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At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement

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At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement

Barbara Stark*

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I. INTRODUCTION

The Obama Administration has signaled a sea change for human rights in the United States. Treaties moribund for decades have been revived. The Administration, for example, has advised Senator John Kerry, Chair of the Senate Foreign Relations Committee, that it “supports action at this time on the Convention on the Elimination of All Forms of Discrimination Against

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Women.”¹ But the same letter states: “The Administration does not seek action at this time” on the International Covenant on Economic, Social, and Cultural Rights (“Economic Covenant”).² The Economic Covenant, along with the International Covenant on Civil and Political Rights (“Civil Covenant”)³ and the Universal Declaration of Human Rights,⁴ comprise the International Bill of Rights. This Article examines the legal, historical, and practical reasons for the Obama Administration’s reluctance to “seek action” on the Covenant and explains why, despite these reasons, it should. Indeed, the United States has never needed the Economic Covenant more.

Part I introduces the Economic Covenant and explains why the United States should ratify it. The Covenant is a straightforward exposition of Franklin D. Roosevelt’s “freedom from want,”⁵ an international instrument setting out what he referred to as the “Second Bill of Rights.”⁶ It requires nation-states to recognize the rights of their people to the basic necessities of life, including work, an adequate standard of living, education, health, and social security.⁷ Every industrialized democracy except the United States has ratified it.⁸

Domestically, the Covenant resonates with the ground-breaking initiatives of the Obama Administration for universal healthcare, job-

¹ Letter from Richard R. Verma, Assistant Sec’y of Legislative Affairs, to the Hon. John F. Kerry, Chairman of the Comm. on Foreign Relations (May 11, 2009), *available at* http://www.gc.noaa.gov/documents/gcil_bd_2009TreatyPriorityList.pdf.

² *Id.*; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) (entered into force Jan. 3, 1976) [hereinafter ICESCR], *available at* <http://www2.ohchr.org/english/law/pdf/cescr.pdf>.

³ On April 2, 1992, the United States ratified the Civil Covenant. For the text of the Resolution of Ratification, see International Covenant on Civil and Political Rights, Apr. 2, 1992, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR], *available at* <http://www2.ohchr.org/english/law/ccpr.htm>.

⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pt. 1, U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter Universal Declaration]. The United States signed the Declaration in 1948. *Id.*

⁵ THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966 2855, 2860 (Fred L. Israel ed., 1966). In his 1944 State of the Union Message, President Roosevelt elaborated on the substance of “freedom from want,” stating that it included “[t]he right to a useful and remunerative job . . . [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; [t]he right to a good education.” *Id.* at 2875, 2881.

⁶ See generally CASS SUNSTEIN, THE SECOND BILL OF RIGHTS (2004).

⁷ ICESCR, *supra* note 2, art. 11 (standard of living), art. 13 (education), art. 12 (health), art. 9 (social security).

⁸ Status . . . *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY#EndDec (last visited Feb. 22, 2011).

creation, educational reform, and expanded benefits for the most vulnerable.⁹ Abroad, the Covenant's ratification would contribute to the "restoration" of America's reputation as a champion of human rights.¹⁰

The two major obstacles to ratification are the Tea Party and Goldman Sachs. The angry group of "patriots" and the financial services superstar are stand-ins, of course, for right-wing ideologues and the ultra-rich, who have not only grown fatter during the current famine, but now have the additional security of being "too big to fail."¹¹ This Article uses stand-ins to give them a human face and bring them down to human scale. The Covenant faces difficult, but not insurmountable, obstacles. Ratification is no more improbable than the election of a black president.

Part II explains why the United States should not only ratify the Economic Covenant, but ratify it as a congressional-executive agreement. This is contrary to the past practice of ratifying human rights treaties as "non-self-executing" Article II treaties.¹² As a result, the human rights treaties that the United States has already ratified are unenforceable in domestic courts.¹³ They do not become part of domestic law until and unless legislation implements them.¹⁴ No legislation has been enacted to implement the Civil Covenant or the Convention on the Elimination of All Forms of

⁹ See *Health Reform in Action*, WHITE HOUSE, <http://www.whitehouse.gov/healthreform> (last visited Oct. 31, 2010); *The Recovery Act*, WHITE HOUSE, <http://www.whitehouse.gov/recovery> (last visited Oct. 31, 2010); *Education*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education> (last visited Oct. 31, 2010). See generally *Civil Rights*, WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Oct. 31, 2010); *Poverty*, WHITE HOUSE, <http://www.whitehouse.gov/issues/poverty> (last visited Oct. 31, 2010); *Seniors & Social Security*, WHITE HOUSE, <http://www.whitehouse.gov/issues/seniors-and-social-security> (last visited Oct. 31, 2010).

¹⁰ Harold Koh, former Dean of Yale Law School, now Legal Adviser to the State Department, has emphasized the importance of this restoration. Harold Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635 (2007). As he recently observed:

Today, a vast majority of our allies believe that our policies on Guantánamo are illegal. And a recent foreign policy survey showed that many Americans believe that the ability of the United States to achieve its foreign policy goals has decreased significantly over the last few years and that improving America's standing in the world should become a major goal of U.S. foreign policy.

Harold Koh, *Repairing Our Human Rights Reputation*, 31 W. NEW ENG. L. REV. 11, 12 (2009).

¹¹ David Cho, *Banks "Too Big to Fail" Have Grown Even Bigger*, WASH. POST, Aug. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/27/AR2009082704193.html>.

¹² Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 519-23 (1991).

¹³ *Id.*

¹⁴ See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

Racial Discrimination ("Race Convention").¹⁵ Even if some of the substantive rights set out in these treaties are assured under domestic law, accordingly, this may leave the United States in violation of international law since anything the treaty requires that does *not* happen to coincide with existing U.S. law will be unenforceable.

Ratifying the Economic Covenant as a non-self-executing treaty would indisputably leave the United States in violation of international law. Unlike the Race Convention and the Civil Covenant,¹⁶ the Economic Covenant does not reinforce rights already well-established in American jurisprudence. Ratifying the Economic Covenant as a non-self-executing treaty, therefore, would leave the United States without any federal minimum standard for those rights, which is in clear violation of its international obligations.

II. THE ECONOMIC COVENANT AND ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE UNITED STATES

Economic, social, and cultural rights refer to a range of affirmative obligations that a state owes its own people, from the assurance of basic needs (such as food, shelter, and healthcare) to access to education and decent jobs.¹⁷ These are not merely aspirations or policy objectives; they are legally recognized claims that an individual has against a state. The Economic Covenant does not require a particular form of economic organization.¹⁸ Free market economies like the United States, as well as those of Western Europe, are fully compatible with its basic principles.

This Part begins by setting out the origins of economic rights. It then explains each article of the Economic Covenant and how each relates to existing U.S. laws, as well as to existing American needs. This Part then explains why the United States should ratify the Covenant and concludes by addressing the admittedly formidable obstacles to ratification.

A. Origins

The underlying notion of economic rights—that no one should suffer from want or deprivation when others have the means to prevent it, or that a community should take care of its own—can be traced to the earliest teachings of the world's major religions.¹⁹ The religious idea of charity,

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www.unhcr.org/refworld/docid/3ae6b3940.html>. In a declaration accompanying its ratification, the Senate noted that "existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated." S. REP. NO. 102-23 (1992), reprinted in 31 I.L.M. 645, 657.

¹⁶ See *id.*

¹⁷ ICESCR, *supra* note 2, at 11–12.

¹⁸ *Id.*

¹⁹ See Isaiah 58:6-8; 2 Corinthians 9:7; 9:60 *The Qur'an*; JEANNE WOODS & HOPE LEWIS, HUMAN RIGHTS IN THE GLOBAL MARKET PLACE 45 (2006). Similarly, Buddhism has historically advocated

however, was the obligation of one individual to another, rather than the obligation of the State to an individual.²⁰ It was voluntary, and if the donor declined to give, the donee had no legal claim or entitlement.²¹ But the recognition that the poor, the sick, the very old, and the very young have some claim against the larger community is a widespread norm.

Economic rights can be traced more recently to the 18th Century Enlightenment philosophers. The notion that the vulnerable had a claim against the State is grounded in the work of Jean-Jacques Rousseau²² and appears in the French Declaration of the Rights of Man and of the Citizen²³ and the French Constitution of 1791.²⁴ Economic rights became part of the modern welfare state in the late 19th century, when the arch-conservative Otto von Bismarck established basic health insurance and social security in Germany to preempt the appeal of socialism.²⁵

There are several references to human rights in the United Nations Charter, drafted in 1945.²⁶ Although the Charter is a legally binding treaty, the specific obligations that it imposes are unclear. The Universal Declaration,²⁷ drafted in 1948, is more specific, but it was originally intended as an aspirational statement.²⁸ It was expected that a legally binding instrument based on the Universal Declaration would be drafted, but the Cold War precluded agreement about rights in general, and economic rights in particular. Instead, two covenants were drafted in the 1960s. The legally binding Civil Covenant and Economic Covenant are multilateral treaties under which ratifying states ensure the human rights of their own people.

The bifurcation of rights into two covenants was further justified by the differences in “the nature of the legal obligation and the systems of

that alms be given for religious purposes, including care of the poor. THE CALCUTTA REVIEW (E. Lethbridge ed., 1876).

²⁰ See LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 9–10 (1981).

²¹ See WOODS & LEWIS, *supra* note 19, at 45.

²² Jean-Jacques Rousseau, *On the Social Contract*, reprinted in LOUIS HENKIN ET AL., *HUMAN RIGHTS* 45–48 (1999).

²³ See DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] arts. 2, 6 (Aug. 26, 1789), translation available at <http://www.hrcr.org/docs/frenchdrc.html>.

²⁴ 1791 CONST. tit. 1 (Fr.).

²⁵ See, e.g., WALTER MICHAEL SIMON, *GERMANY IN THE AGE OF BISMARCK* 60 (Allen & Unwin eds., 1968) (noting that Bismarck's first objective “was to defeat and suppress the growing socialist movement in Germany”); see also WILLIAM HARBUTT DAWSON, *BISMARCK AND STATE SOCIALISM* 34–35 (1890).

²⁶ U.N. Charter pmbl.; art. 1, para. 3; art. 13, para. 1; art. 55; art. 56.

²⁷ Universal Declaration, *supra* note 4.

²⁸ Elisabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 76 (1992).

supervision that could be imposed.”²⁹ The Civil Covenant addresses negative rights, such as freedom of religion and freedom from arbitrary arrest or detention.³⁰ The Economic Covenant addresses positive rights, such as the right to health and the right to education.³¹ Both kinds of rights are considered interdependent and equally important.³²

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 to be implemented immediately.³³ There are exceptions. Article 2 of the Economic Covenant, for example, prohibits discrimination.³⁴ Courts can certainly decide if a particular group is being discriminated against in housing or education.³⁵ While the Civil Covenant assures a right to a trial for those accused of crimes, if there is no functioning judicial system in a particular state, that right can only be realized “progressively.”³⁶ In general, however, the bifurcation of rights is justified on practical and functional grounds.

