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Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast"

BARBARA STARK*

At six o'clock we were waiting for coffee,
waiting for coffee and the charitable crumb
that was going to be served from a certain
balcony,
—like kings of old, or like a miracle.
It was still dark. One foot of the sun
steadied itself on a long ripple in the river.

The first ferry of the day had just crossed the
river.
It was so cold we hoped that the coffee
would be very hot, seeing that the sun
was not going to warm us; and that the crumb
would be a loaf each, buttered, by a miracle.
At seven a man stepped out on the balcony.

He stood for a minute alone on the balcony
looking over our heads toward the river.
A servant handed him the makings of a miracle,
consisting of one lone cup of coffee
and one roll, which he proceeded to crumb,
his head, so to speak, in the clouds—
along with the sun.

Elizabeth Bishop, "A Miracle for Breakfast"¹

Was the man crazy? What under the sun
was he trying to do, up there on his balcony!
Each man received one rather hard crumb,
which some flicked scornfully into the river,
and, in a cup, one drop of the coffee.
Some of us stood around, waiting for the miracle.

I can tell what I saw next; it was not a miracle.
A beautiful villa stood in the sun
and from its doors came the smell of hot coffee.
In front, a baroque white plaster balcony
added by birds, who nest along the river,
—I saw it with one eye close to the crumb—

and galleries and marble chambers. My crumb
my mansion, made for me a miracle,
through ages, by insects, birds, and the river
working the stone. Every day, in the sun,
at breakfast time I sit on my balcony
with my feet up, and drink gallons of coffee.

We licked up the crumb and swallowed the coffee.
A window across the river caught the sun
as if the miracle were working, on the wrong
balcony.

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1. Elizabeth Bishop, *The Complete Poems: 1927-1979*, at 18 (1991).

I. INTRODUCTION

Rhetoric is the art of persuasion. According to James Boyd White, it is "the central art by which community and culture are established, maintained, and transformed."² In this essay, I consider how the rhetoric of "opportunity" has shaped American³ ideas of economic rights⁴ and how the postmodern⁵ fragmentation of that rhetoric has

2. James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684 (1985) [hereinafter White, *Law as Rhetoric*]. White cites Gorgias for a definition of rhetoric "as the art of persuading the people about matters of justice and injustice in the public places of the state." Id. "Rhetoric" has also been described as the postmodern reaction to the modern emphasis on "semantics." David Harvey, *The Condition of Postmodernity* 43 (1989) (citing Hassan, *The Culture of Postmodernism*, in *Theory, Culture and Society* 123-24 (1985) in a table of schematic differences between modernism and postmodernism, and noting that while it is "dangerous . . . to depict complex relations as simple polarizations . . . [this] tabular schema provides a useful starting point.").

3. As Louis Henkin has explained, "'American' is our common usurpation for the inhabitants of the United States." Louis Henkin, *The Age of Rights* x (1990) [hereinafter Henkin, *The Age of Rights*].

4. For purposes of this paper, economic rights may be understood as what President Franklin D. Roosevelt called "freedom from want." Eighth Annual Message to Congress (Jan. 6, 1941), in 3 *The State of the Union Messages of The Presidents, 1790-1966*, at 2855, 2860 (Fred L. Israel ed., 1966) [hereinafter *State of the Union Messages*]. In his 1944 State of the Union Message, Roosevelt elaborated on its substance:

[T]he right to a useful and remunerative job . . . the right to earn enough to provide adequate food and clothing and recreation . . . the right of every family to a decent home . . . the right to adequate medical care . . . the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education.

Eleventh Annual Message to Congress (Jan. 11, 1944), in *State of the Union Messages*, supra, at 2875, 2881. The terms "economic rights," "benefits" and "social welfare" will be used interchangeably to refer broadly to rights that arise out of a recognized affirmative obligation on the part of the state to provide or assure benefits, such as health care. The lack of consistent nomenclature reflects the use by states and commentators of a variety of terms to refer to the same concept, as well as the use of the same term to refer to somewhat different concepts.

5. "Modernity" loosely refers to the Enlightenment project, a belief in reason, Kant, the values of the French Revolution, science and human perfectibility. See Williams, *infra* note 15. "Modernism was about trading in tradition for the future. . . . Criticism was modernism's instrument in philosophy, revolution its instrument in politics and the avant-garde in art. Progress was the modern faith that would see us through successive stages of development to Utopia at the end of history." Nathan Gardels & Marilyn B. Snell, *Debris of the Avant-Garde: The Imagination After Modernity*, *New Persp. Q.*, Spring 1992, at 2. "The postmodernist critique of modernity is wideranging; it focuses on such diverse elements as the modern sense of the self and subjectivity, the idea of history as linear and evolutionary, and . . . the idea of a transcendent reason." *Feminism/Postmodernism* 3 (Linda J. Nicholson ed., 1990); accord Introduction to *Universal Abandon? The Politics of Postmodernism* vii, x (Andrew Ross ed., 1988) (noting "sedimented meanings" acquired by postmodernism in its "migration from a specific set of cultural distinctions proposed by literary critics in the 50s to its current significance as the subject of a debate about global questions.") [hereinafter *Universal Abandon?*]. Cf. Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*, *New Left Rev.*, July-Aug. 1984, at 59, 61 ("[E]very position on postmodernism in culture—whether apologia or stigmatization—is also at one and the same time, and

transformed them. Elizabeth Bishop's poem provides the metaphors for the evolution of social consciousness I want to describe.⁶ The poem works both as a description of our collective, historical experience and as a description of its recapitulation, in whole or in part, in our individual lives. This essay is divided into six sections, the next three corresponding to three iterations of the rhetoric of opportunity which this poem powerfully evokes.⁷ The last section suggests that international human rights law offers a constructive alternative to Bishop's final bleak vision. Faced with the limits of our domestic rhetoric, we would do well to look beyond our borders, "across the river" to another text. The International Covenant on Economic, Social and Cultural Rights⁸ could help us reinvent our rhetoric and

necessarily, an implicitly or explicitly political stance on the nature of multinational capitalism today.") (emphasis in original). See generally Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (G. Bennington & B. Massumi trans., 1984). For descriptions of postmodern jurisprudence, see Costas Douzinas & Ronnie Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law 28* (1991) ("Jurisprudence goes postmodern in order to retain and redraw its old commitment to plural and open forms of reason(s) and communities."); Post-Modern Law: Enlightenment, Revolution and the Death of Man (Anthony Carty ed., 1990) [hereinafter *Post-Modern Law*].

6. This may be seen as part of the deconstructionist project of liberating a text from its author. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743, 772-77 (1987) [hereinafter *Balkin, Deconstructive Practice*]. Literary critics have already done so with this poem, although from other angles. See, e.g., Thomas J. Travisano, *Elizabeth Bishop: Her Artistic Development* 49 (1988) ("An uncanny feature is that the vision in most respects, even to the plentiful coffee, anticipates Bishop's years in an eighteenth century house in [Brazil], several decades in the future."). In her stunning analysis of Apollinaire's poem, "The Gypsy," Barbara Johnson suggests a partial explanation for Bishop's apparent clairvoyance:

Thus it is not the gypsy that knows in advance, but the syntax of assertion that is always in advance of knowledge. Knowledge is nothing other than the effect of syntax, not merely because any affirmation creates an illusion of knowledge, but precisely because syntax is what makes it possible for us to treat as *known* anything that we do not *know* we do not know. And this, in one form or another, is what poetry has always known.

Barbara Johnson, *Poetry and Syntax: What the Gypsy Knew*, in *The Critical Difference: Essays in the Contemporary Rhetoric of Reading* 67, 75 (1980) (emphasis in original) [hereinafter *Johnson, What the Gypsy Knew*]. See generally Richard Rorty, *Contingency, Irony and Solidarity* 25 (1989) (describing "the quarrel between poetry and philosophy, the tension between an effort to achieve self-creation by the recognition of contingency and an effort to achieve universality by the transcendence of contingency.").

Bishop described "A Miracle for Breakfast" as "my Depression poem. It was written shortly after the time of souplines and men selling apples . . . It was my social conscious' poem, a poem about hunger." Ashley Brown, *An Interview with Elizabeth Bishop*, in *Elizabeth Bishop and Her Art* 289, 297 (Lloyd Schwartz & Sybil B. Estes eds., 1983).

7. This is, of course, my own idiosyncratic reading of the text. For more critical views of Bishop's writing on social problems, see Lorrie Goldensohn, *Elizabeth Bishop: The Biography of a Poetry* 208 (1992). Cf. Rorty, *supra* note 6, at 23 (citing "a poem by Philip Larkin which helped me pin down what I wanted to say").

8. See *infra* note 90.

generate its postmodern iterations.

As Professor Balkin has explained, "iterability . . . carries with it the notion of a repetition of the same in a different context."⁹ Iterability is part of everyday life¹⁰—watching a rerun on television, reading the same case for two different classes, telling a child a fairytale. This essay focuses on iterations of rhetoric following a change in context of such substance, such moment, that our prior understanding no longer makes sense.¹¹ We begin to understand, or interpret, the rhetoric in a new way, creating a new iteration.¹² Every iteration, in turn, changes the way we see what has come before, sometimes subtly. The iterations considered here have changed dramatically the way we see what has come before; prior iterations not only look dated, but absurd, laughable.

There are, of course, an indefinite number of iterations.¹³ This

9. Balkin, *Deconstructive Practice*, supra note 6, at 779-780.

Language can only operate to the extent that it is repeatable, but language is repeatable only to the extent that what "A" says means something, albeit not identical to what "A" meant, to another person "B". . . . The structural precondition of the sign is its ability to break free from the author, and to mean other than what the author meant. . . . Derrida's aphorism, "iterability alters," is a shorthand way of saying that once the signifier leaves the author's creation and is let loose upon the world, it takes on a life of its own in the other contexts in which it can be repeated.

Id. For full and rigorous discussions, see Jonathan Culler, *On Deconstruction: Theory and Criticism After Structuralism* (1982); Jacques Derrida, *Of Grammatology* (G. Spivak trans., 1976).

The relationships between deconstruction and postmodernism are ambiguous and the extent, if any, to which they intersect or conflict is unclear. Compare Deryck Beyleveld & Roger Brownsword, *The Implications of Natural Law Theory for the Sociology of Law*, in *Post-Modern Law*, supra note 5, at 126 and Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *Cornell L. Rev.* 254, 313 n.276 (1992) ("Derrida is not postmodern. . . . Because deconstruction further atomizes the individual into discursive fragments, it represents the modernist spirit at its most excessive.") with *Post-Modern Law*, supra note 5, at viii (describing "post-modernism as a method of legal deconstruction"). For purposes of this essay, deconstruction may be understood as a method of critical analysis while postmodernism may be seen as a wide-ranging critique of modernity. Deconstruction may contribute to this critique, which may also be deconstructed.

10. Indeed, "iterability" is what makes it "everyday."

11. As David Harvey notes, "real revolutions in sensibility can occur when latent and dominated ideas in one period become explicit and dominant in another." Harvey, supra note 2, at 44.

12. It is beyond the scope of this essay to consider how this is accomplished. See generally *Interpreting Law and Literature: A Hermeneutic Reader* (S. Levinson & S. Mailloux eds., 1988); James B. White, *Heracles' Bow: Essays in the Rhetoric and Poetics of the Law* (1985) [hereinafter *Heracles' Bow*]; Joseph Singer, *Persuasion*, 87 *Mich. L. Rev.* 2442 (1989); Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 *Yale J.L. & Human.* 129 (1988); White, *Law as Rhetoric*, supra note 2.

13. See Balkin, *Deconstructive Practice*, supra note 6, at 781 n.108 (explaining that the number of possible iterations should be considered "indefinite" rather than "infinite" with

essay discusses three: our early "country-building" rhetoric of opportunity, its transformation during the Depression, and its postmodern fragmentation. These are not necessarily the most significant iterations, nor do they purport to give any kind of comprehensive overview. They vary in duration and specificity. Each contains, and is part of, other iterations; each overlaps, often messily, with the other two. My purpose is not to define distinct stages in the development of the rhetoric of opportunity, but to suggest the ongoing dynamic process through which it shapes American conceptions of economic rights and, at the same time, reveals its own limitations.

This process is worth trying to understand for two related but distinct reasons. First, this is part of a larger project of "unpacking" American conceptions of economic rights.¹⁴ Second, it can help explain why our prior understanding of the rhetoric of opportunity has stopped making sense¹⁵ in the 1990s, and how we might generate new, more constructive iterations.¹⁶

II. COUNTRY-BUILDING RHETORIC

The perception of America as the "land of opportunity" has had a

respect to a particular text because the number of relevant contexts is presumably finite, although not determinable).

14. This is a multi-faceted and long-term project. It includes, for example, institutional critiques such as Frances F. Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (1971); Frances F. Piven & Richard Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (1977), as well as recent law review articles examining American conceptions from the perspectives of presumptive beneficiaries. See, e.g., Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *Yale L.J.* 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1 (1990). See also Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (1986); William Julius Wilson, *The Truly Disadvantaged* (1987); Robert D. Dinerstein, *Review Essay: Clinical Texts and Contexts*, 39 *UCLA L. Rev.* 697 (1992).

