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NOTE

FREEDOM FROM FOOD: ON THE NEED TO RESTORE FDR'S VISION OF ECONOMIC RIGHTS IN AMERICA, AND HOW IT CAN BE DONE

Within the U.S. policy discourse, it has long been taken for granted that the body of human rights law does not—and should not—include economic rights, which include the right to adequate food, shelter, and health care. This is an irony of history, since the origins of modern-day economic rights law lie in the policies advocated by the U.S. President Franklin Delano Roosevelt.

This Note argues that (1) the common justifications for neglecting economic rights are not sound; (2) there is a pressing need to recognize economic rights in the United States; and (3) the best way to do so is to ratify and implement the International Covenant for Economic, Social, and Cultural Rights, or ICESCR. This Note illustrates how this can be successfully accomplished through a blueprint for enforcing one right from the Covenant—the right to adequate food—in the United States. By restoring Roosevelt's vision through the ICESCR, the U.S. government will strengthen its moral stance on the world stage and help secure the integrity of Americans' human rights.

I. INTRODUCTION

*Better the occasional faults of a government that lives in a spirit of charity than the consistent omissions of a government frozen in the ice of its own indifference.*¹

It often takes a truly horrific event for humans to make a leap toward progress. World War II was such an event: its senseless slaughter and destruction sent humanity into an existential crisis and led our species to rethink our fundamental values.² The outcome of this

1. Franklin Delano Roosevelt, U.S. President, Speech Before the 1936 Democratic National Convention (June 27, 1936).

2. See *Drafting and Adoption: The Universal Declaration of Human Rights*, UNIVERSAL DECLARATION OF HUM. RTS. (Aug. 27, 1998), [hereinafter *Drafting and Adoption*]

reexamination was an establishment of a new benchmark for the modern world order: the human being.³ The war-scarred nations, in an unprecedented show of solidarity, came to an agreement that blind adherence to the cause of the nation-state would only bring disaster.⁴ If world peace is ever to be secured, every living human being must be afforded a minimum universal level of respect.⁵

Such are the philosophical underpinnings of the concept of human rights—a concept now universally accepted.⁶ Creation and protection of human rights was an important goal of the newly-created United Nations (“UN”).⁷ To formalize this commitment, the UN, in its third session in 1948, adopted the Universal Declaration of Human Rights (“UDHR”).⁸ The United States, led by Eleanor Roosevelt, was a crucial player in securing the passage of the UDHR.⁹

Over the years, however, the United States’ attitude to the promotion of human rights has been mixed.¹⁰ Undeniably, the U.S.

<http://www.udhr.org/history/overview.htm>.

3. See *id.*; see also Peter Singer, *Kinder and Gentler*, N.Y. TIMES, Oct. 9, 2011, at BR1 (discussing the “rights revolution” that took place after World War II).

4. See *Drafting and Adoption*, *supra* note 2 (“When representatives from forty-six nations gathered in San Francisco on April 25, 1945 to form the United Nations, they brought with them a hatred of war combined with a spirit of respect for human dignity and worth.”).

5. See *id.*

6. Widespread acceptance is evidenced by the fact that there are 160 parties to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; see Status of International Covenant on Economic, Social and Cultural Rights, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en (last visited July 18, 2013) [hereinafter Status of ICESCR]. Such acceptance is also evidenced by the 167 parties to the International Covenant for Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], see Status of International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&lang=en (last visited July 18, 2013).

7. See U.N. Charter art. 1, para. 3.

8. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); see *Conventions, Declarations and Other Instruments Found in General Assembly Resolutions (1946 Onwards)*, UN DOCUMENTATION: RES. GUIDE, <http://www.un.org/depts/dhl/resguide/resins.htm> (last visited July 18, 2013).

9. See *Drafting and Adoption*, *supra* note 2.

10. See Ann Elizabeth Mayer, *Clashing Human Rights Priorities: How the United States and Muslim Countries Selectively Use Provisions of International Human Rights Law*, 9 CHENNAI J. INTERCULTURAL PHIL. 44, 49 (2006); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79, 80 (1992) (“[T]he United States is the only major industrialized democracy that has not yet ratified the Covenant [on Economic, Social and Cultural Rights].”); U.S. INST. FOR PEACE, U.S. HUMAN RIGHTS POLICY: A 20-YEAR ASSESSMENT 4 (1999), available at <http://www.usip.org/files/resources/sr990616.pdf> (citing U.S. opposition to economic measures and policy inconsistencies in security matters). Mayer stated:

The United States has continued to be reluctant to make binding commitments to

government projects a strong commitment to human rights and democratic principles in the world and supports causes such as freedom of speech, expansion of the franchise, separation of powers, and protection of property rights.¹¹ It has historically been active in drafting numerous legal instruments aimed at promoting human rights.¹² The United States, however, has subsequently ratified relatively few human rights treaties,¹³ and for those documents it has often used a variety of procedural devices to weaken its underlying obligations.¹⁴ Despite the fact that the modern conception of economic rights was greatly influenced by the ideas of American President Franklin Delano Roosevelt ("FDR" or "Roosevelt"),¹⁵ the United States in more recent times has demonstrated a preference for civil and political, or "negative," rights over economic and social, or "positive," rights¹⁶—a distinction that has been heavily criticized.¹⁷ Moreover, this theoretical position has the practical consequences of undermining human rights as a whole, civil and political rights included.¹⁸

uphold international human rights law even where mainstream civil and political rights are concerned. It ratifies relatively few human rights conventions, and, when it does ratify, it does so only subject to qualifications that render ratification ineffective.

Mayer, *supra*, at 49.

11. See *Human Rights*, U.S. DEP'T OF ST., <http://www.state.gov/j/drl/hr/index.htm> (last visited July 18, 2013) (stating that U.S. policy aims at promoting, inter alia, freedom from torture, freedom of expression, press freedom, women's rights, the protection of minorities, and the rule of law, without mentioning any economic rights).

12. See, e.g., David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999) (discussing U.S. participation in the drafting of the Rome Statute of the International Criminal Court); Lawrence J. LeBlanc, *United States Foreign Policy Toward Genocide and Crimes Against Humanity*, ENOTES, <http://www.enotes.com/genocide-encyclopedia/united-states-foreign-policies-toward-genocide> (last visited July 18, 2013) ("With U.S. support, the [UN] General Assembly adopted a resolution that branded genocide a crime under international law and called for the adoption of an international treaty on the subject. The treaty, the Genocide Convention, was completed two years later, in December 1948.").

13. See Mayer, *supra* note 10, at 49; Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 395 (2009).

14. See Melish, *supra* note 13, at 441-42 (discussing the use of such procedural tools as non-self-execution declarations, the optional nature of complaints mechanisms, and lenient jurisdictional rules to prevent full enforcement of human rights treaty obligations).

15. See *Drafting and Adoption*, *supra* note 2.

16. See Stark, *supra* note 10, at 81, 92 n.58 (defining positive rights as rights "arising out of a recognized affirmative obligation on the part of the state to provide benefits" and discussing the argument that ICESCR rights are "'foreign' to our notion of rights" because they are merely unenforceable "aspirations").

17. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 20-28 (2004) (discussing the changes in the understanding of rights that occurred during the New Deal, as a result of which the distinction between negative and positive rights lost much of its meaning).

18. See *id.* at 185. This is true because, without basic food, shelter, medical care, and education, people cannot fully exercise their political rights, as their energies are fully devoted to

This Note argues that the United States should once again embrace FDR's vision for economic justice, articulated most clearly in his proposal for a Second Bill of Rights.¹⁹ The U.S. political and legal system is not incompatible with economic rights, and for most of twentieth-century history, economic security was a mainstay of American society and political system.²⁰ The groundwork for economic rights is apparent in U.S. laws and regulatory schemes, court decisions, and public attitudes.²¹ It is a fact, notwithstanding official protestations against economic rights, that the United States has already implemented many of the requirements posed by the major international human rights instruments.²²

This Note contends that the U.S. government should formally recognize economic rights because it would serve the interests of the American people.²³ Recognition should come in the form of ratifying the International Covenant on Economic, Social and Cultural Rights ("ICESCR" or "Covenant")²⁴ and passing domestic legislation to enforce its provisions. This approach is preferable to passing domestic legislation piecemeal because the ICESCR is comprehensive, widely adopted, and sets binding goals.²⁵ It is not, however, an overly intrusive prescription on how these goals should be achieved: the U.S. government would retain the necessary leeway to implement the

fulfilling basic needs. *Id.* Civic participation is thus placed far into the background, creating a vicious circle of political disconnect between the establishment and the needy. *See id.*

19. *See id.* at 86. The Second Bill of Rights included proposals for a "right to earn enough to provide adequate food and clothing and recreation," a "right of every family to a decent home," and a "right to adequate medical care and the opportunity to achieve and enjoy good health," among others. Franklin Delano Roosevelt, U.S. President, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in SUNSTEIN, *supra* note 17, at 235-44.

20. *See infra* Part II.B-C.