B. The State's Obligations

The Economic Covenant begins with a preamble, rooting it in the U.N. Charter and the Universal Declaration, followed by thirty-one articles.³⁷ It is divided into five parts, as is this section. Part I of the Covenant consists solely of Article 1, setting out the right to self-determination. Part II, consisting of Articles 2–5, explains how the substantive obligations set out in Part III are to be met. Part III, consisting of articles 6–15, sets out the actual substantive obligations that the State assumes. Part IV explains how implementation of the Covenant is monitored and Part V sets out the procedures for ratification, accession, and amendment.

²⁹ David P. Forsythe, Book Review, 8 HUM. RTS. Q. 540, 540 (1986) (reviewing A. GLENNMOWER JR., *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* (1985)); accord JOHN THOMAS PETERS HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 144 (1984).

³⁰ ICCPR, *supra* note 3.

³¹ ICESCR, *supra* note 2.

³² See Indivisibility and Interdependence of Econ., Soc., Cultural, Civil, and Political Rights, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/130, at 209 (Dec. 15, 1989), available at <http://www.un.org/documents/ga/res/44/a44r130.htm>.

³³ ICESCR, *supra* note 2, art. 2.

³⁴ *Id.* at para. 2.

³⁵ See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999).

³⁶ See generally ICCPR, *supra* note 3, arts. 2, 14.

³⁷ See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 22 (1998).

This section explains each article of the Economic Covenant and provides examples of state compliance, which are drawn from programs already in effect in the United States. The United States does not seek to comply with the Covenant through these programs, of course, since the United States is not yet a party.³⁸ The point of these examples is to show that the norms of the Covenant are, in fact, norms that are widely accepted in the United States. Most Americans do not want mentally ill people to sleep on the street or children to go hungry. That the United States has taken *some* measures to address these matters does not mean that it does not need to ratify the Covenant, however. The measures the United States has taken are too often uncoordinated, haphazardly supported, and easily revoked.³⁹ The Covenant provides a much-needed framework for a secure safety net, a solid floor.

1. Self-Determination (Article 1)

Article 1 of the Economic Covenant provides that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁴⁰ The same right is set out in the Civil Covenant,⁴¹ emphasizing its importance and its multifaceted character as a civil, political, and an economic right. Since the United States has already ratified the Civil Covenant that sets out the same obligation, in theory, ratification of the Economic Covenant would not give rise to any new claims.⁴²

While self-determination originally referred to the right of peoples in colonial states to be free of their colonizers, the right has more recently been asserted by members of groups, such as ethnic minorities, within states against their own governments.⁴³ This is more problematic, since these groups' secession may threaten the integrity, if not the very existence, of the state itself.⁴⁴ While some have suggested that the right of self-determination

³⁸ See ICESCR, *supra* note 2.

³⁹ See generally Jason Deparle, *For Recession Victims, Patchwork State Aid*, N.Y. TIMES, May 9, 2009, at A1, available at <http://www.nytimes.com/2009/05/10/us/10safetynet.html>. ("As millions of people seek government aid, many for the first time, they are finding it dispensed American style: through a jumble of disconnected programs that reach some and reject others, often for reasons of geography or chance rather than differences in need.")

⁴⁰ ICESCR, *supra* note 2, art. 1, at para. 1.

⁴¹ ICCPR, *supra* note 3, art. 1.

⁴² But see *infra* Part IV (explaining that the Civil Covenant cannot be relied upon in domestic courts and arguing that the Economic Covenant should be).

⁴³ Louise Arbour, President & C.E.O., Int'l Crisis Grp., Speech at the Conference on Self-Determination and Conflict Resolution: From Kosovo to Sudan (Sept. 22, 2010), available at <http://www.crisisgroup.org/en/publication-type/speeches/2010/Louise-Arbour-self-determination-and-conflict-resolution-from-kosovo-to-sudan.aspx>.

⁴⁴ *Id.*

only applies against foreign states,⁴⁵ the Human Rights Committee has affirmed the applicability of this Article outside of the decolonization context.⁴⁶

The Obama Administration has already taken steps to address long-pending claims of Native Americans. A settlement agreement has recently been announced in a thirteen-year-old class action lawsuit, *Cobell v. Salazar*.⁴⁷ “The lawsuit claims that the federal government mismanaged individual Indians’ trust accounts.”⁴⁸ Under the terms of the settlement, the federal government will create a \$1.4 billion Accounting/Trust Administration Fund and a \$2 billion Trust Land Consolidation Fund.⁴⁹ The settlement also creates an Indian Education Scholarship fund of up to \$60 million to improve access to higher education for Native Americans.⁵⁰

In addition, in December 2009, the Senate Committee on Indian Affairs approved the Native Hawaiian Government Reorganization Act of 2009,⁵¹ clearing the way for the full Senate’s consideration. The Act makes clear that Native Hawaiians should have the same opportunities⁵² for self-determination as other indigenous peoples in the United States.⁵³

Ratification of the Economic Covenant would provide broad legal support for *Cobell*-type claims, as well as Hawaiian-type legislative reform. It would also enable the United States to participate in shaping the emerging international jurisprudence of self-determination.

2. General Provisions (Articles 2–5)

Articles 2–5 of the Covenant are general provisions that apply to the substantive rights addressed in Articles 6–15. Article 2 establishes the standard to which a state will be held. The state “undertakes to take steps . .

⁴⁵ The “salt-water test” (a claim is only recognized if asserted against a State across an ocean) was a historical variation of this test. Louis Henkin set out the parameters: “It is accepted that self-determination outlaws traditional colonialism over unwilling peoples; apparently, it does not include a right of secession from an existing state” LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 138 (1995).

⁴⁶ See Human Rights Comm., General Comment No. 12: The Right of Self-Determination of Peoples, art. 1, ¶ 1, U.N. Doc. A/39/40, GAOR, 21st Sess., Supp. No. 40 (Mar. 13, 1984). See generally S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* 73–75, 189 (2009).

⁴⁷ See Class Action Settlement Agreement, *Cobell v. Salazar*, No 1:96CV01285–JR (D.D.C. Dec. 7, 2009).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009).

⁵² *Id.*

⁵³ *Id.*

. to the maximum of its available resources, with a view to achieving progressively the full realization of the rights” set out in the Covenant.⁵⁴ Thus, the state is not expected to immediately assure the rights that follow. At the same time, the state is required to “take steps” to demonstrate some progress toward realizing the right.⁵⁵ As clarified in the guidelines, this has two concrete requirements: 1) no backsliding (once a right is assured, it should not be withdrawn or scaled back) and 2) the state must assure a minimum level of core rights.⁵⁶ In addition, Article 2, along with Article 3, assures non-discrimination in the provision of all other rights.⁵⁷ As noted above, this is often justiciable.

Articles 4 and 5 limit derogation from economic, social, and cultural rights. Article 4 provides in pertinent part that “the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”⁵⁸ As Philip Alston has observed, this imposes a rigorous standard: “[L]imitations must, in the first place be ‘determined by law’ in accordance with the appropriate national procedures and must not be arbitrary or unreasonable or retroactive. The limitations must also ‘be compatible with the nature’ of these rights.”⁵⁹ Article 5 extends the prohibition against derogation in three important ways. First, it extends this prohibition to non-state third parties.⁶⁰ Second, it extends the prohibition to activities indirectly aimed at derogation, such as indenture.⁶¹ Third, it prohibits derogation from any other rights on the pretext that the Covenant requires such derogation.⁶²

⁵⁴ ICESCR, *supra* note 3.

⁵⁵ *Id.*

⁵⁶ See, e.g., Office of High Comm’r for Human Rights & U.N. Inst. for Training & Res. & U.N. Staff C., Manual on Human Rights Reporting, 45–48, U.N. Doc. HR/PUB/91/1, U.N. Sales No. GV.E. 97.0.16 (1997) [hereinafter MANUAL]; *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 9 HUM. RTS. Q. 1, 122–35 (1987) (considering the obligations of state parties to the Economic Covenant). But see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 113–18 (2008) (criticizing the concept of the “minimum core”).

⁵⁷ “Each State Party to the present Covenant undertakes to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . or other status.” ICESCR, *supra* note 2, art. 2.

⁵⁸ *Id.*

⁵⁹ Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in U.N. CENTRE FOR HUMAN RIGHTS MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 39, 48 U.N. Doc. HR/PUB/91/1, U.N. Sales No. E. 91. XIV. 1 (1991) [hereinafter Alston, ICESCR].

⁶⁰ See ICESCR, *supra* note 2, art. 5.

⁶¹ *Id.*

⁶² *Id.*

3. Substantive Obligations (Articles 6–15)

a. The Right to Work

In contrast to the general provisions, Articles 6–15 focus on substantive rights. Articles 6, 7, and 8 address the right to work. As the commentary to the Guidelines notes, “The right to work is of fundamental importance, not only for its own sake but because it can be the key to the enjoyment of many other rights.”⁶³ The Covenant breaks down the right to work into three major guarantees. First, under Article 6, the State “recognize[s] . . . the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”⁶⁴ Article 7 goes on to assure “just and favourable conditions of work.”⁶⁵ Article 8 focuses on the right to form and join trade unions.⁶⁶

Several factors may combine to deny the right to work. First, there may be a lack of jobs. Second, there may be jobs, but wages may be too low or working conditions may be too onerous. Third, occupations and professions may be closed to some members of the population because of gender or other prohibited factors. Fourth, some people may be precluded from working as a practical matter. Childcare responsibilities, for example, might make it impossible for parents to work certain hours.

The current economic crisis has resulted in unprecedented unemployment and underemployment.⁶⁷ In October 2009, the Bureau of Labor Statistics, drawing on new data, estimated that during the twelve months prior to March 2009, the U.S. economy lost 5.6 million jobs (824,000 more than reports from early 2008 had indicated).⁶⁸ The Obama Administration has

⁶³ Alston, *ICESCR*, *supra* note 59, at 117.

⁶⁴ *ICESCR*, *supra* note 2, art. 6.

⁶⁵ *Id.*, art. 7.

⁶⁶ *Id.*, art. 8.

⁶⁷ See, e.g., Michael Luo & Meagan Thee-Brenan, *Poll Reveals Trauma of Joblessness in U.S.*, N.Y. TIMES, Dec. 14, 2009, at A1, available at <http://www.nytimes.com/2009/12/15/us/15poll.html>; Edmund L. Andrews, *Economic Adviser Predicts 10% Jobless Rate*, N.Y. TIMES, Oct. 22, 2009, at B3, available at <http://www.nytimes.com/2009/10/23/business/23outlook.html>. See also *supra* note 39 (discussing various news articles).