15. As the Talking Heads suggest in their performance film of the same name, "stop making sense" may be a postmodern imperative. *Stop Making Sense* (RCA 1983). Joan Williams describes a:

[N]ew epistemology, consist[ing] of a broad and diverse intellectual movement that rejects a range of long-standing Western verities, some dating to the Enlightenment, and others all the way back to Plato. Perhaps the core element of the new epistemology is its rejection of an absolute truth accessible through rigorous, logical manipulation of abstractions.

Joan Williams, *Deconstructing Gender*, 87 *Mich. L. Rev.* 797, 805 (1989).

16. Cf. Guyora Binder, *Beyond Criticism*, 55 *U. Chi. L. Rev.* 888, 914-915 (1988) (discussing the seeming paradox "of undermining instrumental culture . . . by proposing instrumental action."). See generally J.M. Balkin, *The Rhetoric of Responsibility*, 76 *Va. L. Rev.* 197, 262-63 (1990) (considering the relationship between the rhetoric of responsibility and ideology) [hereinafter Balkin, *The Rhetoric of Responsibility*].

powerful influence on our notions of public entitlement. "Opportunity" is certainly not the only idea which shapes our conception of economic rights. Changing notions of the family, for example, also contribute to shifting perspectives on public entitlement.¹⁷ "Opportunity" is singled out as a peculiarly American idea, a heady mixture of belief in ourselves and belief in the limitless possibilities of America.¹⁸ Wave upon wave of immigrants have come to this country to escape ancient systems of caste, class and ownership, to be rid of bureaucracies and kings, to be left alone, free to make their fortunes by their own wit and hard work.¹⁹ It is the American dream, and it has bred a wild energy, a spirit of openness and innovation marveled at throughout the world.²⁰

The early iterations of the rhetoric of opportunity—the get-rich-quick and streets-paved-with-gold stories—were ideal for building a

17. See, e.g., Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 Duke L.J. 274 (describing how single mothers are excluded from relatively privileged "family discourse" and relegated to "welfare discourse," where intrusive state intervention is not only tolerated, but viewed as necessary).

18. "Opportunity" includes the idea of "individualism." See Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 142-63 (1985) [hereinafter Bellah, et al., *Habits of the Heart*]. But it also refers more broadly to the same dynamic functioning on a social level, i.e., when a particular ethnic, racial or religious group has the "opportunity" to establish itself as a community.

19. Cf. Arthur M. Schlesinger, Jr., *The Disuniting of America* 13 (1992) [hereinafter Schlesinger, *The Disuniting of America*]. Schlesinger explains:

Those intrepid Europeans who had torn up their roots to brave the wild Atlantic wanted to forget a horrid past and to embrace a hopeful future. They *expected* to become Americans. Their goals were escape, deliverance, assimilation. They saw America as a transforming nation, banishing dismal memories and developing a unique national character based on common political ideals and shared experiences.

Id. (emphasis added).

20. It has also been envied, despised and ridiculed. For a sharp (and hilarious) fictional account of a foreigner's introduction to the concept, see Lore Segal, *Her First American* 12-13 (1985).

Probably the most devastating indictments of the rhetoric of opportunity are the poverty and mortality statistics of the Native Americans and African-Americans who were exploited by it. Claudette E. Bennett, U.S. Dept. of Commerce, Bureau of the Census, *The Black Population in the United States: March 1990 and 1989, Current Population Reports, Series P-20, No. 448* (1991). For a chart showing "selected characteristics of families below the poverty level," see *id.* at 17. See also U.S. Dept. of Health and Human Services, National Center for Health Statistics, *Vital Statistics of the United States, 1988, vol. 2, mortality, pt. A, at 3* (1991) (table showing death rates by race and sex). The average life expectancy of African-Americans is 70.3 years while the average life expectancy of caucasian Americans is 76 years. The discrepancy may be attributed in part to poverty—1/3 of African-Americans live below the official poverty line—and the high rate of infant mortality (18 per 1000 births for blacks as opposed to 9.2 per 1000 births for whites). Christine Gorman, *Why Do Blacks Die Young?*, *Time*, Sept. 16, 1991, at 50.

American Indians remain the "poorest of the poor" with 28 percent living below the poverty level. Native Americans also have the shortest life expectancy—about 54 years—and the

new country.²¹ They were sure-fire draws for desperate immigrants and effective motivators for those who actually made it here. The basic premise was that there was plenty for everyone willing to work hard and take a chance in America. You could be cold and hungry, "waiting for coffee and the charitable crumb" one minute and up on the balcony yourself the next, with your feet up and more coffee than you could drink. Such opportunity made economic rights superfluous.²²

Once an opportunity was afforded,²³ the American ethos of individualism and self-sufficiency expected you to make your own way.²⁴ It was presumably your own fault if you could not. As George Santayana observed: "When [an American] has given his neighbor a chance he thinks he has done enough for him; but he feels it is an absolute duty to do that. It will take some hammering to drive a coddling socialism into America."²⁵

highest suicide rate—300 percent greater than the national average. Nancy Butterfield, *Indians, Still a Long Way from Racial Equality*, *Seattle Times*, Jan. 21, 1991, § 1, at 13.

In 1980, 29.9% of all blacks were below the poverty level; in 1990, 29.5% were. During the same period, poverty rates for Native Americans rose from 27.5% to 30.9%. See *Minority Report*, 24 *Nat'l J.* 1737 (1992). See also *infra* notes 54 & 57. Some of these statistics have been translated into human terms in recent fiction. See, e.g., Louise Erdrich, *Tracks* (1989); Toni Morrison, *Beloved* (1987); Toni Morrison, *Jazz* (1992) [hereinafter Morrison, *Jazz*].

21. Broadly conceived, this "country-building" rhetoric obtained from the colonial period all the way to the Depression. This 250 year period obviously contains a multiplicity of iterations, some corresponding to the various waves of immigration. See *infra* note 71.

22. The public welfare provisions of colonial era state constitutions, for example, were for the most part intended for incompetents, women and children. See John Stuart Mill, *The Province of Government*, reprinted in Virginia Held, *Property, Profits and Economic Justice* 178, 182 (1980). It should be noted that Mill, unlike most of his contemporaries, rejected the "[c]lassing together, for this and other purposes, of women and children" as "both indefensible in principle and mischievous in practice." *Id.* See also Balkin, *The Rhetoric of Responsibility*, *supra* note 16 (describing how rhetorical devices shape our conceptions of responsibility).

23. Opportunity can be afforded by, *inter alia*, a boundless frontier, a booming economy or the absence or the removal of social or cultural restraints. See Staughton Lynd, *Intellectual Origins of American Radicalism* 67-68 (1968).

24. Some have considered dependence as injurious as need itself. See Mill, *supra* note 22, at 178, 182-85. For a more recent iteration, see J. Anthony Lukas, *Declaring War on Welfare*, *N.Y. Times*, July 12, 1992, § 7 (book review), at 1 (citing Franklin D. Roosevelt, "Continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fiber. To dole out relief in this way is to administer a narcotic, a subtle destroyer of the human spirit.") (reviewing Mickey Kaus, *The End of Equality*). But cf. Rosemary L. Bray, *So How Did I Get Here?*, *N.Y. Times*, Nov. 8, 1992, § 6 (magazine), at 35 (first-hand account of a Yale graduate and former *New York Times* editor who grew up on welfare).

25. George Santayana, *Character and Opinion in the United States* 106 (Doubleday Anchor Books 1956) (1920). For a concise explanation of American aversion to socialism, see Robert N. Bellah, *The American Taboo on Socialism*, in *The Broken Covenant* 112-38 (1975). Cf. Peter Baldwin, *The Politics of Social Solidarity: Class Bases of the European Welfare State*

This became part of our national psyche, widely accepted and internalized. For some, it justified the single-minded pursuit of success, up to and over the borders of legality.²⁶ For others, it has been profoundly demoralizing. For them, the rhetoric brought only the deadening conviction that their efforts were unrewarded because of some irrevocable flaw or inadequacy in themselves, as individuals²⁷ or as a people.²⁸ The escalating standard of living enjoyed by most Americans prior to the Depression²⁹—and the invisibility or shame of those whose standard of living did not improve—sustained some variation of this very broadly understood iteration of the rhetoric of opportunity until the 1930s.

1875-1975 (1990); Carl Landauer et al., *European Socialism: A History of Ideas and Movements from the Industrial Revolution to Hitler's Seizure of Power* (1959). See generally Vernon L. Parrington, *The Beginning of Critical Realism in America* (1927-30) (historical Americanization of imported ideas).

26. For a vivid and richly textured account of one man's discovery (and invention) of a subculture that reified this notion, see E.L. Doctorow, *Billy Bathgate* (1989). Cf. George Yúdice, *Marginality and the Ethics of Survival*, in *Universal Abandon?*, *supra* note 5, at 214, 216 ("Given . . . the 'subversiveness' of 'everyday practices,' how can we distinguish among the various modes of 'bucking the system': the 'getting over' in school by a black teenager from the South Bronx . . . the use of inside information to make hundreds of millions in the stock market?"). See also *infra* text accompanying note 76.

27. For a stinging indictment of this aspect of opportunity rhetoric, see Arthur Miller, *Death of a Salesman* 135, 138 (Penguin Pocket Books 1976) (1948). Willy Loman, a salesman broken by what his son Biff calls, "the wrong dreams," kills himself because he feels he can do no more for Biff than leave him his life insurance. *Id.* at 135, 138.

28. See, e.g., Zora Neale Hurston, *Their Eyes Were Watching God* (1937). This, too, has a contemporary iteration. See, e.g., Thomas Powell, *Feel-Good Racism*, *N.Y. Times*, May 24, 1992, § 4, at 11 ("Most whites are more economically and socially successful than most blacks, so there must be some deficiencies of character and ability . . . And if 'they' generally lack abilities and virtues, there is a hint that perhaps they lack entitlement to equal respect, perhaps don't 'deserve' to be taken as seriously as whites or to be treated as equals.").

29. Cameron describes the growth of this period:

The most spectacular example of rapid national economic growth in the nineteenth century was the United States . . . Income and wealth grew even more rapidly than population. From colonial times the scarcity of labor in relation to land and other resources had meant higher wages and a higher standard of living than in Europe. It was this fact, together with the related opportunities for individual achievement and the religious and political liberties enjoyed by American citizens, that drew immigrants from Europe. Although the statistics are imperfect, it is probable that the average per capita income at least doubled between the adoption of the Constitution and the outbreak of the Civil War. Almost surely, it more than doubled between the end of that war and the outbreak of World War I.

Rondo Cameron, *A Concise Economic History of the World: From Paleolithic Times to the Present* 226-227 (1989). See generally Frances F. Piven & Richard A. Cloward, *Why Americans Don't Vote* 16 (1988) ("[T]he political culture of individualism, materialism, and opportunity . . . was presumably more vigorous in the nineteenth century than in the late twentieth century era of big organizations and big government.") [*hereinafter* Piven & Cloward, *Why Americans Don't Vote*].

III. THE DEPRESSION

In 1920, Santayana could still write, "[O]nce created, weaned, and taught to read and write, the young American can easily shoulder his knapsack and choose his own way in the world. He is as yet very little trammelled by want of opportunity."³⁰ This "young American" lost "his" [sic] sense of limitless possibility in 1929.

The Depression forced us to reconsider our most fundamental assumptions. The collapse of the economy jolted not only business and banking but the entire social order. Many were angry; they felt personally betrayed by the failure of the rhetoric of opportunity. Bishop gives voice to the outraged people waiting for a breakfast that fails to appear: "Was the man crazy! What under the sun was he trying to do, up there on his balcony!" This is the point in the poem when the faceless throng breaks down into different groups with different perspectives. People respond to the failure of rhetoric in different ways.³¹ Many were shocked by the Depression to discover that not only their way of life but their deepest sense of self, who they were, was predicated on the economy. Some literally jumped out of windows. Others took political or intellectual leaps, and became communists or socialists.³² For many Americans, faith in God had gotten mixed up with faith in America, amounting to faith in an American God who rewarded American virtues with the good life here on earth.³³ They lost their faith along with their jobs and savings.³⁴

30. Santayana, *supra* note 25, at 121.

31. See Heracles' Bow, *supra* note 12, at 6-11 (examining the initial conversation between Odysseus and Neoptolemus in Sophocles' "Philoctetes" and analyzing the speakers' respective rhetorical choices, failures, and responses).

32. Reactions varied widely among lawyers and legal scholars. Many found, or deepened their commitment to, legal realism. See Patterson, *supra* note 9, at 302 n.232 ("The return to particulars in law began with American Legal Realism."). For a compelling account of the decline of legal realism at Yale during the Depression, see Laura Kalman, *Legal Realism at Yale 1927-1960*, at 120, 130-145 (1986). Kalman describes how "institutional factors combined with legal theory to destroy a promising intellectual movement." *Id.* at 120. She concedes, however, that "the realists of the 1930s had the advantage of living in a society that was hospitable to reform." *Id.* at 145.