21. *See, e.g.*, Federal Meat Inspection Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 601-95 (2006)) (ensuring the quality of meat products through a system of statutory rules and regulatory agencies, such as the Food and Drug Administration); Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as amended at 21 U.S.C. §§ 451-71 (2006)) (requiring the U.S. Department of Agriculture to inspect all domesticated birds that are processed for consumption); *see also* SUNSTEIN, *supra* note 17, at 63 (citing polls which show that Americans think they are entitled to most of the rights enumerated in the ICESCR).

22. *See, e.g.*, SUNSTEIN, *supra* note 17, at 186-87 (noting that the majority of state constitutions in the United States recognize the right to education). The latest example of the United States moving towards acceptance of widely recognized human rights is the recent health care legislation, which aims at providing universal health insurance to the U.S. population. *See About the New Law, A More Secure Future: What the Health Law Means for You and Your Family*, WHITE HOUSE, <http://www.whitehouse.gov/healthreform/healthcare-overview#healthcare-menu> (last visited July 18, 2013).

23. *See infra* Part III.A.

24. ICESCR, *supra* note 6.

25. *See infra* Part III.

Covenant in a way that is compatible with the particularities of the U.S. legal system.²⁶ To provide a concrete example of how the United States may implement ICESCR rights, this Note explores the implications of enforcing a particular provision of the Covenant—the right to adequate food.²⁷

Part II traces the historical relationship of the United States and the international community as it relates to human rights issues.²⁸ It examines the arguments against the legitimacy of economic rights and devotes particular attention to the question of justiciability of economic rights.²⁹ This Part concludes that America's relationship with economic rights does not fit neatly into either a "for" or "against" category, and that incorporating economic rights into the U.S. political and legal system is a realistic possibility.³⁰

Part III examines the challenges of ICESCR ratification in the United States.³¹ A summary of the benefits that ratification would bring is followed by a discussion of the obstacles currently precluding ratification.³² This Part ends with an overview of the obligations that the ICESCR would impose on the United States if it ratifies the Covenant.³³

Part IV attempts to show the nature and scope of obligations the ICESCR would impose by examining how the right to adequate food may be implemented in the United States.³⁴ This Part uses the framework of various UN treaty bodies to define the right to adequate food and determine which enforcement practices would work best in this context.³⁵ The analysis employs a set of policy directives, the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security ("Voluntary

26. See *infra* Part II.A. This is true because the ICESCR is a non-self-executing treaty, i.e., it requires implementing domestic legislation in order to obtain full effect within a national jurisdiction. See *infra* Part II.A.

27. See ICESCR, *supra* note 6, art. 11, at 7.

28. See *infra* Part II.

29. See *infra* Part II.B–C.

30. See *infra* Part II.C.

31. See *infra* Part III.

32. See *infra* Part III.A–B.

33. See *infra* Part III.C.

34. See *infra* Part IV.

35. See *infra* Part IV.

Guidelines”),³⁶ to determine what changes the U.S. government would have to make should it adopt the right to adequate food.³⁷

This Note concludes that the push to ratify and implement the ICESCR in the United States should be renewed.³⁸ The U.S. political and legal system is conducive to economic rights, and the obstacles that exist are not unassailable.³⁹ Formally integrating ICESCR rights into its legal system would allow the United States to comprehensively tackle economic problems affecting most Americans and lend worldwide credibility to its stance on human rights.⁴⁰

II. AMERICA AND HUMAN RIGHTS: A COMPLEX RELATIONSHIP

The United States has had a complex relationship with human rights.⁴¹ Generally, the United States is actively engaged in promoting human rights worldwide by participating in the drafting of new human rights instruments and providing military assistance in humanitarian interventions.⁴² At the same time, the United States has resorted to various procedures in order to insulate itself from foreign interference, such as not ratifying the treaties it signs, claiming that international bodies lack jurisdiction over its internal affairs, and asserting lack of consent to optional protocols.⁴³

Nevertheless, there is strong evidence that U.S. citizens are knowledgeable and concerned about human rights, including economic rights, and that they exercise these rights to the extent they are implied in the U.S. system of government.⁴⁴ Many state constitutions recognize

36. See generally FOOD & AGRIC. ORG. OF THE U.N., VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY (2005) [hereinafter VOLUNTARY GUIDELINES], available at <ftp://ftp.fao.org/docrep/fao/meeting/009/y9825e/y9825e01.pdf> (establishing guidelines for the national implementation of the right to adequate food).