⁶⁸ Floyd Norris, *The Jobs News Gets Worse*, N.Y. TIMES, Oct. 3, 2009, at WK3 [hereinafter Norris, *Job News*], available at <http://www.nytimes.com/2009/10/04/weekinreview/04norris.html>. The job outlook has been consistently bad. See, e.g., David Leonhardt, *Unemployed, and Skewing the Picture*, N.Y. TIMES, Mar. 7, 2008 [hereinafter Leonhardt, *Unemployed*], available at <http://www.nytimes.com/2008/03/05/business/05leonhardt.html>; Floyd Norris, *U.S. Jobless Rate Likely to Pass Europe's*, N.Y. TIMES, May 22, 2009, at B3 [hereinafter Norris, *U.S. Jobless Rate*], available at <http://www.nytimes.com/2009/05/23/business/economy/23charts.html>; David Leonhardt & Victoria Cherrie, *Part-Time Workers Mask Unemployment Woes*, N.Y. TIMES, July 14, 2009, at A1, available at <http://www.nytimes.com/2009/07/15/business/economy/15leonhardt.html> (“In California and a handful of other states, one out of every five people who would like to be working full time is not now doing so.”); Michael Luo, *Out of Work, and Too Down to Search On*, N.Y. TIMES, Sep. 7, 2009, at A1 [hereinafter Luo, *Out of Work*], available at <http://www.nytimes.com/2009/09/07/us/07worker.html>.

taken some steps to address this. The American Recovery and Reinvestment Act ("ARRA"),⁶⁹ for example, increases job training funds with \$3.95 billion in additional funding for the Workforce Investment System, which will support green job training and summer jobs for young people.⁷⁰ The Senate passed a package of tax breaks and highway spending, totaling \$17.6 billion on March 17, 2010, and the President signed the bill on March 18.⁷¹ "It is the first of what I hope will be a series of job packages that will help to continue to put people back to work all across America," Obama said.⁷²

But it is not enough. As Craven explains, there has been considerable debate among the drafters, commentators, and Committee members regarding the scope of the right to work.⁷³ The idea that states are required to guarantee the right has been rejected as unrealistic.⁷⁴ But the Committee continues to press for policies ensuring "work for all who are available for and seeking work."⁷⁵ As journalist Bob Herbert recently observed:

You can't get back to a robust economy without putting Americans back to work. The economy needs to be rebuilt on a solid foundation of good jobs at good pay, and many of those jobs will have to come from thriving new industries. This is a long-term project that demands big-time government involvement. It will require the kind of commitment—over an even longer period of time—that President Obama and the Democrats in Congress gave to their health care initiative. Franklin Roosevelt had it right in his first Inaugural Address when he declared, "Our greatest primary task is to put people to work." He underscored the urgency of the task when he said it should be treated "as we would treat the emergency of war."⁷⁶

Ratifying the Covenant would transform a Presidential commitment into a long-term, irrevocable *national* commitment.

⁶⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) [hereinafter ARRA].

⁷⁰ *Id.* at 172.

⁷¹ Andy Sullivan, *First of Several Job-Creation Bills Clears Congress*, REUTERS, Mar. 17, 2010, available at <http://www.reuters.com/assets/print?aid=USTRE62E5DC20100317>.

⁷² *Id.*

⁷³ CRAVEN, *supra* note 37 at 203–04.

⁷⁴ *Id.* at 203.

⁷⁵ *Id.* at 204.

⁷⁶ Bob Herbert, Op-Ed., *The Magic Potion*, N.Y. TIMES, Mar. 30, 2010, at A25, available at <http://www.nytimes.com/2010/03/30/opinion/30herbert.html> ("The closest thing to a magic potion for individuals, families and the American Economy is a job. F.D.R. understood that. The longer it takes for the rest of us to catch on, the deeper the long-term damage to the society will be.").

b. Social Security and Family Protection

Article 9 of the Covenant provides that: "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."⁷⁷ This is not work-linked, but is a fundamental entitlement to be afforded each member of society.⁷⁸ It includes, but is not limited to, medical care, maternity, and old-age benefits.⁷⁹

Social Security in the United States is expected to expire in 2037, but the portion that subsidizes Americans with disabilities could expire as early as 2020.⁸⁰ In addition, the trust fund that pays for hospital care under Medicare is now predicted to run out of money in 2017, two years earlier than forecast a year ago.⁸¹ Social Security has often been referred to as the third rail of American politics, because, it would be lethal for an American politician to touch it.⁸² It might be sacrosanct, but that does not necessarily translate into the funds needed to maintain the program. As former Secretary of Labor Robert Reich recently noted, there are potential sources of additional revenue,⁸³ including decades of Social Security taxes that could be collected from young immigrants eager to enter the United States.⁸⁴ Ratifying the Covenant would make Social Security a legal obligation, as well as a political necessity. This would not only buttress efforts to shore up the program, it would also deter those who would gut it.

Article 10 requires the state to recognize that the "widest possible protection and assistance should be accorded to the family . . . particularly for its establishment and while it is responsible for the care and education of dependent children."⁸⁵ Families in the United States are suffering from the

⁷⁷ ICESCR, *supra* note 2, art. 9.

⁷⁸ See Alston, *ICESCR*, *supra* note 59, at 55.

⁷⁹ *Id.*

⁸⁰ See Amy Goldstein, *Alarm Sounded on Social Security*, WASH. POST, May 13, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051200252.html>.

⁸¹ *Id.*; see also Mary Williams Walsh, *Social Security to See Payout Exceed Pay-In*, N.Y. TIMES, Mar. 24, 2010, available at <http://www.nytimes.com/2010/03/25/business/economy/25social.html> (noting that the system will pay out more than it takes in this year).

⁸² See William Safire, *Third Rail*, N.Y. TIMES MAG., Feb. 18, 2007, available at http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html?_r=1.

⁸³ Robert B. Reich, *Why We Need a Public Health Care Plan: Without the Government as Competition, the Private Sector Has Little Incentive to Improve*, WALL ST. J., June 24, 2009, at A15, available at <http://online.wsj.com/article/SB124580516633344953.html>.

⁸⁴ Robert Reich, *Immigrants: The Key to Social Security*, MARKETPLACE (Apr. 7, 2010), <http://marketplace.publicradio.org/display/web/2010/04/07/pm-reich-commentary/> (text and audio recording of commentary available).

⁸⁵ ICESCR, *supra* note 2, art. 10. The Covenant does not define "family." Instead, the Guidelines require the state to "indicate what meaning is given in your society to the term 'family.'" Some have criticized such open-endedness for legitimizing and perpetuating local patriarchal norms. In France, for example, the government announced a plan of action called "10 Steps Towards Women's Autonomy." The plan focused on "reception and referral, shelter, protection, financial

Great Recession. The Census Bureau reported in January 2010 that unemployment rates for couples with children had doubled from 2007 to 2009, usually because the father was out of work.⁸⁶ The Personal Responsibility and Work Opportunity Reconciliation Act imposed a five-year lifetime limit on assistance to welfare recipients.⁸⁷ That cap will kick in during 2010–2011 for tens of thousands of families.⁸⁸

Ratification of the Covenant would prevent backsliding with respect to both Articles.⁸⁹ That is, it would establish a legally binding obligation to continue benefits for those entitled to Social Security. In addition, it would require the state to assure subsistence benefits to all who needed them, whether or not they had paid into Social Security.⁹⁰ Importantly, this would include the growing numbers of elderly Americans.⁹¹

c. Adequate Standard of Living

Under Article 11, “[t]he States Parties . . . recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁹² This is related to, but distinct from, the rights to work

support and job coaching for victims of violence, as well as on ensuring their return to independent living.” Comm. on Econ., Soc. & Cultural Rights, 40th Sess., Geneva, Switz., Apr. 28–May 16, 2008, Implementation of the Int’l Covenant on Econ., Soc. and Cultural Rights, ¶ 165, E/C.12/FRA/Q/3/Add.1 (Apr. 10, 2008).

⁸⁶ Sam Roberts, *Figures Look at Families in Recession*, N.Y. TIMES, Jan. 16, 2010, at A18, available at <http://www.nytimes.com/2010/01/17/us/17census.html>.

⁸⁷ The Personal Opportunity and Work Responsibility Reconciliation Act, Pub. L. No. 104-193, § 403, 110 Stat. 2105 (1996), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ193.104.pdf.

⁸⁸ See The Personal Opportunity and Work Responsibility Reconciliation Act, Pub. L. No. 104-193, § 403, 110 Stat. 2105 (1996); *Welfare Reform: Fifth Anniversary*, NPR (Aug. 22, 2001), <http://www.npr.org/news/specials/welfare/010822.welfare.html>.

⁸⁹ See Alston, *ICESCR*, *supra* note 59.

⁹⁰ ICESCR, *supra* note 2, art. 9.

⁹¹ As set out in General Comment No. 6, on the Economic, Social and Cultural Rights of Older Persons, “The world population is ageing at a steady, quite spectacular rate . . . projected to reach . . . 1.2 billion by the year 2025.” CRAVEN, *supra* note 37, at xxiii. See also *id.* at xxviii–xxix (discussing state’s obligations to older persons under Articles 9 and 10).

⁹² ICESCR, *supra* note 2, art. 11. In the Netherlands, for example:

Anyone who is lawfully resident in the Netherlands and who has insufficient means to support himself is entitled to a guaranteed minimum income under the Work and Social Assistance Act (WWB). These benefits are linked to the minimum wage. The Netherlands has one of the highest minimum wages in the European Union. The statutory minimum wage and the Dutch social security system provide sufficient income to guarantee a decent standard of living.

Comm. on Econ., Soc. & Cultural Rights, 45th Sess., Geneva, Switz., Nov. 1–19, 2010, Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 133, E/C.12/NLD/4-5.

and to social security, as discussed above. While the United States still has the highest G.D.P. in the world,⁹³ many Americans are in desperate straits:

40 million people in this country are living below the poverty line, defined as an income of \$22,205 for a family of four. The middle class also took a major hit. Median household income fell in 2008 to \$50,300 from \$52,200 in 2007. That is the steepest year-to-year drop since the government began keeping track four decades ago.⁹⁴

Hunger has become an increasingly urgent issue in this country.⁹⁵ The Obama Administration has taken steps to address it. The ARRA includes a \$20 billion increase for the Supplemental Nutrition Assistance Program ("SNAP"), formerly known as Food Stamps, as well as funding for food banks and the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC").⁹⁶ But recent federal data suggests that these steps are inadequate.⁹⁷ "The number of people in households that lacked consistent access to adequate nutrition rose to 49 million in 2008," the highest number since the federal government began collecting such data fourteen years ago.⁹⁸

The collapse of the housing bubble has resulted in foreclosures on a scale not seen since the Great Depression.⁹⁹ Increasing numbers of families are

⁹³ The C.I.A. estimated that the United States' GDP for 2009 was approximately \$14,140,250,000,000. China, the country ranked closest in wealth to the United States by the C.I.A., only had a G.D.P. totaling approximately 9 trillion, while the entire European Union's G.D.P. exceeded that of the United States by only 300 million. See CIA, *Country Comparison: GDP (Purchasing Power Parity)*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Oct. 31, 2010).

⁹⁴ Editorial, *A Long Way Down*, N.Y. TIMES, Sept. 16, 2009, at A30, available at <http://www.nytimes.com/2009/09/16/opinion/16wed1.html>. See also Peter S. Goodman, *Emphasis on Growth Is Called Misguided*, N.Y. TIMES, Sept. 23, 2009, at B1, B5, available at <http://query.nytimes.com/gst/fullpage.html?res=9B02EED7143EF930A1575AC0A96F9C8B63> ("Instead of centering assessments on the goods and services an economy produces, policy makers would do better to focus on the material well-being of typical people by measuring income and consumption, along with the availability of health care and education.").

⁹⁵ Jason Deparle, *Hunger in U.S. at a 14-Year High*, N.Y. TIMES, Nov. 16, 2009, at A14, available at <http://nytimes.com/2009/11/17/us/17hunger.html>.

⁹⁶ ARRA, *supra* note 69, at 119–21.

⁹⁷ Editorial, *Hunger in the United States*, N.Y. TIMES, Nov. 18, 2009, at A34, available at <http://www.nytimes.com/2009/11/18/opinion/18wed2.html>.