33. For a recent iteration, see Marshall Berman, *Modernist Anti-Modernism*, *New Persp. Q.*, Spring 1991, at 35, 36-37. As Berman discusses:

[T]he most dynamic developers in America over the last 30 years have been Protestant fundamentalists, who have created immense and ever growing real estate, media, hotels, educational, medical and entertainment empires all over the United States. Many intellectuals still haven't caught up with Ronald Reagan, who understood how fundamentalist dynamism could be channeled to transform America's whole political culture.

Id. at 36-37.

34. The religious metaphor of the Eucharist, of hungry people being fed by faith, contrasted

As a nation, the Depression had a similarly profound impact on us. It transformed our national consciousness. We³⁵ learned that hard work alone could not assure a decent standard of living, that even educated, sober, white men could be hungry and homeless in America. The rhetoric of opportunity no longer made sense.

But we needed more than ever to believe in ourselves and at least *some* future, if not the future of limitless possibilities that now seemed a fantasy.³⁶ We had to revise our rhetoric since we could not afford to

starkly with the secular reality. For an analysis of the Eucharist imagery in this poem, see Bonnie Costello, Elizabeth Bishop: Questions of Mastery 99 (1991) (arguing that those who "flick [their crumbs] scornfully into the river" are atheists). Jerry Phillips has pointed out the use of the "crumb" image in the Lazarus story. Observation made by Professor Phillips in conversation with the author (Summer 1992). See also Luke 16:19-31.

As Thomas Franck has noted, distribution of food may be seen as part of a "legitimation strategy" through which government authority achieves:

[P]olitical socialization For example, the [Aztec] government made a point of distributing food to the citizenry at certain [s]tate ceremonies. Feeding as Christian sacrament is also a symbolic validation of status as members of the mystical body of Christ, of hierarchic authority structure within that community, and serves as a renewal of commitment and obligation.

Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705, 727 (1988).

The impact and clarity of this practice make it particularly susceptible to political manipulation. In the film "Europa, Europa," for example, a young communist youth leader encourages the children in her charge to "pray" to Stalin for candy, which comes pouring through a vent in the ceiling. It soon mixes with dust and plaster as German bombs begin to fall. *Europa, Europa* (Orion 1991). Cf. James B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* 299 n.14 (1990) (comparing the primacy of the practice of the celebration of the Eucharist with the uncertainty of the doctrine) [hereinafter White, *Justice as Translation*].

35. "We constantly speak in the first person plural, pretending to remove difference in a unifying discourse which is an imposition. All *We* do is delude 'Ourselves.'" Anthony Carty, Introduction: Post-Modern Law, in *Post-Modern Law*, supra note 5, at 1, 34-35 (emphasis in original) (citation omitted). Fran Ansley questions the use of what she sees as an "*especially* white 'we'" here. Comments by Fran Ansley to a draft of this essay (August 1992) (on file with author). During the Depression, however, Americans—especially, perhaps, Americans of color—saw this country as a "white" nation. Widespread, collective self-consciousness about such usage does not emerge until the 1960s, corresponding globally to the end of colonialism, domestically to the civil rights movement, and textually to Bishop's fifth and sixth stanzas. See *infra* text accompanying notes 45-55.

36. This fantasy may have achieved its penultimate expression in the musicals of the 1930s, such as the classic *Gold Diggers* of 1933:

The film opens with an outrageous production number featuring starlets garbed in huge coins singing, "We're in the Money." We realize this is a rehearsal number when it is interrupted by the police, who close down the theater and the show for lack of funds. . . . Paradoxically, the downbeat, blues-ballet finale also marks the girls' return to the stage and to the ranks of the employed.

Thomas Schatz, *Hollywood Genres: Formulas, Filmmaking, and the Studio System* 189-190 (1981). This was one of several iterations, beginning with *Gold Diggers of Broadway* (Warner 1929) ("three Broadway chorus girls seek rich husbands") and concluding, after *Gold Diggers*

abandon it.³⁷ The New Deal deliberately and explicitly expropriated the rhetoric of opportunity.³⁸ Americans were "down on their luck" and just needed to "get back on their feet." Once they were helped up and brushed off, the possibilities of America would again assure their future.³⁹

The Depression taught us that "opportunity" was contingent and the rhetoric stretched to accommodate this realization. Sometimes the only "opportunity" was that provided by a government project. The Works Progress Administration ("W.P.A.")⁴⁰ drew on the rhetoric and "put America back to work." The enduring legacy of the New Deal was not the W.P.A., however, but Social Security⁴¹ and Medicaid,⁴² the beginnings of the "safety net"⁴³ that the rhetoric still

of 1935 and *Gold Diggers of 1937*, with *Gold Diggers in Paris* (Warner 1938) (three women "chase rich husbands abroad"). Leslie Halliwell, *Halliwell's Film Guide* 411 (7th ed. 1989).

The references to popular culture throughout this essay reflect its importance in postmodernist thought. As Professor Balkin has pointed out, "CNN and the modern enclosed shopping mall have had a much more significant defining influence on the postmodernist age than any of Richard Rorty's writings." J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 Mich. L. Rev. 1966, 1976 (1992) [hereinafter Balkin, *Postmodern Constitutionalism*].

37. See Richard Hofstadter, *The American Political Tradition* vii (1948) (comparing Roosevelt's "striking" capacity for innovation in practical measures with his less impressive "capacity for innovation in ideas"); see also *supra* note 2 and accompanying text (rhetoric as constitutive).

38. Theodore Marmor et al., *America's Misunderstood Welfare State: Persistent Myths, Enduring Realities* 33-35 (1990). For broader treatment, see generally Charles & Mary Beard, *America in Midpassage* (1939); Hofstadter, *supra* note 37, at 315-52; W. E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal 1932-1940*, at 344-48 (1963); Basil Rauch, *History of the New Deal 1933-39* (1944).

39. And they did, although World War II helped. Michael A. Bernstein, *The Great Depression: Delayed Recovery and Economic Change in America, 1929-1939*, at 207 (1987) (describing how the problem of delayed recovery was overcome by World War II, which brought the "more mature industries of the interwar period . . . out of their doldrums" and provided new industries with the high level of sales required for the full emergence of new products). For a thorough analysis of the New Deal recovery policy, see generally Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (1966).

40. Jason DeParle, *Nostalgia and Need Conjure Up Thoughts of the W.P.A.*, N.Y. Times, May 3, 1992, § 4, at 6 (discussing legislation introduced in April, 1992 to create a new Works Progress Administration).

41. 42 U.S.C. §§ 301-1397 (1988). For a cogent and detailed account of its origins, see Arthur M. Schlesinger, Jr., *The Birth of Social Security*, in *The Coming of the New Deal* 297-315 (1958) [hereinafter Schlesinger, *The Birth of Social Security*].

42. 42 U.S.C. § 1396 (1988).

43. See generally Marmor et al., *supra* note 38, at 33-34; Isaac Shapiro & Robert Greenstein, *Holes In The Safety Nets: Poverty Programs and Policies in the States: National Overview* (1988). Alice M. Rivlin points out that a safety net of "means tested programs for those who can prove they are destitute" only "catches those who actually fall." Alice M. Rivlin, *Reviving the American Dream: The Economy, the States and the Federal Government* 155 (1992).

assured us we did not need.⁴⁴

IV. POSTMODERN FRAGMENTATION

Bishop startles us in the fifth and sixth stanzas, dramatically shifting perspective as well as voice, showing us how abruptly perspective and voice can change and deftly suggesting their infinite multiplicity. It is not only the context that has changed, but the whole idea of "context" as somehow unitary or fixed.⁴⁵ This postmodern fragmentation of context transforms the narrator into a complex new "we" — both the indivisible hoard who "licked up the [single] crumb" and the multitude of separated individuals with "one eye close to the crumb," who each make something different of it. The poem shows us that "things look different from different points of view. Because every interpretation entails a viewpoint, no interpretation is final or objective. Different observations serve different purposes."⁴⁶

44. Carter Bayou, a brilliant, disillusioned, fictional black scholar and diplomat (Lore Segal's "First American"), suggests a fantastic scheme for linking the rhetoric of opportunity and the "safety net:"

"Say you take the Social Security money for the year X and, instead of pissing it away on the poor, the old, and the sick, you divvy it up—let's say three thousand bucks apiece, to every baby born in that same year, black *and* white, and—stick with me here—the government invests each baby's three thousand at, say, five percent, till the baby gets to be twenty-nine—or would you say thirty-five?"

"Thirty-five has more horse sense," said the barman.

"O.K. Now," said the man on the stool, "when the baby is thirty-five they . . . hand it the lump sum of . . ." he patted his breast pocket, took out an envelope, and said, "You got a pencil there? Thank you. Three thousand at five percent times thirty-five compounded"—the man on the stool did arithmetic for a while—"dollars fifteen thousand seven hundred and sixty!" he said triumphantly.

The barman looked agitated. "And the poor, old, sick folks?"

"*What* poor, old, sick folks!" cried the man on the stool. "*They* got *their* lumps when *they* were thirty-five and made a mint! They own their own homes, colored, whites, everybody! In Bayshead!"

Segal, *supra* note 20, at 13 (emphasis in original).

45. "[P]ostmodernism must reject a description of itself as embodying a set of timeless ideals contrary to those of modernism; it must insist on being recognized as a set of viewpoints of a time, justifiable only within its own time." Feminism/Postmodernism, *supra* note 5, at 11. But see Jameson, *supra* note 5, at 63 ("If we do not achieve some general sense of a cultural dominant, then we fall back into a view of present history as sheer heterogeneity, random difference, a coexistence of a host of distinct forces whose effectivity is undecidable.").

46. Joan C. Williams, Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 Duke L.J. 296, 309 (1991) (describing non-foundationalists). See also Balkin, Postmodern Constitutionalism, *supra* note 36, at 1972 (Postmodernism "contrasts with relativism because conflicting perspectives are embedded in people's lives and activities.").

This need not preclude political/social critiques. Roy Boyne & Ali Rattansi, The Theory and Politics of Postmodernism: By Way of an Introduction, in Postmodernism and Society 1, 29 (Roy Boyne & Ali Rattansi eds., 1990) ("There is . . . a postmodernism of 'resistance' as

The civil rights movement in the 1960s⁴⁷ and the women's movement in the 1970s⁴⁸ similarly forced us to recognize different points of view. We began to rethink the economic and social underpinnings of our rhetoric.⁴⁹ Was it "our" rhetoric at all? Who were "we"?⁵⁰

well as a postmodernism of 'reaction.'"). See also Seyla Benhabib, *Epistemologies of Postmodernism: a Rejoinder to Jean-Francois Lyotard*, in *Feminism/Postmodernism*, supra note 5, at 107, 124. Benhabib believes:

It is likely that we will have to live with this polytheism and dazzling "play of surfaces" . . . for some time to come . . . nor is it unwelcome that the frozen founts of philosophy are becoming fluid again. Only it is necessary that we think the epistemic alternatives created by the present also to their moral and political ends. For questions of truth, as Lyotard denies and Rorty admits, are still matters of justice as well.

Id. at 124. Accord Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1617 (1990); Pierre Schlag, *Foreward: Postmodernism and Law*, 62 U. Colo. L. Rev. 439, 440 (1991) (citing Wicke for the proposition that "while postmodernism dissolves the notions of identity and the subject, both social conceptions remain critical (essential?) to the political struggles of oppressed groups within the legal arena.") [hereinafter Schlag, *Foreward*]. Cf. Robert Post, *Postmodern Temptations*, 4 Yale J.L. & Human. 391, 398 (1992) (reviewing Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (1991)) ("Jameson's uncontrollable speculation loses hold of the most subtle insight of its Marxist heritage—that reality, although perhaps unknowable in its noumenal essence, can nevertheless be engaged and respected through forms of human praxis."). But see Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, in *Feminism/Postmodernism*, supra note 5, at 19, 23 ("There is no place in Lyotard's universe for critique of pervasive axes of stratification, for critique of broad-based relations of dominance and subordination along lines like gender, race, and class."). See generally Joanne F. Diehl, *Women Poets and the American Sublime* 91-110 (1990) (feminist critique accusing Bishop, who was lesbian, of "degender[ing] her voice").

47. The civil rights movement brought home the failure of the rhetoric for African-Americans, who were neither lured to this country by "opportunity" nor driven from a hostile homeland, but abducted, enslaved and brought here against their will. This is not to say that African-Americans did not have their own hopeful migrations. For a vivid description of "[t]he wave of black people running from want and violence" in the late nineteenth century and becoming "a steady stream" by 1906, see Morrison, *Jazz*, supra note 20, at 33. Reconstruction and the northern migration remained essentially empty promises. See Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (1988); Nicholas Lemann, *The Promised Land: The Great Black Migration and How It Changed America* (1991). See also Schlesinger, *The Disuniting of America*, supra note 19, at 14 ("The curse of racism was the great failure of the American experiment, the glaring contradiction of American ideals and the still crippling disease in American life.").

48. See Elisabeth Probyn, *Travels in the Postmodern: Making Sense of the Local*, in *Feminism/Postmodernism*, supra note 5, at 176, 178 ("Indeed, it could be argued that what has been labeled as the postmodern dilemma was precipitated not by the supposed passing of modernism but by the questions feminists brought to diverse modernist disciplines."). See also Judith Resnick, *Complex Feminist Conversations*, 1989 U. Chi. Legal F. 1 (1989); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986).

