic, social, and cultural rights in the covenant).

151. *See* COTT, *supra* note 105, at 6.

152. *See, e.g.*, Jane Perlez, *Enlisting Aid to Education In the War on Terror*, N.Y.TIMES, Oct. 12, 2003, at 12 (noting the importance of secular education in countering the influence of fundamentalist Islamic schools in Muslim countries).

153. Review of Reports, *supra* note 92.

led to the abolition of slavery in Massachusetts; the Cold War and its rhetoric of civil/political rights versus economic rights led to the end of state-sanctioned segregation; and World War II and its rhetoric of human rights led to the International Bill of Rights.

At the same time, as shown in Part II, *Economic Rights*, the American rejection of economic rights has distorted the understanding of rights both at home and abroad. As shown in Part III, *The Right to Education*, this has led to a pinched, restrictive understanding of this crucial right, which is a prerequisite to the enjoyment of both civil/political rights and economic rights. If the right to education is to be realized, accordingly, the U.S. should be subject to the International Bill of Rights, including the Economic Covenant. Just as the Fourteenth Amendment has held the states to a higher standard, the International Bill of Rights would hold the U.S. to a higher standard. Just as it was a good idea to subject the states to federal law, it would be a good idea to subject the U.S. to international law.

From another perspective, even as the Fourteenth Amendment reflects and incorporates the American denial of economic rights, it has also been shaped by the leverage of the world. Thus, while the American subordination of economic rights undermines the right to education, this persistent subordination, like the Fourteenth Amendment itself, can still be reshaped and revived by the leverage of the world.

American recognition of economic rights is only a vision, of course, as the Black man trudging up Beacon Hill with his cartload of cans knows all too well. Human rights remain aspirational in many respects and economic rights have become increasingly marginalized since the end of the Cold War. But as the Black Heritage Trail makes plain, vision and hope can be useful on a long trek.[154] And the story is far from over. The Trail also shows how, as Pablo Freire and Myles Horton have observed, "We make the road by walking."[155] Progress is not a preordained trajectory, but a process of deliberate, inevitably contested, steps.

154. As the Hortons note, "Boston's reputation for relative racial tolerance fostered optimism, which in turn encouraged protest organization." HORTON & HORTON, *supra* note 5, at xii.

155. PAULO FREIRE & MYLES HORTON, WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE 3 (1990).