⁹⁸ *Id.*

⁹⁹ Editorial, *The Year in Foreclosures*, N.Y. TIMES, Feb. 14, 2010, at A20, available at <http://www.nytimes.com/2010/02/15/opinion/15mon2.html> ("Nearly 88,000 people had their homes repossessed in January, a 31 percent increase from a year ago . . . With more than four million homes in [the] pipeline, the foreclosure crisis shows no sign of abating."). See also Herbert, *supra* note 76 ("Foreclosure notices went out to 2.8 million households last year and that figure is expected to top 3 million this year. Nearly 1 in every 4 homes with mortgages is 'underwater,' which means that the mortgage holder owes more on the property than it is worth.").

homeless.¹⁰⁰ There is no single federal definition of homelessness, but most federal programs use the definition provided by the McKinney-Vento Act:

An individual who lacks a fixed, regular, and adequate nighttime residence; and a person who has a nighttime residence that is (a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations . . . (b) an institution that provides a temporary residence for individuals intended to be institutionalized; or (c) a public or private place not designed for, nor ordinarily used as, a regular sleeping accommodation for human beings.¹⁰¹

While the homeless are “notoriously difficult to count because of their nomadic nature and because so many of the homeless are not in shelters, but are on the streets or are doubled up with friends and family,” those in the field estimate that the number of homeless people falls between 600,000 and 2.5 million.¹⁰²

d. Right to Health

Article 12 addresses the right to health.¹⁰³ As Virginia Leary has pointed out, the “‘right to health’ is . . . shorthand, referring to the more detailed language contained in international treaties and to fundamental human rights principles.”¹⁰⁴ This complex and wide-ranging right may be broken down into two major components: (1) medical services and (2) the prevention

¹⁰⁰ Brenda Laroche, *Region III News*, U.S. DEP'T OF HOUSING AND URBAN DEV. [HUD] (July 20, 2010), <http://portal.hud.gov/portal/page/portal/HUD/states/pennsylvania/newsletter/2010-07>.

¹⁰¹ MAGGIE MCCAUSTY, CONG. RESEARCH SERV., RL30442, HOMELESSNESS: RECENT STATISTICS, TARGETED FEDERAL PROGRAMS, AND RECENT LEGISLATION 1 (2005) [hereinafter HOMELESSNESS: RECENT STATISTICS] (citing McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 1302 (1987)).

¹⁰² *Id.* at 1.

¹⁰³ See ICESCR, *supra* note 2, art. 12.

¹⁰⁴ Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 25, 28 (1994). In Sweden, for example:

Access to health care is based on residence, not on citizenship. The individual county councils are responsible for providing health care to people residing within their geographic jurisdiction. The county councils are also obliged to provide emergency health care to persons not residing in the county council. This means that no health institution can turn away a person in need of immediate care, regardless of his or her legal status, financial situation, religious background etc. According to Swedish law, no health institution may claim that a patient must pay the full cost in advance or be denied treatment.

Comm. on Econ., Soc. & Cultural Rights, 41st Sess., Nov. 3–21, 2008, *Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 135 U.N. Doc. E/C.12/SWE/Q/5/Add.1 (2008).

of health problems through public health measure such as nutrition programs, safe drinking water, and public education.

In March 2010, President Obama signed the Patient Protection and Affordable Care Act ("the Act"),¹⁰⁵ requiring almost all Americans (94 percent) to obtain health insurance and providing subsidies enabling them to do so.¹⁰⁶ With the passage of this law, the United States joins the rest of the industrialized states, which have long assured their populations universal healthcare.¹⁰⁷ Unlike these states, however, the United States still does not recognize the human right to health.¹⁰⁸ Thus, although the new Act promises to significantly advance that right, the failure to explicitly acknowledge that it is in fact a right, rather than a transitory policy preference, leaves it vulnerable to the attacks and erosion already underway.¹⁰⁹ A key element of the Act, for example, is the new Center for Medicare and Medicaid Innovation.¹¹⁰ As Harvard Medical School Professor Atul Gawande points out:

[The Center] offers to free communities and local health systems from existing payment rules, and let them experiment with ways to deliver better care at lower costs. In large part, it entrusts the task of devising cost-saving health-care innovation to communities like Boise and Boston and Buffalo, rather than to the drug and device companies and the public and private insurers that have failed to do so.¹¹¹

This approach could encourage just the kind of public health measures Leary contemplated. It could also be hijacked by those seeking the most visible kinds of improvement for the lowest cost. While an analysis of the

¹⁰⁵ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010: ADVANCING HEALTH EQUITY FOR RACIALLY AND ETHNICALLY DIVERSE POPULATIONS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES 1 (Dennis P. Andrulis et al. eds., 2010).

¹⁰⁶ MISSOURI HOSPITAL ASSOC., PATIENT PROTECTION AND AFFORDABLE CARE ACT: FACT SHEET (2010), available at <http://web.mhanet.com/userdocs/articles/Reform%20Ready/FactSheet.pdf>.

¹⁰⁷ INST. OF MED. OF THE NAT. ACAD., INSURING AMERICA'S HEALTH: PRINCIPLES AND RECOMMENDATIONS (2004), available at <http://www.iom.edu/Reports/2004/Insuring-Americas-Health-Principles-and-Recommendations.aspx>.

¹⁰⁸ *Human Right to Health*, NAT'L ECON. & SOC. RIGHTS INITIATIVE, <http://www.nesri.org/programs/health> (last visited Feb. 12, 2011).

¹⁰⁹ *Health Care is a Human Right*, AMNESTY INT'L USA, <http://www.amnestyusa.org/demand-dignity/health-care-is-a-human-right/page.do?id=1021216> (last visited Feb. 12, 2011).

¹¹⁰ H.R. 3590, 111th Cong. § 3021 (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590enr.txt.pdf#page=271.

¹¹¹ Atul Gawande, *Now What?*, THE NEW YORKER, Apr. 5, 2010, at 21–22, available at http://www.newyorker.com/talk/comment/2010/04/05/100405taco_talk_gawande. See also Michelle Andrews, *In All Those Pages, a Surprise or Two*, N.Y. TIMES, Mar. 30, 2010, at D4, available at <http://www.nytimes.com/2010/03/30/health/30fine.html> (noting that \$1.5 billion has been allotted for home visiting programs over five years because, for example, "Pregnant teenagers who receive home visits by nurses once or twice a month before delivery and for a few years afterward learn parenting and coping skills that can cut child abuse and neglect in half").

actual mechanisms through which the objectives of the Center are to be achieved is beyond the scope of this article, a clear and legally enforceable commitment to the right to health would offer some protection from the bean counters.

e. Right to Education and Cultural Life

Article 13 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.”¹¹² More specifically, Article 13(2) provides that “[p]rimary education shall be compulsory and available free to all [and] secondary education . . . shall be made generally available and accessible to all [and] higher education shall be made equally accessible to all, on the basis of capacity.”¹¹³ Article 14 refers more particularly to those states that have “not been able to secure . . . compulsory primary education, free of charge.”¹¹⁴

While the United States provides free, compulsory primary education, and secondary education is “generally available,” the quality of free education provided is often poor. This was shown in the weak performances on the federal tests mandated by the No Child Left Behind Act of 2002.¹¹⁵ In early March 2010, the National Governors Association and a group representing state school superintendents proposed rigorous new national standards, internationally benchmarked.¹¹⁶ Ratifying the Covenant would establish a framework for such initiatives. Ratification would also provide a bulwark for those seeking to defend school systems from the drastic cutbacks many now face.¹¹⁷

¹¹² ICESCR, *supra* note 2.

¹¹³ ICESCR, *supra* note 2, art. 13(2). In the United Kingdom, for example:

The “National Strategies” (funded by Government) manage a Gypsy, Roma and Traveller Achievement Programme supporting local authorities and schools to meet the aspirations of Gypsy, Roma and Traveller (GRT) pupils and parents more effectively. The programme aims to improve the quality, sensitivity and relevance of education provision for all GRT pupils. The programme was launched in September 2006 and now covers 22 local authorities and 79 schools.

Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Consideration of Reports Submitted by States Parties in Accordance with Article 16 of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GBR/Q/5/Add.1 (Mar. 26, 2009).

¹¹⁴ ICESCR, *supra* note 2, art. 14.

¹¹⁵ *How to Fix No Child Left Behind*, TIME, May 24, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1625192,00.html>.

¹¹⁶ Editorial, *National School Standards, At Last*, N.Y. TIMES, Mar. 14, 2010, at WK7, available at <http://www.nytimes.com/2010/03/14/opinion/14sun1.html>.

Article 15 assures the right to take part in cultural life.¹¹⁸ The Article encompasses three distinct but interrelated rights, specifically “the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; [and] (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹¹⁹

The denial of the right to take part in cultural life affects the entire culture, as well as the individuals or groups denied the right. Rights can only be understood in specific cultural contexts.¹²⁰ Where segments of the population are excluded or limited in important ways from contributing to or challenging the dominant culture, those who do control the culture remain the primary rights-holders, and through their cultural work explain what rights mean.

The Committee on Economic, Social, and Cultural Rights (“CESCR”) emphasizes in General Comment No. 17 that this right is quite distinct from national intellectual property rights, which do not protect indigenous peoples’ collective cultural property.¹²¹ The “Twilight” vampire series, for example, is loosely based on the Quileute creation story, in which “tribal members were transformed into humans from wolves (not vampire-fighting wolves).”¹²² The billion dollar “Twilight” juggernaut has exploited the Quileute, providing them no compensation. Under the Covenant, the tiny Quileute Nation, with roughly 700 members, would at least have a claim, and possibly some right, to compensation.¹²³

4. Monitoring (Articles 16–25)

Finally, Article 16 sets out the major enforcement mechanism for the Economic Covenant.¹²⁴ This is the requirement that Member States submit self-monitoring reports to the CESCR within two years of becoming a party to

¹¹⁷ See, e.g., Brent Staples, *New Jersey’s Governor and the Public Education Debate*, N. Y. TIMES, Oct. 25, 2010, at A26 (describing New Jersey’s failure to win a crucial \$400 million education grant from the Race to the Top program sponsored by the federal government).

¹¹⁸ ICESCR, *supra* note 2, art. 15.

¹¹⁹ *Id.*

¹²⁰ Elsa Stamatopoulou & Joanne Bauer, *Why Cultural Rights Now?*, The Ethics of Preserving Cultural and Natural Heritages Program Series, Address to the Human Rights Initiative at the Carnegie Council (Sept. 23, 2004), transcript available at <http://www.cceia.org/resources/transcripts/5006.html>.

¹²¹ Comm. On Econ., Soc. & Cultural Rights, General Comment No. 17, Nov. 7–25, 2005, ¶ 2, U.N. Doc. E/C.12/GC/17 (2005).

¹²² Editorial, Angela R. Riley, *Sucking the Quileute Dry*, N.Y. TIMES, Feb. 7, 2010, at A21, available at <http://nytimes.com/2010/02/08/opinion/08riley.html>.

¹²³ General Comment No. 17, *supra* note 121, ¶ 34.