49. See, e.g., Nicholas Lemann, *Survival of the Loudest*, N.Y. Times, July 12, 1992, § 4, at 21 (op-ed.). Lemann points out that:

At the same time, the range and number of citizens demanding a share of the American dream has increased since the boom days, when women and members of

What does opportunity mean for a black teenage boy in Newark?⁵¹
 For a single white mother of three small children in the mid-west?⁵²
 Some of us, especially men of color and women, slowly and painstakingly began to develop what Mary Joe Frug has described as a

racial and ethnic minorities were second-class citizens economically, and quiescent. The result is a sour and fragmented country, whose public discourse is dominated by a cacophony of complaints.

Id.

50. The question has generated a rich and growing body of scholarship. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 Va. L. Rev. 539 (1991); Martha Minow, Supreme Court, 1986 Term, Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 15 (1987); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9 (1989); Resnick, *supra* note 48, at 7. Cf. Pierre Schlag, *The Problem of the Subject*, 69 Tex. L. Rev. 1627 (1991):

[T]he problem of the subject . . . [is] at least two problems. One problem is we are missing any convincing accounts of who or what it is that thinks or produces law. Another problem is that apparently we and our legal rhetoric have been constituted to avoid inquiry into this question of who or what produces law.

Id. at 1629.

A telling variation appears in the literature on economic rights. As Jeffrey Swanson points out in his review of P. Rossi, *Down and Out in America: The Origins of Homelessness* (1989), the book is "address[ed] to an audience that excludes the poor and homeless." 5 *Med. Human. Rev.* at 50, 55 (1991). Swanson criticizes Rossi for referring to "we," his audience, who can rescue "them," the poor. In this essay, "we" is all of us in this country, many of whom are (or have been or will be) poor. Cf. Rorty, *supra* note 6, at 198:

We have to start from where we are . . . What takes the curse off this ethnocentrism is not that the largest such group is "humanity" or "all rational beings" . . . but, rather, that it is the ethnocentrism of a "we" . . . which is dedicated to enlarging itself, to creating an ever larger and more variegated *ethnos*. It is the "we" of the people who have been brought up to distrust ethnocentrism.

Id. (emphasis in original).

This is not to suggest that those of us asking the question represented some tacit majority. As Powell suggests:

Most whites, and some blacks like Clarence Thomas and Shelby Steele, hold the article of faith that each individual has control of, and responsibility for, his or her own opportunity. "Where there is a will there is a way" and "you can't keep a good man down," we say. Those who are down, then, must not be very good.

Powell, *supra* note 28, at 11. There were enough of "us," however, to destabilize the status quo, to call that which was once taken for granted into question.

51. See Celia W. Dugger, *In Newark, Single Mothers on the Edge of Survival*, N.Y. Times, July 6, 1992, § 1, at 1 (describing the "wearying struggle just to pay the bills with welfare benefits worth one-third less than 20 years ago.").

52. See Peter Kilborn, *Lives of Unexpected Poverty in Center of a Land of Plenty*, N.Y. Times, July 7, 1992, § 1, at 1 (describing Marshalltown, Iowa, which "shows with unusual clarity powerful forces (other than culture, behavior, racism or reckless childbearing) that make welfare and poverty hard to escape anywhere: the nation's proliferation of low-wage jobs and two decades of falling wages, especially for the least skilled, in terms of what they can buy.").

"decentered, polymorphous, contingent understanding"⁵³ of the rhetoric of opportunity.

The country-building rhetoric of opportunity had assumed a limitless pot. If the Depression taught us that the pot had a bottom, the civil rights and women's movements made us realize that there has always been a lid on it as well, easily lifted for some and firmly closed for others.⁵⁴ Opportunity, in short, is not only limited but contingent.⁵⁵ The struggle for "equal opportunity" began to explore the

53. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 Harv. L. Rev. 1045, 1046 (1992). See also Anthony D. Cook, *Reflections on Postmodernism*, 26 New Eng. L. Rev. 751, 765 (1992) (linking "the struggles of formerly colonized people of color and women for inclusion in the American society" and postmodern philosophy, in which "the core and periphery appear to constantly remake themselves under conditions of confrontation, conflict and deeper understandings of the processes of marginalization.").

54. These "others" arguably refer to everyone but white, able-bodied, middle and upper class men; these "others" had no direct access to opportunity. See, e.g., Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) (people of color as others); Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 Cornell L. Rev. 993, 1025-35 (1990) (discussing the white supremacist "class model" that excludes others); *The Poor Image of Black Men* (interview with William Julius Wilson), *New Persp. Q.*, Summer 1991, at 26, 27 (black men as others); Felice Schwartz, *Management Women and the New Facts of Life*, Harv. Bus. Rev., Jan.-Feb. 1989, at 65 (women as others; criticizing the term "glass ceiling" as a way of glossing over real factors responsible for the differences in male and female job performance and opportunities); Barbara P. Noble, *And Now the "Sticky Floor,"* N.Y. Times, Nov. 22, 1992, § 3, at 23 (women as others; sociologists report that 55% of the approximately 3 million women in state and local government jobs work in the lowest paying employment categories, with women of color occupying the lowest classifications in disproportionate numbers); supra note 20 and accompanying text (Native Americans as others); infra note 57 and accompanying text (Native and Hispanic Americans as others).

Carter Bayou exposes the absurdity of extending an already depleted rhetoric to people of color:

"We hold these truths to be self-evident, that all men, blah, blah, blah, have the unalienable right to a lump sum?"

"Once in your lifetime," said the barman, "is all I'm saying to you."

"See if I understand you, now, this is for white only, or for colored as well?"

"Listen! I ain't prejudiced. I'm New York!" said the barman. "Ain't I standing here? Ain't I talking with you like you are a person? You want me, I'll make you a sandwich."

"Jesus, God!" the man on the stool said gaily. "Imagine every one of us black sons of a gun going to have an equal opportunity, same as any white man in the land, to get our thumbs, legs, and eardrums busted! Let me check *this* out with you now: everybody has to first get pretty much chewed up, is what you're saying?"

"That's what it's compensation *for*! The way I figure you don't get something for nothing, but how it is now you get nothing period."

Segal, supra note 20, at 12 (emphasis in original).

55. This distresses some liberals who argue that while the "great swirling world beyond Europe" should be acknowledged, a "cult of ethnicity" threatens the fundamental concept of an integrated, "melting pot" culture. Schlesinger, *The Disuniting of America*, supra note 19, at 15-16. See also Barbara Ehrenreich, *Cultural Baggage*, N.Y. Times, Apr. 5, 1992, § 6

variables.⁵⁶ Equal to whom? White people?⁵⁷ Men? The able-bodied? Where was the starting line and what would it take to bring everyone up to it?⁵⁸ The rhetoric of opportunity was broken into shards.⁵⁹

(magazine), at 16-17 ("[W]e are the kind of people . . . who do not believe, who do not carry on traditions, who do not do things just because someone has done them before."). Cf. Rorty, *supra* note 6, at 28 ("Only poets, Nietzsche suspected, can truly appreciate contingency.").

56. This may be seen as part of the deconstruction of "opportunity" itself. Feminists, for example, have questioned whether they want what white men want. See *Feminism/Postmodernism*, *supra* note 5, at 4. See generally Harvey, *supra* note 2, at 49 (discussing the "acute problem of communication" posed by the acceptance of "the fragmentation, the pluralism, and the authenticity of other voices in other worlds.").

57. For a chart comparing social and demographic characteristics of black, Mexican, Puerto Rican, other Hispanic, American Indian and non-Hispanic white families, including the number of wage earners, see Gary D. Sandefur & Marta Tienda, Introduction: Social Policy and the Minority Experience, in *Divided Opportunities: Minorities, Poverty, and Social Policy* 1, 10 (Gary D. Sandefur & Marta Tienda eds., 1988) [hereinafter *Divided Opportunities*]. For a chart showing the evolution of family incomes for the same groups, see Marta Tienda & Leif Jensen, Poverty and Minorities: A Quarter-Century Profile of Color and Socio-economic Disadvantage, in *Divided Opportunities*, *supra*, at 23, 27.

58. See, e.g., Nadine Taub & Wendy Williams, Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?, 37 Rutgers L. Rev. 825 (1985) (discussing gender equality). See generally Mickey Kaus, *The End of Equality* (1992) (neo-liberal scheme for replacing the welfare system with a massive public works program that would guarantee every American a job).

Federal equal protection has not been expanded to include poverty as a "suspect classification." It is settled, in fact, 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); *Lindsay v. Normet*, 405 U.S. 56, 73-74 (1972) (no right to housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no right to welfare benefits). As Professor Henkin has noted, our emergence in the twentieth century as what some have characterized as a welfare state has been accomplished despite the Constitution, rather than because of it. Henkin, *The Age of Rights*, *supra* note 3, at 122. See also Lynn A. Baker, *The Myth of the American Welfare State*, 9 Yale L. & Pol'y Rev. 110 (1991). But see Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103 (1986); Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

As Patricia Williams has pointed out, however, "opportunity" has no meaning in an economic vacuum. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989) (criticizing *City of Richmond v. Croson*, 488 U.S. 469 (1989)).

59. This reinforced and reflected a change in perception succinctly noted by Charles A. Reich in his classic, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965) ("Perhaps at one time we could have justified this discrimination by arguing that the poor are to blame for their poverty. But today we see poverty as the consequence of large impersonal forces in a complex industrial society."). See also Seth Mydans, *Separateness Grows in a Scarred Los Angeles*, N.Y. Times, Nov. 15, 1992, § 1, at 1 (describing how racial and ethnic communities have "withdrawn into themselves, more aware than ever of their differences," finding common ground in their shared loss of faith in the American dream). The article concludes by quoting a Korean businessman: "I thought there

Each shard contains worlds.⁶⁰ Perspective may be a function of identity, but "identity" too is a variable.⁶¹ We may be stuck inside our skins⁶² and our genders,⁶³ but the meaning and the consequences of skin and gender depend on particular circumstances. Each of us is a complex amalgam of multiple identities; we are each members of many separate as well as overlapping groups—family, neighborhood,

was equal opportunity for everyone in America, but it is not true." *Id.* at 30. See generally Balkin, *Deconstructive Practice*, *supra* note 6, at 762-64.

60. Recall Bishop's description of "my crumb my mansion." The implications are as wide-ranging—and as resistant to categorization—as the use of "tiny, discrete worlds" as a metaphor. See James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 *Harv. Int'l L.J.* 327, 358 (1985) ("[O]ne should not divide one's life into tiny, discrete worlds — the struggle against racism and sexism and class-violence in one box . . . the production of scholarly utopias in still another."). Marshall Berman discusses the "Gretchen Tragedy" that concludes part one of Goethe's *Faust*:

Gretchen's successors will get the point: where she stayed and died, they will leave and live. In the two centuries between Gretchen's time and ours, thousands of "little worlds" will be emptied out, transformed into hollow shells, while their young people head for great cities, for open frontiers, for new nations, in search of freedom to think and love and grow. Ironically, then, the destruction of Gretchen by the little world will turn out to be a crucial phase in the destruction of the little world itself.

Marshall Berman, *All That is Solid Melts Into Air: The Experience of Modernity* 59 (1982) [hereinafter *Berman, Melts Into Air*]; see also Theodore S. Geisel, *Horton Hears a Who* (1954) (Dr. Seuss' story of the tiny bustling world that Horton the elephant discovers on a dust mote and saves from extinction).

61. See Berman, *Melts Into Air*, *supra* note 60, at 35 (describing the tension between "our desperate allegiances to ethnic, national, class and sexual groups which we hope will give us a firm 'identity,' and the internationalization of everyday life—of our clothes and household goods, our books and music, our ideas and fantasies—that spreads all our identities all over the map.").

62. In her brilliant essay, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, Barbara Johnson explicates Hurston's essay, *How It Feels to Be Colored Me*:

Far from answering the question . . . [Hurston] deconstructs the very grounds of an answer, replying, "Compared to what? As of when? Who is asking? In what context? For what purpose? With what interests and presuppositions?" What Hurston rigorously shows is that questions of difference and identity are always a function of a specific interlocutory situation — and the answers, matters of strategy rather than truth.

Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, in *A World of Difference* 172, 178 (1987) [hereinafter *A World of Difference*].

Some people resist immutability. See, e.g., John H. Griffin, *Black Like Me* (1960) (author temporarily changed his skin color from white to black and traveled through the deep south for a month in 1959); Yúdice, *supra* note 26, at 214, 215 (discussing Griffin, *supra*, and "the pathos of a redemptive position").

63. But see Jan Morris, *Conundrum* (1974) (autobiography of a transsexual); Virginia Woolf, *Orlando* (1928) (in which Woolf opts out of the usual narrative bounds, tracking her protagonist across the centuries and observing with interest as s/he changes gender). Cf. Gloria Steinem, *If the Shoe Doesn't Fit, Change the Foot*, *Ms.*, Feb. 1977, at 76, 85 ("[T]ranssexualism just may be the most fervent and radical testimony to the power of sex roles . . . [W]hat greater tribute could there be to the idea that genital differences must dictate our entire lives and futures?").

ethnic, racial, and innumerable interest groups.⁶⁴ Our perspectives are also likely to reflect our place in those groups, whether we are the oldest or youngest in the family, a third-year law student or the Dean of the law school. Which particular identity matters most depends on the specific context⁶⁵—where, and in what condition, you find yourself.⁶⁶ Perspective, identities and contexts all change over time.⁶⁷ Like Bishop's narrator(s), each of us experiences the world from different, often disjunctive, angles.⁶⁸

Not only is the meaning of opportunity contingent, it means quantitatively less for growing numbers of us.⁶⁹ We realize in the 1990s that our resources are not unlimited⁷⁰ and that recent immigrants may have a much harder time establishing themselves than their pred-

64. Mary Douglas uses "group" to refer to the extent of an individual's incorporation into bounded units. For a description of her influential grid-group typology, see Mary Douglas, *Cultural Bias*, in *In the Active Voice* 183, 190-205 (1982). For a stimulating exploration of the ways in which "adherence to a certain pattern of social relationships generates a distinctive way of looking at the world; [and] adherence to a certain world view legitimizes a corresponding type of social relation," see Michael Thompson et al., *Cultural Theory* 1-15 (1990).

65. For a perceptive and scholarly discussion of the postmodern emphasis on context, see Minow & Spelman, *supra* note 46.

66. See Patricia Williams, *And We Are Not Married: A Journal of Musings upon Legal Language and the Ideology of Style*, in *Consequences of Theory* 181, 193-97 (Jonathan Arac & Barbara Johnson eds., 1991) (describing the nervous breakdown of a black female judge whose job "was to wear all the contradictions at the same time—to wear them well and reconcile them.").

This can, of course, be a matter of life and death. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) ("[C]ases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination."); *The World's Women 1970-1990: Trends and Statistics*, at 19, U.N. Doc. ST/ESA/STAT/SER.K/8, U.N. Sales No. E.90.XVII.3 (1991) (India had 1,786 registered cases of dowry death in 1987).

67. They are often imperfectly synchronized, however. We may become stuck in one context, one time-frame, and inappropriately continue to see the world from the perspective of a former self in a former time. This phenomenon has become a cultural cliché. In *For the Boys*, for example, Bette Midler plays a singer who entertains troops during World War II, the Korean War and the Vietnam War with her partner, played by James Caan. The entertainment formula that worked for the WWII troops seems tired in Korea and embarrassing in Vietnam. *For the Boys* (Fox 1991).

68. For descriptions of the ways in which individuals mediate conflicts among their various roles, see Thompson et al., *supra* note 64, at 265-67. Interestingly, there may be no need to do so. See *The Multiple Self* 4 (John Elster ed., 1985) ("Contradictory beliefs may coexist peacefully for a long time, if they belong to different realms of life."). See also Goldensohn, *supra* note 7, at 180 (describing Bishop's "nuance-laden shifts in perspective").

69. See generally Berman, *Melts Into Air*, *supra* note 60, at 330 (attributing the end of the economic boom that had followed World War II to a combination of inflation, technological stagnation, and the developing world energy crisis).

70. See generally Francis J. Turner, *Significance of the Frontier in American History* (1894). See also *infra* notes 130-31 and accompanying text.

ecessors.⁷¹ It is becoming increasingly clear to aging "baby boomers" that they are likely to get sick,⁷² old, or poor⁷³—or all three—sooner or later.⁷⁴ For those stuck in the underclass,⁷⁵ the rhetoric has acquired cruel twists. The pregnant teenager's promise of a new life shackles her to the old one; the fierce group loyalty and willingness to take risks that meant success for generations of immigrant entrepreneurs mean prison or early death for inner-city gang members.⁷⁶

We no longer assume in the 1990s that those requiring assistance will be few,⁷⁷ their dependent situation temporary (as it is for children) and their needs adequately met by private charities.⁷⁸ The rhetoric based on these assumptions sounds hollow at best; more often it sounds inane.⁷⁹ As the precipitous drop from the balcony becomes all

71. In the 1960s, for example, "millions of black and Hispanic people would converge on America's cities — at precisely the moment when the jobs they sought, and the opportunities that earlier poor immigrants had found, were departing or disappearing." Berman, *Melts Into Air*, *supra* note 60, at 324-25. See also John Tenhula, *Voices from Southeast Asia: The Refugee Experience in the United States* (1991); Anthony DePalma, *For Haitians, Voyage to a Land of Inequality*, *N.Y. Times*, July 16, 1991, § 1, at 1. Indeed, for some the door has closed so tightly that even those seeking political asylum here have been returned to the state where they face almost certain persecution, contrary to U.S. and international law. See *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d. Cir. 1992).

72. See Robert Pear, *U.S. Reports Poverty is Down but Inequality is Up*, *N.Y. Times*, Sept. 27, 1990, § 1, at 14.

73. *The Blue-Collar Dream Fades*, *L.A. Times*, Sept. 15, 1992, at 9 (describing impact on blue collar workers of loss of more than one million manufacturing jobs in the 1980s); William B. Falk & Gwen Young, *The Big Squeeze: A Newsday Special Report*, *Newsday*, March 15, 1992, at 4 (impact of recession on Long Island); Brian O'Riley, *The Job Drought*, *Fortune*, Aug. 24, 1992, at 62 (analyzing Labor Department data indicating that nearly 5 million of 13.6 million full-time jobs added to the U.S. economy between 1979 and 1989 paid less than \$250 a week, after adjusting for inflation—below the official poverty level for a family of four; also citing Census Bureau figures that 18.9 percent of full-time workers had low-wage jobs in 1977, rising to 25.7 percent of full-time workers in 1992).

74. See Powell, *supra* note 28, at 11 ("Some of our forms of individualism make us the Western industrial nation harshest toward many of its own people: ethnic minorities, but also the sick and the poor, the young and old.").

75. Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 *Rutgers L.J.* 881, 883 (1989) (citation omitted) ("[D]emocracy and negative rights may no longer be effective vehicles for dealing with the structural needs of a chronically weak and permanently outvoted underclass."). The term "underclass" is controversial. See, e.g., Martha Fineman, *The Concept of the Natural Family and the Limits of American Family Law*, in *Gender Bias and Family Law: Comparative Perspectives* (Barbara Stark ed., 1992) ("What seems to unify the category of the underclass is . . . that their poverty results from their own failings.").

76. See *supra* note 26.

77. Bill Clinton & Al Gore, *Putting People First* 164-65 (1992).

78. See Bush Takes the Lead and Defines His Mission, *XLIV Cong. Q. Almanac* 41-A, 44-A (1988) (accepting the presidential nomination and suggesting the privatization of social welfare through "a thousand points of light").

79. The idea of endless opportunity persists. For a novel argument for "universal

too easily imagined,⁸⁰ the need for some kind of "safety net"⁸¹ is being recognized in unexpected quarters.⁸² Even those who think their perch secure have felt their quality of life erode as the public sector deteriorates.⁸³ Even those who still believe in the rhetoric⁸⁴ have seen it devalued as the United States struggles unsuccessfully to keep its place in the global economy. The rhetoric has again lost its coherence.⁸⁵

V. TOWARD POSTMODERN ITERATIONS

Bishop's poem ends with the exhaustion of the rhetoric. The final image barely recalls opportunity's most familiar symbol, Liberty's torch shining across the water. Now the light across the water mocks

ownership" to assure universal opportunity, see Robert H.A. Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 Rutgers L.J. 3 (1990).

The former socialist states may be particularly receptive to the idea of opportunity, at least during their initial enthusiastic transition to market economies. See, e.g., Celestine Bohlen, *Yeltsin Outlines Sale of Industry*, N.Y. Times, Aug. 20, 1992, § 1, at 11 (outlining Yeltsin's privatization program to provide vouchers worth about \$60 representing the value of each Russian's share of state-owned property). Cf. Steven Erlanger, *Economic Compromise is In the Air as Russian Legislators Head to Moscow*, N.Y. Times, Sept. 20, 1992, § 1, at 14 (describing widespread apprehension about privatization).

80. This anxiety was fueled by the 1980s. See generally Barbara Ehrenreich, *Fear of Falling: The Inner Life of the Middle Class* (1989). See also United Nations, *Global Outlook 2000: An Economic, Social, and Environmental Perspective* 47 (1990) (describing the "abrupt deterioration of the world economy in the early 1980s") [hereinafter *Global Outlook 2000*]. For graphically depicted vertiginous plunges, see the animated film *Aladdin* (Disney 1992). In the Disney version, both the homeless poor boy who becomes Sultan and the princess who leaves her protected garden seem empathetic toward claims of distributive justice. *Id.* Disney is taken quite seriously by many postmodernists. See, e.g., Jameson, *supra* note 5, at 73; Christopher Norris, *Lost in the Funhouse: Baudrillard and the Politics of Postmodernism*, in *Postmodernism and Society*, *supra* note 46, at 119, 130-31.

81. See *supra* note 43 and accompanying text.

82. See *supra* text accompanying notes 70-74. But see Peter T. Kilborn, *The Middle Class Feels Betrayed, But Maybe Not Enough to Rebel*, N.Y. Times, Jan. 12, 1992, § 4, at 1 (most middle class families still have employer health insurance, so their own spending for medical care, while increasing, is still only about 5% of their incomes).

83. Robert B. Reich, *Secession of the Successful*, N.Y. Times, Jan. 20, 1991, § 6 (magazine), at 16. Accord *Talk of the Town*, *The New Yorker*, June 24, 1991, at 21, 22 ("The irony of 'privatization' is that the money saved by underfunding public services . . . suddenly is desperately needed to buy the alternatives.").

84. See, e.g., Francis Fukuyama, *The End of History and the Last Man* (1992). See generally Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (1991).

85. As Octavio Paz recently observed, "even the great land of the open future, the United States, has become the land of 'now'." *Time, Form and Ethics in the Wake of Modernity*, *New Persp. Q.*, Spring 1992, at 5, 6 (interview with Octavio Paz). See generally Jeffrey S. Lehman, *To Conceptualize, To Criticize, To Defend, To Improve: Understanding America's Welfare State*, 101 Yale L.J. 685 (1991) (reviewing Theodore R. Marmor, *America's Misunderstood Welfare State* (1990)).

us, glinting from a distance, a "miracle working on the wrong balcony." We no longer have a sense of limitless possibility; we no longer believe that everyone can be brought up to the starting line. Many of us feel that we have little to gain by subscribing to the rhetoric; the rest are afraid of those who have nothing to lose. We are all increasingly apprehensive about the long-term social costs of increasing polarization.⁸⁶

While few would deny the problems, there is no clear consensus on how to approach them. We are not sure whether we can (or want to) assure basic material needs for an increasingly diverse population, although we seem more and more troubled by our failure to do so. While this dilemma is relatively recent and urgent for us, it has been a primary focus of international law for almost forty-five years.⁸⁷ There is nothing new about hopeless poverty, as Bishop reminds us. Indeed, this is what made America's promise of opportunity so wonderful, and so irresistible.⁸⁸ Most children in the world grow up to live the

86. This was the theme of the film *Grand Canyon*, referring both to the chasm of race and class between the main characters and a mythic America, epitomized by natural grandeur, that can redeem them. *Grand Canyon* (Fox 1991). Its images of a combat-zone nighttime Los Angeles, lit by police helicopters, reappeared on the news after the Rodney King verdict.

The Los Angeles riots reminded the rest of the country that the problems of the inner-city poor affect the entire society. L.A. Lawless (editorial), 254 *The Nation* 651 (May 18, 1992); Timothy Noah & David Wessel, *Urban Solutions: Inner City Remedies Offer Novel Plans—and Hope, Experts Say*, *Wall St. J.*, May 4, 1992, § 1, at 1; *Routine Wastelands* (editorial), *N.Y. Times*, May 3, 1992, § 4, at 16. See also *The Talk of the Town*, *The New Yorker*, May 11, 1992, at 27 ("[W]hat, as a nation, did we really expect? The residents of our inner cities have for many years now been unable to lay claim to our national sense of common humanity and simple decency. On what basis can we expect to suddenly lay claim to theirs?"); Mydans, *supra* note 59, at 1. For variations on this theme, see generally Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* (1990) (arguing that the widening gap between rich and poor, along with greater concentration of wealth, is likely to lead, as it did in the 1930s, to a resurgence of populism); Jason DeParle, *Democrats' Invisible Man Specializes in Making Inequity to Poor Easy to See*, *N.Y. Times*, Aug. 19, 1991, § 1, at 12 (stating that under the 1991 federal budget, gain in after-tax income for the lowest fifth of the population and the loss for the highest fifth was only 1.2%).

87. The Universal Declaration of Human Rights, for example, provides that "[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Universal Declaration of Human Rights, art. 23.3, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]. Art. 25.1 further provides:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Id. art. 25.1.

88. Just as "gallons of coffee" become a glorious extravagance (rather than just too much

same hard life that their parents live, if they are lucky.⁸⁹

The promise of a decent standard of living for oneself and one's children is a specific focus of several international instruments.⁹⁰ These are not widely known in the United States for a plethora of interrelated reasons. Our ignorance may be attributed to our isolationism, our geography, our unique history, our economic hegemony—many of the same factors that have sustained the rhetoric of opportunity itself.⁹¹ This is changing, reflecting both the growing

coffee) only because of the remembered "drop," the magic of "opportunity" depends on its comparison with a remembered society in which there was none. See Balkin, *Deconstructive Practice*, *supra* note 6, at 751-53 (discussing the notion of "différance," denoting the idea that a construct both incorporates and draws meaning from its opposite).