¹²⁴ ICESCR, *supra* note 2, art. 16.

the Covenant and every five years thereafter.¹²⁵ These reports provide the CESCR with detailed information regarding the measures taken by the state and the progress achieved in the progressive realization of the specified rights. The CESCR reviews these reports during its two annual sessions. It then prepares a report on each state, including its recommendations and concerns. In 1990, the CESCR promulgated a revised set of detailed guidelines, intended to ensure that States Parties provide necessary information to assess their progress under the Covenant and to reduce redundant reporting requirements of the various treaty bodies.¹²⁶

While states, in general, tend to put a positive spin on their activities, the Guidelines and the CESCR press for factual data. For example, under the provisions regarding Article 7, the guidelines regarding the right to work request a description of the machinery for setting and adjusting the minimum wage, as well as a breakdown of the “average and minimum wages 10 years ago, 5 years ago and at present, set against the . . . cost of living.”¹²⁷ If the CESCR feels that the state has not been forthcoming or it is otherwise dissatisfied with the report, it will say so in its concluding observations. In addition, representatives of the reporting states may be questioned by the CESCR during sessions.¹²⁸ But if the CESCR remains dissatisfied, all it can do is note its dissatisfaction.¹²⁹

These reports are published and posted on the internet, however, and they are available to NGOs as well as to dissident groups or government factions.¹³⁰ Even if states resist the recommendations of the CESCR, they may be more responsive to public outcry or negative publicity, especially in democracies with active media.

5. Ratification

Articles 26-31 address the mechanics of signature, ratification, and accession.¹³¹ The Economic Covenant came into force on January 3, 1976,

¹²⁵ *Comm. on Econ., Social and Cultural Rights: Monitoring Econ., Social and Cultural Rights*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cescr/index.htm> (last visited Feb. 12, 2011).

¹²⁶ *Comm. on Econ., Soc. & Cultural Rights, Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted By States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Transmitted by Note of the Secretary-General*, U.N. Doc. E/C.12/1991/1 (June 17, 1991), available at http://shr.aaas.org/article15/State_Reports/Reporting%20Guidelines_Eng.pdf (last visited Oct. 31, 2010).

¹²⁷ *Id.*

¹²⁸ Philip Alston, *U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 370 (1990) [hereinafter Alston, *Entirely New Strategy*].

¹²⁹ *Id.*

¹³⁰ See, e.g., Deparle, *supra* note 39.

three months after the date of the deposit of the thirty-fifth instrument of ratification, in accordance with Article 27.¹³² Some States Parties have incorporated the Covenant into domestic law.¹³³ As with all human rights, enforcement in domestic courts is the gold standard. In monist states, incorporation is automatic.¹³⁴ In the Netherlands, for example, nationals can sue for violation of human rights in domestic courts.¹³⁵ Other states pass domestic legislation.¹³⁶ In both cases, the Covenant has the force of law.

Under Article 28, “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”¹³⁷ This simply confirms that the Covenant requires States Parties to assure a uniform federal minimum standard, with the option to exceed the uniform floor.

C. Why the United States Should Ratify the Economic Covenant

This Section explains why the United States should ratify the Covenant for utilitarian reasons, as well as reasons of justice and morality.¹³⁸ First, pragmatically, ratification will help the United States deal with the current economic crisis. It will help to avoid, or at least to cushion, future debacles. It could also improve U.S. global credibility. Second, the United States should ratify the Covenant as a matter of justice. The Economic Covenant assures a safety net for those most vulnerable to the vagaries of global capitalism. Third, the United States should ratify the Covenant because it is the right thing to do. A country is often judged by how it treats its most vulnerable members.

¹³¹ ICESCR, *supra* note 2, at Part VI, art. 48–53.

¹³² *Id.*

¹³³ See *X v. Major and Aldermen of Haarlem*, 10 NETH Y.B. INT’L L. 494 (1979) and *Non-Discrimination in Dutch Social Security Law*, INTERRIGHTS BULL., No. 3, 1988, at 38–39 (noted in Alston, *Entirely New Strategy*, *supra* note 128, at 376).

¹³⁴ HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1096 (3d ed. 2008)

¹³⁵ Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1998) (discussing “judicial internalization” in which domestic litigation prompts adoption of international norms).

¹³⁶ *Id.* (explaining that even in countries where domestic legislation is not legally required, as a practical matter, it may be necessary); Arthur Chaskalson, Former Chief Justice of the Supreme Court of S. Afr., Address at Columbia Law School (Nov. 3, 2004) (explaining that Courts are ill-equipped to enforce broad statements of economic rights).

¹³⁷ ICESCR, *supra* note 2, art. 50.

¹³⁸ As the Author has explained at greater length elsewhere, these are the major liberal responses to poverty in general. See Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 395–402 (2009).

Finally, the United States should ratify the Covenant because economic rights and civil/political rights are interdependent.¹³⁹ As President Obama has pointed out:

[I]t matters little if you have the right to sit at the front of the bus if you can't afford the bus fare; it matters little if you have the right to sit at the lunch counter if you can't afford the lunch. [S]o long as Americans are denied the decent wages, and good benefits, and fair treatment they deserve, the dream for which so many gave so much will remain out of reach; that to live up to our founding promise of equality for all, we have to make sure that opportunity is open to all Americans.¹⁴⁰

People in need cannot participate in democracy, and may well threaten it.¹⁴¹ As Franklin D. Roosevelt warned, "Necessitous men are not free men. People who are hungry and out of a job are the stuff of which dictatorships are made."¹⁴²

1. Ratification Is Practical

There are at least six related, but distinct, practical reasons for ratifying the Economic Covenant. First, as noted above, it would increase economic and political stability. European center-right parties have stolen the Left's thunder by supporting nationalized healthcare and generous welfare benefits.¹⁴³ Second, establishing an infrastructure to assure these rights would promote such stability in the future.¹⁴⁴ As Cass Sunstein has

¹³⁹ See Indivisibility and Interdependence of Econ., Soc., Cultural, Civil and Political Rights, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989).

¹⁴⁰ Senator Barack Obama, Remarks of Senator Barack Obama at the 99th Annual Convention of the NAACP (July 14, 2008), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=77650>.

¹⁴¹ Adam Przeworski, *The Poor and the Viability of Democracy*, <http://politics.as.nyu.edu/docs/IO/2800/duke.pdf> (last visited Feb. 12, 2011).

¹⁴² President Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), available at http://www.fdrlibrary.marist.edu/archives/address_text.html.

¹⁴³ Steven Erlanger, *Europe's Socialists Suffering Even in Bad Capitalist Times*, N.Y. TIMES, Sept. 29, 2009, at A1, available at <http://nytimes.com/2005/09/29/world/europe/29socialism.html>.

¹⁴⁴ As President Obama has explained:

In Washington, they call this the Ownership Society. But in our past there has been another term for it—Social Darwinism—every man or woman for him or herself. It's a tempting idea, because it doesn't require much thought or ingenuity. It allows us to say that those whose health care or tuition may rise faster than they can afford—tough luck. . . . But there is a problem. It won't work. It ignores our history Our economic [dominance has] depended on individual initiative. . . [and] belief in the free market; but it has also depended on our sense of mutual regard for each other . . . that we're all in it together and everybody's got a shot at opportunity. That's what's produced our unrivaled political stability.

explained, President Roosevelt linked Social Security to payroll taxes to make it impossible to revoke.¹⁴⁵ FDR understood, as have other leaders of industrialized democracies, that basic entitlements should be institutionalized as *rights* for the same reason.¹⁴⁶ Third, an educated, healthy, well-nourished population will enable the United States to better compete in a global economy.¹⁴⁷ Fourth, an educated population, as the Framers knew, is necessary to maintain a strong democracy.¹⁴⁸

Fifth, ratification would improve U.S. credibility in the rest of the world.¹⁴⁹ As Henkin notes:

[F]ailure to adhere to the [Economic] Covenant is seen the world over as rejection of [economic and social] rights as rights, as a rejection of rights dear to the developing world and as an affront to their hopes and aspirations. It is seen as a blind confusion of ideological communism (which almost all are now prepared to reject), with commitment to the welfare of individual human, beings to which virtually all states are now committed in principle and in fact.¹⁵⁰

Sixth, as the United States has learned the hard way with healthcare, an

Senator Barack Obama, Commencement Address at Knox College (Jun. 4, 2005), *available at* http://deptorg.Knox.edu/newsarchive/news_events/2005/obamaaddress.html. *But see* JOSEPH STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS AND THE SINKING OF THE GLOBAL ECONOMY* 58–76 (2009) (arguing that the Obama Administration has failed to recognize or address the underlying causes of the Great Recession, including deregulation).

¹⁴⁵ SUNSTEIN, *supra* note 6, at 63.

¹⁴⁶ *Id.* at 62–63.

¹⁴⁷ RICHARD L. SKOLNIK, *ESSENTIALS OF GLOBAL HEALTH* 138–39 (2008).

¹⁴⁸ *See* FREDERICK EBY & CHARLES FLINN ARROWOOD, *THE DEVELOPMENT OF MODERN EDUCATION: IN THEORY, ORGANIZATION, AND PRACTICE* 542 (1934) (describing the philosophy of education of the leaders of the American Revolution, including their shared belief “that education is the principal means by which governments can procure the welfare of the people”).

¹⁴⁹ This may well be increasingly difficult. *See, e.g.,* Louise Story et al., *Wall St. Helped to Mask Debts Shaking Europe*, N.Y. TIMES, Feb. 14, 2010, at A1, *available at* <http://www.nytimes.com/2010/02/14/business/global/14debt.html> (entitled *Wall St. Helped Mask Debt Fueling Europe's Crisis*) (describing how American banks, including Goldman Sachs and JP Morgan, arranged complex deals to allow the weaker European economies to overspend).

¹⁵⁰ Louis Henkin, *Preface*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* vii, xv (Louis Henkin & John Lawrence Hargrove eds., 1994). *See* Global Poverty Act, S. 2433, 110th Cong. (2008). (“It is the policy of the United States to promote the reduction of global poverty, the elimination of extreme global poverty, and the achievement of the Millennium Development Goal of reducing by one-half the proportion of people worldwide, between 1990 and 2015, who live on less than \$1 per day.”); *see also* Bono, *Rebranding America*, N.Y. TIMES, Oct. 18, 2009, at WK10, *available at* <http://www.nytimes.com/2009/10/18/opinion/19bono/html/> (quoting Obama’s speech at the UN: “We will support the Millennium Development Goals, and approach next year’s summit with a global plan to make them a reality. And the United States will set our sights on the eradication of extreme poverty in our time,” and concluding, “[T]hese 36 words, alongside the administration’s approach to . . . creating jobs and providing health care at home, are rebranding in action.”).

ounce of prevention is worth a pound of cure.¹⁵¹

2. Ratification Is the Right Thing to Do

Economic rights are a matter of justice because, as Thomas Paine explained, any legal system of property gives owners exclusive rights at the expense of those without property: “[The landed monopoly] has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them . . . and has thereby created a species of poverty and wretchedness that did not exist before.”¹⁵² Similarly, when a state decides that a 6 percent (or 10 percent) unemployment rate is acceptable, it must assure that those who are left unable to earn their living survive.¹⁵³ Many of those hurt most by the current crisis did nothing to deserve it. They were laid off from manufacturing jobs lost because others decided to outsource them; they lost their homes because others took absurd risks; they lost their savings because others continued to gamble. Indeed, many of those responsible have profited at the expense of those who were not.¹⁵⁴

Economic rights are not charity, but *rights* on par with equal protection¹⁵⁵ and freedom of thought, conscience, and religion.¹⁵⁶ These rights are a requisite of human dignity¹⁵⁷ and the entitlement of every child, woman, and man in the United States. Americans should settle for nothing less.