89. See United Nations Department of International Economic and Social Affairs, 1989 Report on the World Social Situation 36-45 (1989) [hereinafter U.N. Report on the World Social Situation].

90. See, e.g., Universal Declaration, *supra* note 87. The major instrument is the International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 (adopted by the U.N. General Assembly, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6319 (1966)) [hereinafter Economic Covenant]. See also American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978). Art. 26 obligates parties to:

[A]dopt measures, both internally and through international cooperation . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Id. art. 26. See also the African Charter on Human and People's Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (expressly noting in the preamble that "civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."); U.N. Charter art. 55 (providing that "the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development"); *infra* text accompanying notes 95-97 & 100-102.

91. It may be more specifically attributable to our failure to require international law as a course in our law schools, unlike law schools throughout Europe, China, Japan, and Canada, for example. See generally Catherine Tinker, ABA Committee on International Law Education, Draft Report: The Case for Testing International Law on the Bar Examination (Feb. 1992).

U.S. scholarship on the Economic Covenant is "meager at best" and there is only one book on the subject in English, see A. Glenn Mower, Jr., *International Cooperation For Social Justice: Global and Regional Protection of Economic/Social Rights* (1985). See also Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy, 84 Am. J. Int'l L. 365, 388 (1990). Our lack of familiarity with the Economic Covenant is likely to make us that much more doubtful about it. *Id.* at 366 (noting the suspicion of some Americans, who view the Covenant as the "Covenant on Uneconomic, Socialist and Collective Rights"). For a discussion of the extent to which the rhetoric of the Covenant is compatible with our own, 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) [hereinafter Stark, *Toward an "Entirely New Strategy"*]. For a

domestic concern about economic rights⁹² and the post-Cold War sea change in the international system.⁹³ In fact, the United States has already signed the Universal Declaration of Human Rights,⁹⁴ the Vienna Declaration of 1989,⁹⁵ and the Charter of Paris for a New Europe.⁹⁶ These international texts affirm that everyone "has the right to enjoy his economic, social and cultural rights."⁹⁷ More

thoughtful inquiry into the problems posed by adopting the rhetoric of another culture, see Thompson, et al., *supra* note 64, at 261-73.

92. See Adam Clymer, *Politicians Take Up Domestic Issues: Polls Suggest Why*, N.Y. Times, Sept. 15, 1991, § 5, at 5; Andrew Rosenthal, *Bush Tries to Shift to Active Style on Domestic Policy*, N.Y. Times, May 10, 1992, § 1, at 1 (Bush focuses more on domestic economic problems after Los Angeles riots). Even law professors are concerned. The theme of the Annual Meeting of the Association of American Law Schools in 1992 was "Ensuring Social & Economic Justice in a Changing America: Time for a New Bill of Rights?" AALS Program, Jan. 3-7, 1992. See generally Marmor et al., *supra* note 38, at 48 (noting widespread public support for the Medicare, Food Stamp and Social Security programs); Phillips, *supra* note 86.

Opinions vary widely as to causes of economic problems and policy solutions. See, e.g., Christopher Jencks, *Rethinking Social Policy: Race, Poverty, and the Underclass* (1992); Lawrence Mead, *The New Politics of Poverty: The Nonworking Poor in America* (1992); Stephen Haggard, *Markets, Poverty Alleviation, and Income Distribution: An Assessment of Neo-liberal Claims*, 5 *Ethics & Int'l Aff.* 175, 176 (1991) (arguing that in the 1980s, unlike previous periods of economic crisis, "socialist . . . alternatives to economic management were politically and intellectually discredited.").

93. See Daniel Patrick Moynihan, *On the Law of Nations* (1990). This change in the international system is attributed primarily to the collapse of the Soviet Union and the end of the Cold War. Other structural changes include the disintegration of states previously held together, directly or indirectly, by the former superpowers and the projected economic unification of Europe. See, e.g., John Pinder, *European Community: The Building of a Union* (1991); Alpo M. Rusi, *After the Cold War: Europe's New Political Architecture* (1991); Gregory F. Treverton, *The New Europe*, 71 *Foreign Aff.* 94 (1991/92); Thomas L. Friedman, *Clinton Inherits Conflicts that Don't Follow Rules*, N.Y. Times, Dec. 13, 1992, § 5, at 3.

These developments have led to new roles for international organs, including the U.N. Security Council, possibly the U.N. Secretary General's Office, and the International Court of Justice ("ICJ"). See Boutros Boutros-Ghali, *An Agenda for Peace*, reprinted in 31 *I.L.M.* 956 (1992) (new role for Secretary General's office); Agora: *The Gulf Crisis in International and Foreign Relations Law*, 85 *Am. J. Int'l L.* 63 (1991) (symposium discussing new role for U.N. Security Council); Richard B. Bilder, *The Brendan Brown Lecture: The United States and the World Court in the Post-"Cold War" Era*, 40 *Cath. U. L. Rev.* 251 (1991) (new role for ICJ); Symposium, *The Iraqi Crisis: Legal and Socio-Economic Dimensions*, 15 *S. Ill. U. L.J.* 411 (1991) (new role for U.N. Security Council).

94. See Universal Declaration, *supra* note 87.

95. The Vienna Declaration of 1989, 28 *I.L.M.* 527. See also Alston, *supra* note 91, at 365 (discussing U.S. support of economic and social rights as evidenced by the signing of various human rights documents).

96. Conference on Security and Cooperation in Europe: *Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter*, Nov. 21, 1990, 30 *I.L.M.* 190.

97. *Id.* at 194. The United States also participated in the Copenhagen Conference on the Human Dimension. Document of Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE), June 5-29,

importantly, they explicitly require the state to help its people realize these rights.

These instruments are generally considered "political" rather than "legal" undertakings.⁹⁸ The United States assumes no enforceable legal obligation by adhering to these texts. The explicit recognition of economic rights—as opposed to the "opportunity" to achieve economic independence—nevertheless represents a rhetorical milestone.⁹⁹ The next step would be ratification of the International Covenant on Economic, Social and Cultural Rights (the "Economic Covenant" or "Covenant"),¹⁰⁰ which translates these political commitments into legally enforceable terms. The Covenant has already been ratified by the vast majority of nations, including all of the other major Western democracies and Japan.¹⁰¹

While it would be premature to predict U.S. ratification, it has never been a more realistic possibility.¹⁰² Politically, ratification

1990, 29 I.L.M. 1305 (substance of most recent follow-up meeting to the Helsinki Accords). For the Helsinki Accords, see the Final Act of the Conference on Security and Cooperation in Europe (CSCE), Aug. 1, 1975, 14 I.L.M. 1292.

98. Lori F. Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 *Yale L.J.* 2315, 2319 (1991). Cf. Oscar Schachter, *International Law in Theory and Practice*, 178 *Recueil des Cours d'Academie de Droit International [R.C.A.D.I.]* 123-32 (1982-V). "[A] State assuming an international political commitment may (under the requirement of good faith) be considered to have given up its prior right under international law to declare the matter in question as purely domestic." *Id.* at 131.

99. In the international context, "soft law," in the form of declarations and resolutions, has frequently been the first stage in the development of "hard law." Adherence to various treaties has been obtained through such a process. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967), for example, originated in "soft" accession to general principles. See generally Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *Int'l & Comp. L.Q.* 850 (1989).

100. See Economic Covenant, *supra* note 90. See generally *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex (1987), reprinted in Symposium: *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 *Hum. Rts. Q.* 122 (1987) (considering the obligations of state parties to the Economic Covenant) [hereinafter *Limburg Principles*]. In 1986, a group of distinguished experts in international law synthesized the Limburg Principles, which they agreed "reflect the present state of international law" unless specifically qualified as a recommendation by the use of the word "should." *Id.* at 122-23.

101. One hundred and four states have ratified or acceded to the Covenant as of December 13, 1991. Committee on Economic, Social & Cultural Rights, Report on the Sixth Session, U.N. ESCOR, Supp. No. 3, at 2, 103-12, U.N. Doc. E/1992/23, E/C.12/1991/4 (1992) [hereinafter *Sixth Session Rep.*]. But see Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 *Harv. Hum. Rts. J.* 69, 71 (1991) (deploring ratification by countries with "neither the intention nor the desire to abide by [the Covenant].").

102. First, the United States is renewing its participation in international organizations. Congress approved full payment of 1990 U.N. dues, plus a 20 percent down payment on

would reassure both domestic constituencies concerned about the U.S. commitment to economic rights and internationalists concerned about the U.S. commitment to international legal institutions. Less obviously—but not less importantly—ratification would facilitate the reconstruction of our deconstructed rhetoric. The Economic Covenant could help us shape that rhetoric to the diverse demands of a postmodern world because it is a postmodern legal instrument created

accumulated arrearages. Steven A. Dimoff, U.S.-U.N. Funding Update, *The Inter Dependent*, June-July 1991, at 4. It has also been suggested, somewhat cynically, that the U.S. is becoming interested in the U.N. because there is no longer any effective opposition to the U.S. there. Ian Williams, *Why the Right Loves the U.N.*, 254 *The Nation* 478 (Apr. 13, 1992). See generally Frederic L. Kirgis, *The United States Commitment to the Norms of the United Nations and Its Related Agencies*, 1 *Transnat'l L. & Contemp. Probs.* 125 (1991); *supra* note 93.

Second, on April 2, 1992 the United States finally ratified the Civil Covenant, the "other half" of the "International Bill of Rights." Text of the Resolution of Ratification, April 2, 1992, 31 *I.L.M.* 658. For a discussion of the background, see 31 *I.L.M.* 648, 649 (1992). For the text of the Civil Covenant, see *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 *U.N.T.S.* 171 (entered into force March 13, 1976). As Ambassador J. Kenneth Blackwell has pointed out, urging ratification of the Economic Covenant, "[t]he U.S. currently has the unique distinction of being the only country in the world that has ratified the Civil/Political Covenant but has not ratified the Economic Covenant." J. Kenneth Blackwell, *Book Review*, 14 *Hum. Rts. Q.* 485, 498 (1992). See also Natalie Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (1990).

Third, not since the Depression have we been more receptive to the idea of economic rights and the notion of a true "safety net." See Marmor et al., *supra* note 38. Cf. Robert Pear, *Social Programs Grow, But Largely by Neglect*, *N.Y. Times*, Aug. 2, 1992, § 1, at 1 ("For better or for worse, domestic social programs have grown much more rapidly under Mr. Bush than under Mr. Reagan." In large part, "social programs have grown simply because the sluggish economy has left millions more Americans in need of government aid."). See also *supra* note 92.

Fourth, the end of the Cold War provides an unprecedented opportunity to focus on the needs of our own people. It permits the reallocation of resources from defense to domestic social programs, although it is increasingly clear that it is going to be some time before we realize any "peace dividend." As a corollary, the end of the Cold War left us ideologically adrift, in need of some common "vision." See, e.g., *The Vision Thing*, *N.Y. Times*, July 12, 1992, § 4, at 20.

Finally, the election of President Clinton promises a renewed commitment to economic rights. Clinton & Gore, *supra* note 77, at 84-88, 107-15, 164-68; David E. Rosenbaum, *Take a Number: What Can Clinton Change, and When?*, *N.Y. Times*, Nov. 8, 1992, § 4, at 1 (cautioning that "[t]he country's health care, welfare and education systems cannot be reformed until a consensus is built in the country on which directions to go," but noting Clinton's support for reform in these areas). See Jeffrey E. Garten, *The 100-Day Economic Agenda*, 71 *Foreign Aff.* 16, 17 (Winter 1992/93). See also Leon Sigal, *The Last Cold War Election*, 71 *Foreign Aff.* 1, 15 (Winter 1992/93) ("[T]o get domestic policy right, Clinton will have to get foreign . . . policy right").