In addition, even if economic rights are the state’s obligation as a matter of justice, citizens still have a collective moral obligation as individuals to help those in need. As Immanuel Kant explained, everyone has an obligation to help the poor since the “maxim of self-interest contradicts itself when it is made universal law.”¹⁵⁸ That is, everyone would be free to deny aid to the needy, although everyone in need wants aid.¹⁵⁹ President Obama has

¹⁵¹ See, e.g., Steve Benen, *Republicans Sure Do Love Emergency Rooms*, WASH. MONTHLY, Oct. 2, 2009 (citing numerous Republicans for the proposition “that if you’re uninsured and get sick, there are public hospitals that will treat you.” He points out, “But it’s *extremely expensive* to treat patients this way, and it would be far cheaper, and more effective, to pay for preventative care so that people don’t have to wait for a medical emergency to seek treatment.”).

¹⁵² WOODS & LEWIS, *supra* note 19, at 61.

¹⁵³ See *supra* Part II.B.2.a.

¹⁵⁴ Story et al., *supra* note 149.

¹⁵⁵ Universal Declaration, *supra* note 4.

¹⁵⁶ *Id.* art. 18.

¹⁵⁷ *Id.* art. 1.

¹⁵⁸ IMMANUEL KANT, *The Doctrine of Virtue, in THE METAPHYSICS OF MORALS* (M.J. Gregor trans., 1964) (1797), reprinted in HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 291 (3d ed. 2008).

¹⁵⁹ *Id.*; but see Nicholas Wade, *Is “Do unto Others” Written into Our Genes?*, N.Y. TIMES, Sept. 18, 2007, at F1 (describing recent work by biologists linking human morality to “behaviors evolved by social animals to make societies work”).

explicitly recognized the moral obligation to assure certain economic rights: it is a “moral imperative” to provide healthcare to “every single American” and invest in early childhood education.¹⁶⁰

D. Obstacles to Ratification

There are two major obstacles to the Covenant’s ratification. First, some Americans,¹⁶¹ including the former Chair of the Foreign Relations Committee, the late Senator Jesse Helms, viewed it as “socialist.”¹⁶² Second, it has been argued that the cost would be prohibitive.¹⁶³

Some believe that the Economic Covenant is anathema to core American values, such as independence and the entrepreneurial spirit.¹⁶⁴ As the Administration’s prudent deferral of the Covenant suggests, some would argue that ratification would taint the domestic project and undermine the international effort to revitalize capitalism.¹⁶⁵

But ratification would do neither, except to the extent that the project and those efforts in fact run counter to the fundamental objectives of the Economic Covenant. That is, ratification of the Economic Covenant might indeed deter America from recovering from the Great Recession at the expense of the most vulnerable U.S. citizens.¹⁶⁶ Article 2, for example, would arguably preclude major cutbacks in the Food Stamp program.¹⁶⁷ But why would the United States want to cut back on such programs, especially when a recent study estimates that roughly six million Americans have no other income?¹⁶⁸

¹⁶⁰ Senator Barack Obama, Address at Messiah College 2008 Democratic Compassion Forum (Apr. 13, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0804/13/se.01.html>.

¹⁶¹ See, e.g., Alston, *Entirely New Strategy*, *supra* note 128, at 365. As Alston argued almost twenty years ago, ratification would require a real political shift: “Only by facing that reality, and by taking it as a starting point for an open and animated public debate, is there any real prospect of securing the broad-based support and momentum without which the Senate is unlikely ever to act.” *Id.* at 366.

¹⁶² *Id.* at 366.

¹⁶³ *Id.* at 371–72.

¹⁶⁴ *Id.* See, e.g., Dinesh D’Souza, *How Obama Thinks*, FORBES, Sept. 27, 2010 (arguing that Obama is working “to wring the neocolonialism out of America”).

¹⁶⁵ See generally Curtis Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307 (2007) (arguing that such matters should be left to domestic politics).

¹⁶⁶ See *supra* Part II.B.2. If the Covenant further deters the United States from imposing the costs of that recovery on the world’s most vulnerable, that would be acceptable. It should be noted, however, that the Covenant does not impose extraterritorial obligations on individual state parties.

¹⁶⁷ See Luo, *Out of Work*, *supra* note 68; Norris, *Jobs News*, *supra* note 68; Norris, *U.S. Jobless Rate*, *supra* note 68. See, e.g., Leonhardt, *Unemployed*, *supra* note 68.

¹⁶⁸ See Jason Deparle & Robert M. Gebeloff, *Living on Nothing but Food Stamps*, N.Y. TIMES, Jan. 2, 2010, at A1, available at <http://www.nytimes.com/2010/01/03/us/03foodstamps.html>.

Second, there is the question of cost. While it is beyond the scope of this Article to estimate the cost of implementing the Covenant, or even to suggest a methodology for doing so, a few general observations may be useful. As noted above,¹⁶⁹ the United States is already providing some of the benefits and services required under the Covenant, but it is doing so in a haphazard way.¹⁷⁰ The Covenant would provide an organizing framework. As to cost, the United States is one of the wealthiest countries in the world.¹⁷¹ All of the other industrialized democracies have ratified the Covenant.¹⁷² Most take better care of their people. The United States could, too.

This would not require a radical redistribution of wealth. Rather, simply increasing the tax on the super-rich¹⁷³—the \$20 million a year households, people who, as President Obama put it, “make more in 10 minutes than a worker makes in 10 months,”¹⁷⁴—would go a long way toward relieving the misery of those on the bottom. Reducing the gap between them and ordinary mortals would not affect the middle class. Norway, for example, manages to take care of its people without impoverishing the middle class, as suggested by the recent exchange between journalist Deborah Solomon and Thorbjorn Jagland, Chair of the Nobel Peace Prize Committee:

DS: Here in the United States, “socialism” is one of those words bandied about by Obama’s critics. When people hear “socialist,” they worry you’re going to take away their cars and make them ride bicycles.

¹⁶⁹ See *supra* Part II.B.

¹⁷⁰ Deparle, *For Recession Victims*, *supra* note 39.

¹⁷¹ For discussion of this issue, see *supra* note 93.

¹⁷² Status of the International Covenant on Economic, Social, and Cultural Rights (Jan. 2, 2010), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

¹⁷³ Eric Konisberg, *A New Class War: The Haves vs. the Have Mores*, N.Y. TIMES, Nov. 19, 2006, <http://www.nytimes.com/2006/11/19/weekinreview/19konisberg.html> (explaining that the “superrich” . . . are getting richer almost twice as fast as the rich—the top one percent with an average income of \$940,000). See Jenny Anderson & Julie Craswell, *Top Hedge Fund Managers Earn over \$240 Million*, N.Y. TIMES, Apr. 24, 2007, <http://www.nytimes.com/2007/04/24/business/24hedge.html> (noting that the top twenty-five hedge fund managers earned a combined total of \$14 billion, “enough to pay New York City’s 80,000 public school teachers for nearly three years”). See also *Annual Rankings of Top Earning Hedge Fund Managers*, ALPHA MAG., Apr. 2007 (noting that the top 25 managers earned more than \$14 billion, equivalent to the GDP of Jordan or Uruguay). The average income in the U.S. for the top 400 households was \$345 million. *Top-Earning U.S. Households Averaged \$345 Million in ‘07*, N.Y. TIMES, Feb. 17, 2010, at B11, available at <http://www.nytimes.com/2010/02/18/business/economy/18irs.html>.

¹⁷⁴ Jeff Zeleny, *Obama Proposes Tax Cut for Middle Class and Retirees*, N.Y. TIMES, Sept. 19, 2007, at A22, available at <http://www.nytimes.com/2007/09/19/us/politics/19obama.html>.

TJ: Look at the welfare state in Norway that the Labor Party Social Democrats built. Everyone has better cars than most of the Americans.¹⁷⁵

While some of the super-rich have certainly seen their incomes plunge during the global economic crisis,¹⁷⁶ others continue to profit from it.¹⁷⁷ Efforts to reverse the increase in economic inequality that has occurred over the last thirty years have already begun,¹⁷⁸ but more can be done. Imposing a windfall tax on bankers' bonuses, for example, would not only produce revenue, but "realign the fat cats' boundless greed with the public interest."¹⁷⁹ The British government expects to collect almost \$1 billion from such a tax, and the United States could collect substantially more since its financial sector is so much larger.¹⁸⁰ Like the British public, the American public seems to have had enough of financial wizards who profited at the expense of

¹⁷⁵ Deborah Solomon, *Peace Be with You*, N.Y. TIMES, Oct. 23, 2009, at MM14, available at <http://www.nytimes.com/2009/10/25/magazine/25fob-q4-t.html>. One should note, however, that tax systems and social programming alone cannot be credited for economic differences between countries. For a discussion on the shortcomings of U.S. social programs, see David Leonhardt, *A Market Punishing to Mothers*, N.Y. TIMES, Aug. 4, 2010, at B1 (noting that the United States is the only developed country that does not assure paid parental leave); Sylvia Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998) ("More U.S. women confront unintended pregnancy than women in nearly every other developed country. One reason is that most employment-based health insurance programs in the United States exclude payment for contraceptives from otherwise comprehensive coverage for prescription drugs and medical services."); see also JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 9 (2003) ("In all of our eleven comparison countries, fewer parents work non-standard hours, and families headed by employed parents are less likely to be poor. Children in many of these countries are also doing better on dimensions ranging from infant birth weight to adolescent childbearing.").

¹⁷⁶ See, e.g., Vikas Bajaj, *Household Wealth Falls by Trillions*, N.Y. TIMES, Mar. 13, 2009, at B1, B4, available at <http://www.nytimes.com/2009/03/13/business/economy/13wealth.html> (noting that while American households lost \$5.1 trillion in the last quarter of 2008, "[t]he loss [was] concentrated among the most affluent").

¹⁷⁷ See, e.g., Eric Dash, *JPMorgan Chase Earns \$11.7 Billion*, N.Y. TIMES, Jan. 15, 2010, at B1, available at <http://www.nytimes.com/2010/01/16/business/16morgan.html>. The article notes:

In a remarkable rebound from the depths of the financial crisis, JPMorgan earned . . . more than double its profit in 2008 Workers in JP Morgan's investment bank, on average, earned roughly \$380,000 each. Top producers, however, expect to collect multimillion-dollar paychecks Over the next week or so, Bank of America, Citigroup, Goldman Sachs and Morgan Stanley are expected to report similar surges in pay

Id.

¹⁷⁸ David Leonhardt, *A Bold Plan Sweeps Away Reagan Ideas*, N.Y. TIMES, Feb. 26, 2009, at A1, available at <http://www.nytimes.com/2009/02/27/business/economy/27policy.html> (describing Obama's ten-year budget, which "[m]ore than anything else . . . seek[s] to reverse the rapid increase in economic inequality over the last 30 years" by increasing taxes on the wealthiest).

¹⁷⁹ Op-Ed, *Taming the Fat Cats*, N.Y. TIMES, Dec. 20, 2009, at WK6, available at <http://www.nytimes.com/2009/12/20/opinion/20sun1.html>.