See generally Thomas J. Ehr, *After 40 Years, Let's Ratify U.N. Bill of Rights*, *N.Y. Times*, Jan. 1, 1989, § 5, at 10 (letter to the editor); Paul Savoy, *Time for a Second Bill of Rights; Economic One*, 252 *The Nation* 797 (June 17, 1991) (advocating the adoption of an Economic Bill of Rights). But see Alan Tonelson, *What is the National Interest?*, *The Atlantic*, July 1991, at 35, 37 ("Internationalism . . . has led directly to the primacy of foreign policy in American life and to the consequent neglect of domestic problems . . .").

to do just that.¹⁰³

As David Harvey has pointed out, "the most startling fact about postmodernism [is] its total acceptance of ephemerality, fragmentation, discontinuity, and the chaotic."¹⁰⁴ The Economic Covenant similarly accepts economic rights as necessarily ephemeral, fragmented, discontinuous and chaotic. The actual substance of these rights, like the ways in which they are interpreted and implemented, changes over time. Solutions are invariably partial, sporadic and as "chaotic" (or unpredictable) as the forces of nature, or vagaries of late capitalism, to which they respond.¹⁰⁵

Article 11, for example, requires states to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and shelter, and to the continuous improvement of living conditions."¹⁰⁶ What kind of food, clothing

103. See Schlag, *Foreward*, *supra* note 46, at 439-44. Many of the features associated with postmodernism—"the increasing fragmentation and heterogeneity of culture, the weakening of traditional historical narratives, the devolution of the modernist syntheses, the increasing speed, proliferation and succession of forms of life, the new modes of critical practice and techniques—are all already present in the law." *Id.* at 444 (citation omitted). But see Beyleveld & Brownsword, *supra* note 9, at 126, 144-154 (rigorous, if concededly "somewhat polemical," philosophical analysis suggesting fundamental inconsistencies between postmodernism and human rights). See also Post, *supra* note 46, at 392. Post finds that "the generic characteristics of postmodern sensibility" may be "conceptualized as concentric circles of deprivation." *Id.* Cf. Balkin, *Postmodern Constitutionalism*, *supra* note 36, at 1973 (explaining that postmodern jurisprudence will not necessarily be "fragmented, celebrate surfaces, irony, and pastiche, and eschew master narratives because those are postmodernist themes. . . . The jurisprudence produced during the postmodern era will turn out to display elements of postmodernity whether this is consciously desired or not."); see also *id.* at 1978 (focusing on the ways in which postmodern culture and technology have affected law as an institution). For a cogent description of "pastiche," see Jameson, *supra* note 5, at 70-71. Jameson explains how pastiche eclipses parody:

Pastiche is, like parody, the imitation of a peculiar mask, speech in a dead language: but it is a neutral practice of such mimicry, without any of parody's ulterior motives, amputated of the satiric impulse, devoid of laughter and of any conviction that alongside of the abnormal tongue you have momentarily borrowed, some healthy linguistic normality still exists.

Id. at 64.

104. Harvey, *supra* note 2, at 44.

105. See Balkin, *Postmodern Constitutionalism*, *supra* note 36, at 1972 (describing postmodernism as "both a cultural situation and a set of claims about how that culture should be interpreted, altered and continued").

106. Economic Covenant, *supra* note 90, art. 11. Students in my international law classes usually pause at the phrase, "continuous improvement of living conditions." Is the Covenant endorsing unlimited acquisitiveness? Or does the Covenant assume an initial level of material comfort much lower than their own? Cf. Schlesinger, *The Birth of Social Security*, *supra* note 41, at 315 (citing John Quincy Adams' 1825 declaration that "the great object of the institution of civil government" was "the progressive improvement of the condition of the governed").

and shelter—and how much—is adequate? This obviously requires a series of complex, fact-specific determinations. One state may begin to meet its obligation under article 11 by allocating blocks of housing to state employees¹⁰⁷ while another state may comply by providing food and snacks for school children.¹⁰⁸ Specific obligations also vary over time, in part simply because basic human needs are recurring and constant—we will be hungry and in need of shelter again tomorrow even if we eat and are sheltered today.¹⁰⁹

The process through which the Economic Covenant is interpreted is similarly open-ended. Like our Constitution, the Covenant sets out broad precepts rather than specific rules. Unlike our Constitution, however, the Covenant does not require that the resulting interpretations be reconciled or even consistent.¹¹⁰ Ratification of the Covenant merely represents legal adherence to general principles; interpretation of those principles is left to the ratifying states.¹¹¹

Interpretation is supposed to be a public, participatory process

107. Sixth Session Rep., *supra* note 101, at 21 (describing steps taken by Afghanistan).

108. *Id.* at 29 (describing steps taken by Panama).

109. Harvey, *supra* note 2, at 44-45 ("Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is."). But compare the purposefulness of the states' efforts to the "play" of postmodernism. *Id.* See also *infra* note 125.

110. In addition to the impossibility of specifying content, discussed above, this reflects the sensitivity of the Economic Covenant's drafters to issues of cultural relativism. See generally *Relativism: Interpretation and Confrontation* (Michael Krausz ed., 1989); Alison D. Renteln, *International Human Rights: Universalism Versus Relativism* 61-87 (1990); Alison D. Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 *Hum. Rts. Q.* 514 (1985).

Moreover, as Philip Alston has astutely observed, in the U.S., this built-in flexibility broadens the Economic Covenant's appeal to diverse groups, "such as those dealing with issues like women's rights, homelessness, child abuse, malnutrition and access to education," who may be persuaded "that their concerns might usefully be pursued under the rubric of economic, social and cultural rights, and that ratification of the Covenant would be a productive step in that direction." Alston, *supra* note 91, at 392. Covenant mechanisms are less likely than traditional rights analysis to pit one disadvantaged group against another. Rather, these mechanisms can be used to provide an alternative to a "zero-sum game," a way of mediating competition for always limited resources. See John S. Murray et al., *Processes of Dispute Resolution* 102-108 (1989).

111. There are, however, two norms from which derogation is unacceptable: one, the norm that the rights set out in the Economic Covenant be enjoyed without discrimination, see *Economic Covenant*, *supra* note 90, art. 2(2), and two, the affirmation of a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights." *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* 45, U.N. Doc. HR/PUB/91/1 (1991) (text of general cmt. 3, para. 10) [hereinafter *Manual on Human Rights*]. The norm against discrimination resonates with "pervasive axes of stratification," see Fraser & Nicholson, *supra* note 46, at 23, as well as our own equal protection jurisprudence. Stark, *Toward an "Entirely New Strategy," supra* note 91, at 120-22. The "minimum core obligation" evokes Yúdice's "utterly marginalized Indian

under the Covenant,¹¹² which is a necessarily interactive text.¹¹³ It does not rely on "legal" enforcement, such as court orders, to implement economic rights.¹¹⁴ American efforts to assure such rights, to provide affordable housing¹¹⁵ or access to quality education,¹¹⁶ for example, have demonstrated the limitations of such enforcement mechanisms all too well.¹¹⁷ The Covenant scheme, in contrast,

women," see Yúdice, *supra* note 26, at 226-31 (discussing ethical obligations to the oppressed and marginalized). For further explanation of this obligation, see *infra* note 125.

112. In order to assure public involvement in the preparation of a report, each state is required to describe the manner and extent of public dissemination of the Economic Covenant and to state whether "its content [has] been the subject of public debate." Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, U.N. ESCOR, 1991, Supp. No. 3, U.N. Doc. E/1991/23, E/C.12/1990/8 (1991) at 89 [hereinafter Fifth Session Rep.]. See also Ian Johnstone, Treaty Interpretation: The Authority of Interpretive Communities, 12 Mich. J. Int'l L. 371 (1991) (application of interpretive theory in the context of international treaties).

113. Harvey, *supra* note 2, at 49. Harvey explains that:

Whereas modernists had presupposed that there was a tight and identifiable relation between what was being said . . . and how it was being said . . . [postmodernist] thinking sees these as "continually breaking apart and re-attaching in new combinations." "Deconstructionism" . . . is . . . a way of thinking about and "reading" texts. . . . Cultural life is then viewed as a series of texts intersecting with other texts, producing more texts . . . this intertextual weaving has a life of its own.

Id. Cf. Patterson, *supra* note 9, at 313 n.276. For a pellucid treatment of intertextuality or "the multitude of ways a text has of not being self-contained, of being traversed by otherness," see Barbara Johnson, *Les Fleurs Du Mal Armé: Some Reflections on Intertextuality*, in *A World of Difference*, *supra* note 62, at 116, 117-31.

The Covenant's emphasis on "participation, process, text and intertext" as opposed to "finished work, genre/boundary" seems to situate it squarely within the postmodern project. Harvey, *supra* note 2, at 42. But see *infra* note 125.

114. While such enforcement is not provided for under the Economic Covenant, domestic legal enforcement may be relied upon by a state party as part of its implementation program. See Implementation of the International Convention on Economic, Social and Cultural Rights, U.N. ESCOR, 58th Sess., at 1, U.N. Doc. E/1986/4/Add.21 (1986) (Norway's Report). Since Norwegian law is more specific than the Covenant, the international instrument is not relied on. In Sweden, similarly, the more detailed Swedish law is cited and the Covenant has not even been enacted domestically. Committee on Economic, Social and Cultural Rights, Report on the Second Session, U.N. ESCOR, Supp. No. 4, at 26-27, U.N. Doc. E/1988/14, E/C.12/1988/4 (1988) [hereinafter Second Session Rep.].

115. See, e.g., Paula A. Franzese, *Mt. Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 Seton Hall L. Rev. 30 (1988); Alan Mallach, *Blueprint for Delay: From Mt. Laurel to Molehill*, 15 N.J. Rep. 21 (Oct. 1985); John Payne, *Housing Rights and Remedies: A Legislative History of Mt. Laurel III*, 14 Seton Hall L. Rev. 889 (1984).

116. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). State courts have found themselves in a similar morass. See, e.g., *Cahill v. Robinson*, 67 N.J. 333 (1975). For an illuminating analysis of some of the difficulties, see Peter Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. Pa. L. Rev. 1041 (1984). See generally Michael J. Perry, *The Constitution, the Courts and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

117. Some commentators have suggested that economic rights litigation may even be self-

requires ratifying states to initiate a public discussion¹¹⁸ and begin developing a consensus regarding specific economic rights in specific communities.¹¹⁹ The committee charged with administering the Covenant then helps the state devise practical plans reflecting that consensus.¹²⁰

Like the content of rights and the process of interpreting them, spe-

defeating. See, e.g., Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Raneta J. Lawson, *The Child Seated Next to Me: The Continuing Quest for Equal Educational Opportunity*, 16 T. Marshall L. Rev. 35, 54 (1990).

118. Limburg Principles, *supra* note 100, at 124 ("Popular participation is required at all stages, including the formulation, application and review of national policies."). See also Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1861 (1987) (arguing that law is "a communal language" and urging that it be interpreted in "social contexts in which norms can be generated and given meaning."). Cf. Steven Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 Cal. L. Rev. 1441, 1443 (1990) (exploring implications of "situatedness" as applied to the development, practice, and "attempted reconstruction of modern constitutional law"). See generally Boyle, *supra* note 60, at 358 (urging international legal scholars to avoid reification by "thinking up methods of getting ourselves away from the objectified fantasy world of state sovereignty and towards the actual human beings whose lives our abstractions affect").

119. See Nancy Fraser, *Talking About Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies*, 99 Ethics 291, 292-93 (1989) (suggesting a continuum for analyzing economic rights, or "needs claims," ranging from "'thin' needs such as food or shelter *simpliciter*" to "thick" needs; or the "specific forms of provision . . . implied once we acknowledge . . . very general, thin need."). Cf. After the Nation-State: Reinventing Democracy, *New Persp. Q.*, Fall 1992, at 4, 8 (interview with Michael Sandel) ("Any agenda for revitalized self-government and the effective empowerment of smaller-scale communities must contain the devolution of power to smaller units and the universalization of rights on a supra-national level."). See generally Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 Brooklyn L. Rev. 861 (1990).

This consensus-generating process relies on the methods as well as the rhetoric of alternative dispute resolution ("ADR"). This should not be surprising, since ADR has its genesis in international law. See generally Roger Fisher & William J. Ury, *Getting To Yes: Negotiating Agreement Without Giving In* (1981); Roger Fisher, *International Conflict For Beginners* (1969); *International Mediation in Theory and Practice* (Saadia Touval & I. William Zartman eds., 1985); William J. Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1988).

This limited scale, open-ended (as opposed to ideologically pre-determined) process also reverberates with the "New Public Law Movement." See, e.g., William N. Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707 (1991).

120. The Economic Covenant has no legally binding precedent, nor does it directly generate any. Cf. James B. White, *The Judicial Opinion and the Poem, in Heracles' Bow*, *supra* note 12, at 107, 119-20 ("[A] simple but powerful statement (like 'All men are created equal') is 'simple' only on the surface. It works as it does in large part because it forcefully evokes a rich and shared knowledge of language and culture.") [hereinafter White, *The Judicial Opinion and the Poem*].

cific methods for implementing the Covenant are left open.¹²¹ The ratifying state has to devise its own particular solutions to its own particular problems.¹²² Adherence to the Covenant triggers, rather than determines, a process intended to generate multiple intertextual combinations.¹²³ The Economic Covenant contemplates a limitless array of compliance mechanisms, depending on the parties' needs, resources, preexisting institutions, and creativity.¹²⁴

Ironically,¹²⁵ the rhetoric of the Covenant resonates powerfully

121. See Patterson, *supra* note 9, at 316 ("It is true that postmodernism has no program — it provides no blueprint. . . . The lesson of postmodernism is that the answers to our questions are *not already there* waiting to be found; instead they will have to be produced."). I have suggested elsewhere the possibility of ratifying the Covenant and delegating its implementation to the 50 states. Stark, Toward an "Entirely New Strategy," *supra* note 91. See generally Rivlin, *supra* note 43 (advocating a shift from the federal government to the states for management and funding of most programs aimed at skills training and retraining, housing, transportation, infrastructure and economic development).

122. "No particular economic or political system is required for the realization of those rights." Fifth Session Rep., *supra* note 112, at 85. See also Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355, 1411-34 (1991) (describing models of current remedial decision-making). The Economic Covenant contemplates multi-level and even overlapping efforts. See generally Leopold Pospisil, Legal Levels and Multiplicity of Legal Systems in Human Societies, 11 J. Conflict Resol. 2 (1967).