¹⁸⁰ *Id.*

average consumers.¹⁸¹ As economist James Surowiecki has recently observed, “[T]he top 0.1 percent of earners . . . earn as much as the bottom hundred and twenty million people.”¹⁸² Under the current U.S. tax system, however, the top bracket is set at \$375,000, with a tax rate of 35 percent.¹⁸³ The second highest bracket, starting at \$172,000, pays 33 percent.¹⁸⁴ “This means,” explains Surowiecki, “that someone making two hundred thousand dollars a year and someone making two hundred million dollars a year pay at similar tax rates.”¹⁸⁵

III. THE ECONOMIC COVENANT SHOULD BE RATIFIED AS A CONGRESSIONAL-EXECUTIVE AGREEMENT

A. *The United States’ History Regarding Human Rights*

The United States has a long and shameful history of shirking international human rights obligations. Historically, those who feared that the federal government would use international law to limit States’ rights have opposed ratification of international human rights treaties.¹⁸⁶ The United States was eager to declare its support for international human rights after World War II¹⁸⁷ and recognized the need for *other* states to guarantee them.¹⁸⁸ But the United States was less eager to invite scrutiny of its own practices, including racial segregation in the American South.¹⁸⁹

¹⁸¹ See, e.g., Op-Ed, *Betting Against All of Us*, N.Y. TIMES, Dec. 29, 2009 at A30, available at <http://www.nytimes.com/2009/12/29/opinion/29tue2.html> (“Goldman Sachs and other financial firms created complicated mortgage-related investments, sold them to clients and then placed [their] bets that those investments would decline in value [enabling them] to profit handsomely as [their] clients tanked . . . [and] spreading the losses to pretty much everyone.”). It has been suggested that certain financial transactions, including investments in hedge funds should also be taxed. John Ydstie, *Senate Seeks to Close Hedge Fund Tax Loophole*, NPR (Jan. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=127728787>.

¹⁸² James Surowiecki, *Soak the Very, Very Rich*, NEW YORKER, Aug. 16, 2010, at 33, available at http://www.newyorker.com/talk/financial/2010/08/16/100816ta_talk_surowiecki.

¹⁸³ *Id.*; see also *U.S. Federal Income Tax History, 1913–2010*, THE TAX FOUNDATION, http://www.taxfoundation.org/files/fed_individual_rate_history-20100923.pdf (last visited Oct. 31, 2010).

¹⁸⁴ Surowiecki, *supra* note 182, at 33.

¹⁸⁵ *Id.*

¹⁸⁶ For an example of this perspective, see James A.R. Nafziger, *State Collaboration in United States Ratification of Human Rights Treaties*, 3 ILSA J. INT’L & COMP. L. 621 (1997).

¹⁸⁷ DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 121 (1991) (“[F]rom 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.”).

¹⁸⁸ Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2D 365, 366 (1998).

¹⁸⁹ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988). As Mary Dudziak has explained, “U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.”

While the executive branch was concerned about the international reaction to domestic practices, the Senate was more concerned about the domestic reaction to international law-making.¹⁹⁰ In the debate in the U.S. Senate Foreign Relations Subcommittee on the Genocide Convention, Senator Rix stated, "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?"¹⁹¹ "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."¹⁹²

Senator Bricker of Ohio proposed an amendment to the U.S. Constitution that would require an Act of Congress before any human rights treaty could become law in the United States.¹⁹³ The Eisenhower Administration was able to defeat the Bricker Amendment, but only by promising not to ratify any human rights treaties.¹⁹⁴ It was not until 1992, after the end of the Cold War—and any possible claim that ratification might give the Soviets an advantage—that the United States finally ratified the Civil Covenant.¹⁹⁵ Even then, it did so with reservations, understandings, and declarations

Id. This is not the only reason. The United States has historically been hostile to economic rights. In part, this hostility can be attributed to the rhetoric of opportunity and the rhetoric of the "American Dream." Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast,"* 33 VA. J. INT'L L. 433, 438 (1993).

¹⁹⁰ Vicki Goldberg, *Photography View: Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, available at <http://www.nytimes.com/1994/07/17/arts/photography-view-remembering-the-faces-in-the-civil-rights-struggle.html?scp=4&sq=vicki+goldberg&st=nyt>. ("The Kennedy administration was extremely worried about damage to this nation's image abroad. Well it might have been: the Soviet Union broadcast 1,420 anti-American commentaries linked to the troubles in Birmingham in 1963.") The Third World was appalled by media coverage of domestic civil rights struggles. "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." *Id.*

¹⁹¹ *The Genocide Convention, Hearings Before a Subcommittee of the Senate Committee on Foreign Relations*, 81st Cong., 2d Sess. 206, 208 (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 UN Charter in state and federal U.S. 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 (1984).

¹⁹² Barbara Stark, *Rhetoric, Religion and Human Rights: "Save the Children!"*, in WHAT IS RIGHT FOR CHILDREN? 49 (Martha Fineman & Karen Worthington eds., 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612852.

¹⁹³ S.J. Res. 1, 83d Cong., 99 Cong. Rec. 6777 (1953).

¹⁹⁴ LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 964-65 (1973). See, e.g., A. E. Sutherland, Jr., *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952); Symposium, *Should the Constitution Be Amended to Limit the Treaty-Making Power?*, 26 S. CAL. L. REV. 347 (1953). 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 (1959); Gertrude C.K. Leighton & Myres S. McDougal, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60 (1949).

¹⁹⁵ See ICESCR, *supra* note 2.

(“RUDs”) that ensure that the Civil Covenant cannot be relied on in U.S. courts and that it adds nothing to rights already assured under existing domestic law.¹⁹⁶ As Harold Koh observed, the United States remains wary: “In the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.”¹⁹⁷

This arguably leaves the United States in violation of international law since the failure to implement a treaty on the domestic level does not relieve a state of its obligations under international law.¹⁹⁸ The Obama Administration has promised a new approach. Ratification of the Economic Covenant as a congressional-executive treaty would be a good start.

B. Why a Congressional-Executive Agreement?

As Professor Oona Hathaway points out, congressional-executive treaties are generally recognized as interchangeable with Article II treaties among scholars, as well as lawmakers.¹⁹⁹ Congressional-executive agreements avoid the political impasse often triggered by Article II’s supermajority

¹⁹⁶ See, e.g., Louis Henkin, *Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995). As Damrosch noted with respect to the Torture Convention:

. . . U.S. law taken as a whole (that is, considering federal and state laws in their totality) already complied with the Torture Convention, and only minimal gaps were identified to be filled by implementing legislation. If the Administration is correct about the substantial conformity of U.S. law to the Convention’s requirements, then there is no reason to erect an artificial barrier to the application of the Convention as a complementary but fully compatible source of law. On the other hand, to the extent that the Convention may provide greater protection than either the Constitution or statutory law . . . it is all the more important to allow the Convention to operate of its own force.

Lori Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 522 (1991). See also Catherine Redgell, *U.S. Reservations to Human Rights Treaties: All for One and None for All?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392, 393 (Michael Byers & Georg Nolte eds., 2003).

¹⁹⁷ Harold Koh, *The Future of Lou Henkin’s Human Rights Movement*, 38 COLUM. HUM. RTS. L. REV. 487, 490 (2007). Scholars have long urged the United States to participate in international human rights. See, e.g., MALVINA HALBERSTAM & ELIZABETH DEFEIS, *WOMEN’S LEGAL RIGHTS: INTERNATIONAL COVENANTS—AN ALTERNATIVE TO ERA?* 50–63 (1987); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66–72 (1978).

¹⁹⁸ Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331. See Jordan Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988).

¹⁹⁹ Oona Hathaway, *Treaties End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1247 (2008) (noting that the North American Free Trade Agreement (“NAFTA”) and the treaties establishing the WTO and the Bretton Woods institutions were all congressional-executive treaties).

requirement.²⁰⁰ They also have the advantage of what Hathaway calls “one-stop shopping”;²⁰¹ that is, they are presumed to be self-executing under the Supremacy Clause. Thus, these agreements avoid debacles like the decision in *Medallin v. Texas*,²⁰² in which the Supreme Court held that Texas law trumped U.S. international obligations because the treaties on which those obligations were based were not self-executing.²⁰³

Additionally, as Hathaway demonstrates, congressional-executive agreements are more “democratically legitimate.”²⁰⁴ They involve more elected representatives.²⁰⁵ In fact, most constitutional nation-states only require a simple majority to enter into an international agreement.²⁰⁶ Finally, as Hathaway concludes:

The informal reform strategy is both legally unproblematic and politically feasible. It is, as a mechanical matter, breathtakingly simple All that is necessary to end the use of the Article II process is for the President to cease proposing agreements as Article II treaties and instead to propose them as congressional-executive agreements.²⁰⁷

In addition to showing the world and its own people that the United States does, in fact, value human rights, ratification on these terms would serve as an example to recalcitrant states. An agreement would also establish a federal floor for economic rights. Finally, as set out in the recent ABA/ASIL Task Force on Treaties Report (“Task Force Report”), the United States is ill-served by ambiguous treaty obligations.²⁰⁸

C. A National Floor for Economic Rights

It is especially important that the Covenant be ratified as a congressional-executive agreement, because economic rights are what the United States lacks as a nation and what Americans hardly have words for, just as those in other states hardly have words for the civil liberties that

²⁰⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁰¹ Hathaway, *supra* note 199, at 1322.

²⁰² *Medellín v. Texas*, 552 U.S. 491 (2008).

²⁰³ *Id.*; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (explaining why the presumption that treaties are self-executing endures after *Medellín*).

²⁰⁴ Hathaway, *supra* note 199, at 1337.

²⁰⁵ *Id.* at 1271.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1352.

²⁰⁸ ABA/ASIL JOINT TASK FORCE ON TREATIES IN U.S. LAW, REPORT 10–13 (2009), available at <http://www.asil.org/files/TreatiesTaskForceReport.pdf>.

many take for granted here.²⁰⁹ Economic rights are the real contribution of international human rights law to U.S. domestic jurisprudence.²¹⁰ Americans generally think of human rights law as protection for oppressed people in distant places—people denied their civil and political rights.²¹¹ The Economic Covenant protects the oppressed in the United States, including those denied basic economic rights taken for granted in every other industrialized democracy.²¹²

²⁰⁹ Many newly emerging states have sought guidance from U.S. constitutional law and U.S. constitutional lawyers in drafting their own constitutions. See, e.g., AMERICAN CONSTITUTIONALISM ABROAD (George A. Billias ed., 1990); William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1 (1991); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 NOVA L. REV. 483 (1991). But see Editorial Board, *Preface to Approaching Democracy: A New Legal Order for Eastern Europe*, 58 U. CHI. L. REV. 439, 440 (1991) (“Eastern Europe must consult many models, not just the American, as it goes about the business of constitution-making.”).

²¹⁰ As Koh observes:

Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is “downloaded” from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is “uploaded, then downloaded”: for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or “horizontally transplanted” from one national system to another: for example, the “unclean hands” doctrine, which migrated from the British law of equity to many other legal systems.

Harold Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 746 (2006).

²¹¹ See, e.g., David Rieff, *Human Rights Watch Looks Within*, NEW YORKER, Dec. 13, 1993, at 53.

²¹² It is settled that economic rights are not protected under any provision in the U.S. Constitution. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (no right to sleep in public places); *Harris v. McRae*, 448 U.S. 297 (1980) (no right to Medicaid funding for abortion); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (no right to housing). Several imminent scholars have argued that the Constitution *should* assure these rights. See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); 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”); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) (“[M]inimum protections’ for the necessities of life . . . are preconditions for civic republican citizenship.”). See also Lui Goodwin, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008). Some economic rights are assured under state constitutions. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy*, 44 HASTINGS L.J. 79 (1992).

Economic rights are not a panacea,²¹³ but they are a necessary baseline. Without an irrevocable national commitment, emerging norms of economic rights are likely to be nipped in the bud every time there is an election. No state or city wants to be a "welfare magnet"²¹⁴ and no state or city wants to alienate its own tax base.

It has been argued that the federal government should defer to the states with respect to some of the rights addressed in the Covenant. Existing federal programs, such as Social Security, preempt such arguments in many areas.²¹⁵ But in others, states' rights claims persist. Education, for example, has long been left to the states. The results, however, have been dismal, as explained above.²¹⁶ While some states have recognized a right to education under their own state constitutions, they have found it difficult to implement that right.²¹⁷ As Damrosch forcefully reiterates:

[T]his view ignores the definitive repudiation of theories of limitations on the treaty power emanating from inchoate claims of states' rights. By virtue of both the authoritative decision of the Supreme Court in *Missouri v. Holland* and the rejection of Senator Bricker's attempts to reverse that decision by means of constitutional amendment, U.S. constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations.²¹⁸

²¹³ As Professor Alston has pointed out, economic rights provide few solutions, instead leaving crucial policy questions wide open. See Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 167-81 (Louis Henkin & John Lawrence Hargrove eds., 1994).

²¹⁴ PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD 17-20 (1990) (discussing state welfare systems and the establishment of a national welfare standard); Richard B. Stewart, *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).

²¹⁵ ICESCR, *supra* note 2.

²¹⁶ See *infra* Part II.B.3.e.

²¹⁷ See, e.g., *Campaign for Fiscal Equity v. New York*, 861 N.E.2d 50, 52 (N.Y. 2006):

More than a decade ago, we held that the education article of the New York State Constitution requires the State 'to offer all children the opportunity of a sound basic education . . . Mindful of the fundamental value of education in our democratic society, we agreed with plaintiffs' interpretation of the education article. The state must ensure that New York's public schools are able to teach 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.' (citations omitted).

²¹⁸ Damrosch, *supra* note 12, at 530.

While some still argue for states' rights, they remain a small, if increasingly vocal, minority.²¹⁹

Even if it is conceded that a national obligation should be recognized, opponents may claim that this does not explain why that obligation should be undertaken through a treaty rather than a federal statute. It may be argued that such federal legislation is particularly appropriate where, as here, the underlying rights are not justiciable. Rather, they require a range of measures, including coordination of existing agencies and, above all, expenditures that can only be implemented by the legislative branch.

There are two compelling reasons for undertaking this obligation by means of this treaty.²²⁰ The first relates to the role of the United States in the international system; that is its role vis-à-vis other sovereign states.²²¹ The second relates to the role of the United States at home; that is, its role vis-à-vis its own people, especially those still reeling from the Great Recession.²²²

First, as Justice Holmes explained in *Missouri v. Holland*, "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could."²²³ Just as desegregation was a Cold War imperative, ratification of the Economic Covenant is imperative now. Then, people of color and people of conscience throughout the world were appalled by racial discrimination, including still-legal segregation in the American South. Now, the world's have-nots increasingly blame the United States for the global economic crisis²²⁴ and wonder whether it will aid those who are not "too big to

²¹⁹ Monica Davey, *Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims*, N.Y. TIMES, Sept. 29, 2009, at A25, available at <http://www.nytimes.com/2009/09/29/us/29states.html> ("In more than a dozen statehouses across the country, a small but growing group of lawmakers is pressing for state constitutional amendments that would outlaw . . . the requirement that nearly everyone buy insurance or pay a penalty."). See also Kirk Johnson, *States Rights Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1, available at <http://www.nytimes.com/2010/03/17/us/17states.html> (describing growing interest in states' rights).

²²⁰ Jim Kelly, *U.S. Citizens Are Plugged into the Matrix of Human Rights Governance*, GLOBAL GOVERNANCE WATCH (Mar. 24, 2010), http://www.globalgovernancewatch.org/spotlight_on_sovereignty/us-citizens-are-plugged-into-the-matrix-of-human-rights-governance.

²²¹ *Id.*

²²² *Id.*

²²³ *Missouri v. Holland*, 252 U.S. 416, 433 (1920). An Act of Congress assuring economic rights has never been politically feasible. See, e.g., Barbara Stark, *What's Left?* (manuscript on file with author, describing evisceration of the American Left during the McCarthy years). As noted above, many eminent scholars have argued that these rights should be found in the U.S. Constitution. For a thoughtful analysis of the Supreme Court's resistance to economic rights, see Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, in ECON. RTS. 141, 151–70 (Ellen Frankel Paul et al. eds., 1992).

²²⁴ See, e.g., Story et al., *supra* note 149.

fail.”²²⁵ There is a growing perception in Central and South America, Europe, and Asia that the United States is more concerned about capital than people.²²⁶

Just as the United States’ failure to extend human rights to its own people was seen as a callous lack of commitment to human rights during the Cold War, its apparent willingness to tolerate soaring unemployment, foreclosures, and food insecurity among its own people is perceived as a callous indifference to the poor throughout the world.²²⁷ Now, like then, it is a matter of the “sharpest exigency”²²⁸ for the United States to show that it is committed to human rights by finally ratifying the other half of the International Bill of Rights.

Second, as the ongoing debacle of healthcare reform demonstrates, the United States desperately needs a clear, broad commitment to basic economic rights before the “sausage-making” that is the legislative process begins.²²⁹ The absence of such a commitment enabled politicians to pass the Stupak-Pitts Amendment to the Healthcare Reform Bill, for example, even though that amendment meant that millions of women would lose insurance coverage that they already had.²³⁰ In order to get Representative Stupak’s vote for the bill, President Obama signed Executive Order 13535, which makes it clear that federal funds are not to be used for abortion except in cases of rape or incest.²³¹ Because this represents a reduction in existing coverage, it is backsliding, which would arguably be prohibited under the Covenant.²³²

²²⁵ Peter S. Goodman, *Too Big to Fail?*, N.Y. TIMES, July 20, 2008, at WK1, available at <http://www.nytimes.com/2008/07/20/weekinreview/20goodman.html>.

²²⁶ See, e.g., Neil MacFarquhar, *At U.N., a Sandinista’s Plan for Recovery*, N.Y. TIMES, May 25, 2009, at A8, available at <http://www.nytimes.com/2009/05/25/world/25nations.html> (describing efforts of Miguel d’Escoto Brockman, President of the U.N. General Assembly, to reform global economic institutions to better reflect the interests of the poorest states).

²²⁷ See, e.g., China Mieville, *The Commodity Form Theory of International Law*, in INTERNATIONAL LAW ON THE LEFT 92, 132 (Susan Marks ed., 2008).

²²⁸ *Missouri v. Holland*, 252 U.S. 416.

²²⁹ “Otto von Bismark said, ‘Laws are like sausages. It is better not to see them being made.’” 150 Cong. Rec. H11,231 (June 2, 2004) (statement of Rep. Louise Slaughter).

²³⁰ 155 Cong. Rec. H12,924–25 (Nov. 7, 2009) (statement of Rep. Janice Schakowsky, Illinois). See also Andrea Seabrook, *Breaking Down Abortion Language in Health Bill*, NPR (Nov. 9, 2009), www.npr.org/templates/story/story.php?storyId=120251035.

²³¹ *Id.*

²³² The U.S. Supreme Court’s decisions refusing to fund abortions for indigent women would arguably violate the Covenant. See *Maher v. Roe*, 432 U.S. 464 (1977) (holding that neither the state nor the federal government must pay for a poor woman’s abortion); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (holding that “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency,” which would arguably violate the Covenant).

D. Economic Rights Are Justiciable

The Economic Covenant could be enacted as binding law in its present form, as it has been in monist states like the Netherlands.²³³ Alternatively, some provisions could be enacted as binding law while others are sent to a congressional committee charged with drafting legislation, as was recently done with the Hague Convention on Inter-country Adoption.²³⁴ This would be the President's political choice. As a matter of law, however, the Covenant *could* be enacted in its present form. As Vázquez explains, "Legislative implementation is needed either because the treaty requires something that cannot be accomplished by treaty or because the treaty imposes an obligation that requires judgments that, in our constitutional system, are not for the courts to make."²³⁵ Neither is necessarily the case here. First, there are many contexts in which economic rights are plainly justiciable. If such rights are assured in a discriminatory manner, for example, courts can and have ordered relief.²³⁶ The CESCR has identified several rights that require immediate implementation and are thus capable of judicial determination. These rights include, for example, Article 3's assurance of equal rights for men and women and Article 7's assurance of equal pay for work of equal value.²³⁷

Second, even where the issue is not discrimination, a judicial determination that the state is or is not meeting its obligations certainly seems within a court's competence. If the state is not meeting its obligations, the appropriate legislature or regulatory agency can determine exactly how it should do so. Matthew Craven notes that while it was argued during the drafting of the Covenant that "it would be impossible for a supervisory body to decide whether or not a State is acting in conformity with its obligations under the Covenant,"²³⁸ this view has largely been rejected.²³⁹ Craven concludes, accordingly, that "there is, in fact, a justiciable core to every human right,"²⁴⁰ a conclusion that the recent entry into force of the Optional Protocol confirms.

²³³ *Status of Ratification, Reservations, and Declarations*, UNITED NATIONS TREATY COLLECTION, Chap. IV, 3 (Oct. 6, 2010), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en.

²³⁴ *Status Table*, HAGUE CONF. ON PRIVATE INT'L LAW (Aug. 17, 2010), http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

²³⁵ Vázquez, *Treaties as Law*, *supra* note 203, at 631–32.

²³⁶ See, e.g., Symposium, *Brown v. Board of Education After Forty Years: Confronting the Promise*, 36 WM. & MARY L. REV. 337 (1995) (discussing arguments on the continuing importance of education to the black community and the continuing obstacles to its realization).

²³⁷ CRAVEN, *supra* note 38, at 101.

²³⁸ *Id.*

²³⁹ *Id.* at 102.

²⁴⁰ *Id.* at 102. But see *Treaties As Law*, *supra* note 203, at 603 ("There may be questions about whether the provision is sufficiently determinate to be amenable to judicial enforcement.

IV. CONCLUSION

This Article has introduced the Economic Covenant and described its origins. It has explained why the United States remains the only industrialized democracy that has not ratified the Covenant. It also shows why the United States should do so now, when far too many Americans have lost their jobs, their savings, their homes, and their hope.

Ratification of the Economic Covenant is hardly a silver bullet. Rather, throwing down the gauntlet by ratifying the Covenant might well precipitate a national struggle over resources and values that would make the uproar over healthcare reform look like a tea party.²⁴¹ But it would be a beginning, a crucial first step toward assuring the people, *all* the people, of the richest country in the world freedom from want, at last.

Answering these questions in cases involving statutory or constitutional provisions is often difficult.”).

²⁴¹ Think of the gentle tinkle of silver spoons against fine china, rather than the braying of outraged conservatives sporting tri-cornered hats and Sarah Palin buttons. See Jill Lepore, *Tea and Sympathy*, NEW YORKER, May 3, 2010, at 26 (describing the multiple appropriations of American history).