This flexibility may be particularly apt now. See David E. Rosenbaum, After the Riots: Concern, Cash, But Not Accord on Urban Woes, N.Y. Times, May 10, 1992, § 1, at 1 (despite continuing absence of consensus among politicians and academics about "the best ways to lift people out of poverty," locally organized "programs that might not be applicable nationwide" are "bright spots"). See also White, *supra* note 119, at 863 (The *Kelly* decision, "[r]ather than dictating single, authoritative meaning to a passive audience . . . seems to invite readers to bring their own creativity into an open-ended, deeply pluralistic project of 'authorship' of our constitutional norms.").

123. See Hassan's tabular schema in Harvey, *supra* note 2, at 43, in which these are posited as postmodern reactions to modernism.

124. The idea of protecting rights through such a patchwork is familiar to American jurists. For a compelling account of the "myriad ways in which constitutional 'public law' protections are intricately bound up with—indeed, presuppose—a general backdrop of 'private law' protections defining primary rights of personal property," see Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1507 (1987).

125. Irony is endemic to any postmodern project and this section of the essay is fairly reeking with it. First, there is the irony of seeking relief from a postmodern dilemma in internationalism, the epitome of the "modernism" rejected (even trashed) by postmodernism. Second, there is the multiple irony of relying not only on a *prescriptive text* (either the "prescriptiveness" or the "textual" condition itself is sufficient to disqualify this as postmodernist) but a prescriptive text rooted in the "universal" values of the Universal Declaration of Human Rights. See Universal Declaration, *supra* note 87. But see Universal Abandon?, *supra* note 5, at xiv ("If we accept . . . that the political status of claims to universality is at stake, then the following question ought to be addressed. *In whose interests is it, exactly, to declare the abandonment of universals?*") (emphasis in original).

This apparent surfeit of irony may be defended on theoretical as well as practical grounds. In theory, postmodernism has been defined by its rejection of definition, its indiscriminate accumulation and its refusal to refuse. (As one commentator rather archly points out, "[t]he

with the rhetoric of opportunity whose failure necessitates it.¹²⁶ Just

refuse may also, however, refuse." Peter Goodrich, *Contractions: Rousseau in the Year Two Thousand*, in *Post-Modern Law*, supra note 5, at 40, 64.) So the embrace of internationalism—not as an all-encompassing model but as another possible world view—cannot be seen as inconsistent with the postmodern embrace of inconsistency.

Furthermore, the Economic Covenant is the "other," marginalized half of the International Bill of Rights. (The "privileged" half is the International Covenant on Civil and Political Rights, recently ratified by the United States. See supra note 102.) So recognition of the Economic Covenant may be seen as central to the postmodernist project of demarginalization. See Cook, supra note 53, at 765.

More concretely, it could be argued that the usual criticisms of critical theory (i.e., its lack of finality) or of postmodernism (i.e., its rejection of consistent standards) may not be as important in the context of economic rights as in other contexts because there is in fact a discernible bottom line here: human survival and health. The World Food Council, for example, has promulgated workable, globally accepted standards regarding human nutritional needs. See, e.g., *Food Consumption and Supply*, in U.N. Report on the World Social Situation, supra note 89, at 18-35 (World Food Council estimated that over 500 million people were "chronically deprived of the food necessary for them to lead and enjoy an active, healthy life and develop their human potential" in the mid 1980s.). See also *id.* at 25 (discussing malnutrition problems in industrialized market economies); Yúdice, supra note 26, at 226-31 (describing the formation of "the subjective and moral dimensions of identity, in an utterly marginalized Indian woman who has to struggle for survival at every step of her life" and arguing that "[o]ur ethical practice, then, is the political art of seeking articulations among all the 'marginalized' and oppressed, in the interests of our own survival."). See generally *Manual on Human Rights*, supra note 111, cmt. 3, para. 10 (citing "minimum core obligation"); Post, supra note 46, at 397 (discussing the relationship between postmodernism and consumerism, particularly the ways in which "postmodernism seeks culturally to privilege [mass market] consumption."). Is it "ironic" (or worse) to meet subsistence needs just to enable the hungry and the homeless to join the ranks of mass market consumers? It may well be, but no more so than the efforts of the developed world to create markets for consumer goods in the Third World.

Finally, the postmodern appeal of the Covenant framework may be attributed to the careful efforts of its drafters, and especially the committee charged with its implementation, to assure the Covenant's flexibility and usefulness in a multi-cultural world. Cf. Rorty, supra note 6, at 94:

The metaphysician's association of theory with social hope and of literature with private perfection is, in an ironist liberal culture [like ours], reversed. Within a liberal metaphysical culture the disciplines which were charged with penetrating behind the many private appearances to the one general common reality — theology, science, philosophy — were the ones which were expected to bind human beings together, and thus to help eliminate cruelty. Within an ironist culture, by contrast, it is the disciplines which specialize in thick description of the private and idiosyncratic which are assigned this job. . . . Solidarity has to be constructed out of little pieces, rather than found already waiting.

Id.

126. The rhetoric of the Covenant also resonates with the American rhetoric of republicanism. Stark, *Toward an "Entirely New Strategy,"* supra note 91, at 101. See generally Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *Harv. J. L. & Pub. Pol'y* 37 (1990); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale L.J.* 1623 (1988); Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539 (1988). But see Richard Epstein, *Modern Republicanism—or the Flight from Substance*, 97 *Yale L.J.* 1633 (1988). For an analysis of American disenchantment

as the early iterations of opportunity promised immigrants that they would be rid of kings and bureaucracies, the enabling approach of the Covenant promises local groups that they will be free of centralized, external authority.¹²⁷ Just as we once relied on our own wit and hard work to make us rich, we would rely on our own creativity and industry to "continuously improve [our] standard of living" under the Covenant.¹²⁸ If the Depression required a new iteration of the rhetoric of opportunity, the postmodern recognition of diversity requires a whole new range of iterations. The Covenant provides a process as well as a text for generating them.

VI. CONCLUSION

The early rhetoric of opportunity was country-building rhetoric, useful for luring the adventurous and the ambitious and for encouraging prodigious effort once they got here. The New Deal iteration offered crucial reassurance—even when the bottom fell out, the state would make sure that everyone had a chance to get back to work until opportunity came again.¹²⁹

The previous iterations of the rhetoric of opportunity are no longer credible in the 1990s. We know that "opportunity" in apparently inexhaustible abundance will not come again to this planet.¹³⁰ At the recent Earth Summit in Rio de Janeiro, for example, the countries of the developing South as well as the developed North rejected the rhetoric of unlimited growth in favor of the rhetoric of "sustainable development."¹³¹ It has been globally acknowledged that human needs

with democratic approaches to public policy issues, see E.J. Dionne, Jr., *Why Americans Hate Politics* (1991).

127. Cf. David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992) (advocating entrepreneurial government which focuses on results, decentralizes authority, diminishes bureaucracy and encourages competition). But see Paul Peterson & Mark Rom, *Welfare Magnets: A New Case for a National Standard* (1990). Cf. Richard B. Steward, *Federalism and Rights*, 19 Ga. L. Rev. 917, 975-70 (1985) (urging a system of "horizontal income transfers" among states and localities, the recipients to be given broad discretion with respect to their use).

128. Economic Covenant, *supra* note 90, art. 11. This may be understood as part of the process of "cognitive mapping" described by Jameson: "The political form of postmodernism, if there ever is any, will have as its vocation the invention and projection of a global cognitive mapping, on a social as well as spacial scale." Jameson, *supra* note 5, at 98.

129. See *supra* notes 38-44.

130. But see National Space Society, *Outer Space and the Global Environment: A National Space Society Position Paper* (1991) (suggesting that outer space is the next frontier).

131. United Nations Conference on Environment and Development ("UNCED"), June 3-14, 1992, reported at 31 I.L.M. 814 (1992). But see Martti Koskenniemi, *The Future of Statehood*, 32 Harv. Int'l L.J. 397, 403 (1991).

The official ideology of [UNCED] compels diplomats to speak of environmental and

must be met in a closed ecosystem.¹³² "Opportunity" can no longer be predicated on endless expansion.

Even as we enter an era of unprecedented internationalism, paradoxically, we increasingly seek particular, contextualized solutions to the problems of homelessness, hunger, unemployment, and poverty.¹³³ The Economic Covenant is an international text intended for local application. It requires those who adopt it to enter into it, as we enter into a poem, to contextualize it and make it their own.¹³⁴ The Economic Covenant could enable us to generate more coherent iterations of the rhetoric of opportunity, iterations that retain the rhetoric's vibrancy but channel it to meet the specific needs of diverse communities. We are still one of the richest countries in the world.¹³⁵

developmental goals as if there were no essential conflict between them, by defining one in terms of the other. Poverty is pollution; environmental quality is an aspect of the standard of living. Such harmony is soon dispelled when concrete action is debated.

Id. See generally Global Outlook 2000, *supra* note 80, at 75-77.

132. The first important inter-governmental meeting to address the need for an international response to environmental degradation was held in Stockholm in 1972. U.N. Conference on the Human Environment, Stockholm, U.N. Doc. A/CONF. 48/14/Rev. 1 (1973). See generally Agora: What Obligation Does One Generation Owe to the Next? An Approach to Global Environmental Responsibility, 84 Am. J. Int'l L. 190 (1990) (symposium); Louis Sohn, The Stockholm Declaration of the Human Environment, 14 Harv. Int'l. L.J. 423 (1973). For a comprehensive overview, see Developments in the Law—International Environmental Law, 104 Harv. L. Rev. 1484 (1991).

133. A concern for autonomy, or "local control," appears to be universal. See, e.g., Philip Mawhood, Local Government in the Third World (1983); Michael Libonati, Home Rule: An Essay on Pluralism, 64 Wash. L. Rev. 51, 55 (1989) (describing the "rediscovery of the values of decentralization of power and localism in [former] socialist bloc countries."). Cf. David Kennedy, Some Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke, 62 U. Colo. L. Rev. 475 (1991). The European Community's 1992 program "intensifies an institutional or pragmatic modernism" but at the same time seeks:

[T]o develop a form of politics and legal culture that breaks in some ways from the Weberian/Wilsonian idea of an administration of delegated powers or of modern mass party democracy. So, in legal culture, as I suspect elsewhere, we could locate elements that suggested both a repetitive continuity with the modernist era and a rotation or break towards alternative, perhaps postmodern forms.

Id. at 478. But cf. Piven & Cloward, Why Americans Don't Vote, *supra* note 29 (attributing low voter turnout percentages in national elections to voter registration procedures that discourage poor and working class people, rather than to voter disaffection).

134. See White, The Judicial Opinion and the Poem, *supra* note 120; White, Justice as Translation, *supra* note 34, at 299 n.16 (on the need to "inhabit" a poet's language). Cf. Johnson, What the Gypsy Knew, *supra* note 6, at 69 ("Verse, then, in its rhythm and rhymes, is a practice of pivoting, as its etymology (*versus*) indicates. It is an enactment of the alternative as law and of law as alternative, necessitated precisely by the perverse way language has of disappointing the search for simple alternatives.").

135. See Michael J. Sullivan III, Measuring Global Values: The Ranking of 162 Countries 95-109 (1991) (U.S. is among the richest, whether measured by gross national product, gross national product per capita, or gross domestic product).

Surely we do not need a "miracle"¹³⁶ to assure everyone living here enough to eat.¹³⁷

136. Could Bishop have intended such a neat postmodern inversion? The poem is certainly open to multiple interpretations. Or was she suggesting, more cynically, that the political will required to even begin redistributing our ample riches, to "break [the] fast," would indeed require a miracle? See Rorty, *supra* note 6, at 198. Professor Rorty describes human solidarity:

[A]s the self-doubt which has gradually, over the last few centuries, been inculcated into inhabitants of the democratic states — doubt about their own sensitivity to the pain and humiliation of others, doubt that present institutional arrangements are adequate to deal with this pain and humiliation, curiosity about possible alternatives. . . . The self-doubt seems to me the characteristic mark of the first epoch in human history in which large numbers of people have become able to separate the question "Do you believe and desire what we believe and desire?" from the question "Are you suffering?" . . . Distinguishing these questions makes it possible to distinguish . . . the domain of the liberal from the domain of the ironist. It thus makes it possible for a single person to be both.

Id.

137. This would be a beginning, a "breakfast"—necessary, but not sufficient, for "an existence worthy of human dignity." See *supra* notes 87 & 111. The drafters of the Economic Covenant maintained that political and civil rights could not be effectively exercised unless the basic needs of survival were met. The interdependence of the Economic Covenant and the International Covenant on Civil and Political Rights, *supra* note 102, and the fallacy of asserting the superiority of either, is now well established. See *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G. A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989). See, e.g., Melanie Beth Oliviero, *Human Needs and Human Rights: Which Are More Fundamental?*, 40 *Emory L.J.* 911 (1991). See generally Russel Lawrence Barsh, *Current Developments: A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 *Am. J. Int'l L.* 192, 199 (1991) (noting a recent "linkage of human rights with the conditions for capitalism"). The questionable distinction between "positive" and "negative" rights remains an open issue in domestic law. See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 *U. Chi. L. Rev.* 864 (1986).