37. See *infra* Part IV.B.3.

38. See *infra* Part V.

39. See *infra* Part V.

40. See *infra* Part V.

41. See *infra* Part II.B–C.

42. See Sheffer, *supra* note 12; LeBlanc, *supra* note 12; see also, e.g., Keith Ellison, *U.S. Role Made the Difference in Libya*, CNN (Aug. 26, 2011), <http://www.cnn.com/2011/OPINION/08/26/ellison.libya.obama> (discussing the United States' support for the humanitarian intervention in Libya).

43. See Melish, *supra* note 13, at 441–42.

44. See *supra* note 22 and accompanying text. There is abundant evidence that U.S. citizens frequently resort to private enforcement of their perceived rights by litigation; this is true, for example, of the right to adequate food. See, e.g., *Odwalla Litigation Troubles Continue: Observers Differ About Effect on Firm*, INT'L FOOD SAFETY NETWORK (Jan. 6, 1998), <http://foodsafety.k-state.edu/en/news-details.php?a=3&c=29&sc=220&id=8520> (discussing *E. coli* litigation against Odwalla); see also Bob Van Voris, *Jack in the Box Ends E. coli Suits*, NAT'L L. J., Nov. 17, 1997, at

economic rights, as states have historically been responsible for ensuring the “general welfare” of its citizens.⁴⁵ Granting economic rights formal recognition at the federal level would build on these protections by creating uniform federal standards, helping to curb economic inequality, and reducing class-based polarization.⁴⁶ Protecting economic rights is no less pressing today than it was when the country last experienced a severe economic calamity—the Great Depression.⁴⁷ As the current economic crisis demonstrates the need for a modern New Deal for the American people, ratifying the ICESCR is a particularly well-suited solution to this need.

A. *The International Human Rights Framework and the United States*

Since the UDHR, the UN has created numerous binding legal instruments aimed at protecting human rights.⁴⁸ In 1966, it codified the provisions of the UDHR in a pair of multilateral treaties—the ICESCR and its companion, the International Covenant for Civil and Political Rights (“ICCPR”).⁴⁹ Apart from the ICESCR and the ICCPR, the international community has also adopted such instruments as International Convention on the Elimination of All Forms of Racial Discrimination⁵⁰ in 1965, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵¹ in 1984, and the Convention on the Rights of the Child⁵² in 1989.

To become legally binding under international law, each treaty must be (1) signed by the parties and (2) ratified by each party according

A8 (discussing *E. coli* litigation against Jack in the Box).

45. See Stark, *supra* note 10, at 93, 97-98 (explaining that “general welfare” rights include, among others, public education, welfare, affordable housing, and health benefits).

46. See, e.g., Shaila Dewan & Robert Gebeloff, *One Percent, Many Variations*, N.Y. TIMES, Jan. 15, 2012, at A1; *Republicans Accuse Obama of Waging ‘Class Warfare’ with Millionaire Tax Plan*, FOX NEWS (Sep. 18, 2011), <http://www.foxnews.com/politics/2011/09/18/rep-ryan-accuses-obama-waging-class-warfare-with-millionaire-tax-plan>.

47. For example, the decline of organized labor in the United States severely undermines the right guaranteed by article 8 of the ICESCR “to form trade unions and join the trade union of [one’s] choice.” ICESCR, *supra* note 6, art. 8, at 6-7; see also Tim Kane & James Sherk, *Unions in Decline and Under Review*, HERITAGE FOUND. (Aug. 29, 2006), <http://www.heritage.org/research/reports/2006/08/unions-in-decline-and-under-review>.

48. See *infra* notes 49-52 and accompanying text.

49. See ICCPR, *supra* note 6, at 173; ICESCR, *supra* note 6, at 5. The ICCPR recognizes, inter alia, the right to life, liberty, equality before the law, freedom of thought and religion, as well as the right to be free from slavery, torture, and discrimination; see generally ICCPR, *supra* note 6 (stating throughout the various rights afforded to all human beings).

50. *Opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

51. *Opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 112.

52. *Opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

to domestic laws regarding international obligations.⁵³ In the United States, ratification of a treaty requires the consent of two-thirds of the Senate.⁵⁴ Following the grant of such consent, the extent of the obligations under a treaty depends on whether the treaty is self-executing or non-self-executing.⁵⁵ Self-executing treaties are automatically integrated into domestic law upon ratification; non-self-executing treaties, by contrast, require domestic implementing legislation to achieve this effect.⁵⁶

The passage of the UDHR exemplified an unprecedented show of solidarity among world nations.⁵⁷ It included all types of human rights without making distinctions between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other.⁵⁸ UDHR article 25 proclaims that:

[e]veryone 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.⁵⁹

53. See Vienna Convention on the Law of Treaties, art. 14, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

54. U.S. CONST. art. II, § 2.

55. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled on other grounds by* *United States v. Percheman*, 32 U.S. 51, 88 (1833), where the Supreme Court articulated this rule:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Id.; see also Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540-41 (2008) (discussing the principle of self-execution and its application in the United States).

56. Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHTS (May 1997), <http://www.asil.org/insigh10.cfm>. Kirgis explains that, in determining whether a treaty is self-executing:

[T]he primary consideration is the intent—or lack thereof—that the provision become effective as judicially-enforceable domestic law without implementing legislation. . . . [T]he more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing.

Id.

57. See *Drafting and Adoption*, *supra* note 2.

58. See generally G.A. Res. 217 (III) A, *supra* note 8 (declaring an international commitment to specific human rights norms).

59. *Id.* art. 25, at 76.

The U.S. delegation, led by Eleanor Roosevelt, unequivocally supported the Declaration.⁶⁰ This is not surprising given that the United States was instrumental in the drafting of the UDHR and inspired many of its provisions.⁶¹ It is an irony of history that the very economic and social rights that the United States now opposes were in large part based on the policies and speeches of President Roosevelt.⁶²

While the UDHR reflected the view that human rights are indivisible and interdependent, it was not a binding document.⁶³ When UN members set out to create a binding treaty that would codify UDHR provisions, the former unanimity between states was gone: the Cold War drew a sharp divide between the West (the United States and Western Europe) and the East (the Soviet Union and the Eastern Bloc countries).⁶⁴ The United States moved gradually away from its former acceptance of economic rights, insisting that only civil and political rights were legitimate and viewing economic rights as a mere pretext for socialist countries to suppress political freedoms.⁶⁵ Ultimately, the United States succeeded in persuading the UN General Assembly to pass a resolution calling for the creation of two separate covenants in 1952.⁶⁶

The two treaties that emerged were the ICCPR and the ICESCR.⁶⁷ The United States has signed both covenants, but ratified only the former.⁶⁸ Although there may have been legitimate ideological reasons for refraining from ratifying the ICESCR during the Cold War, the

60. See SUNSTEIN, *supra* note 17, at 100.

61. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 244 (2000). An influential draft of the UDHR was submitted by a Commission of the American Law Institute. *Id.*

62. See SUNSTEIN, *supra* note 17, at 100; Melish, *supra* note 13, at 441-42.

63. See 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, 385 n.89 (1990); *Drafting and Adoption*, *supra* note 2.

64. See RHONA K.M. SMITH & CHRISTIEN VAN DEN ANKER, *THE ESSENTIALS OF HUMAN RIGHTS* 194 (2005); James Nickel, *Human Rights*, STAN. ENCYC. PHIL., at 24, <http://plato.stanford.edu/archives/fall2010/entries/rights-human> (last updated Aug. 24, 2010).

65. See Stark, *supra* note 10, at 81 ("During the Cold War, the U.S. Department of State viewed ICESCR as a socialist manifesto thinly veiled in the language of rights."); Nickel, *supra* note 64, at 15.

66. See Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 773 (2006).

67. See Nickel, *supra* note 64, at 24.

68. See Robert S. Lawrence et al., *Poverty, Food Security, and the Right to Health*, 15 GEO. J. ON POVERTY L. & POL'Y 583, 587 (2008). The ICESCR, if signed, would most likely be considered a non-self-executing treaty. See Stark, *supra* note 10, at 106 n.114 (citing Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987)) ("[A]n obligation to incorporate cannot be deduced from the text of [ICESCR] Article 2 and no such proposal was even considered during the drafting of the Covenant.").

demise of the Soviet Union brought an end to global ideological polarization and presumably eliminated the negative connotation between economic rights and communism.⁶⁹ Since the end of the Cold War, a majority of countries in the world have ratified both covenants.⁷⁰ The U.S. government, however, still refuses to acknowledge the legitimacy of rights embodied in the ICESCR, arguing that these rights are vague and unenforceable.⁷¹ This position leaves the United States as the only industrialized Western democracy to not be a party to the ICESCR.⁷²

B. *Debate over the Legitimacy of ICESCR Rights*

In the debate against economic rights, three main lines of argument may be discerned: First, they are not real rights and are alien to Western liberal ideals; Second, economic rights invite unwanted government interference in society, suppressing individual liberty; Third, they are unenforceable by courts.⁷³ The following discussion examines each of these arguments in turn.

1. The "So-Called" Economic Rights

In the words of the prominent international law scholar and professor Philip Alston, Americans tend to view the ICESCR as the "Covenant on Uneconomic, Socialist and Collective Rights."⁷⁴ It is a longstanding U.S. policy that there is no such thing as economic and social rights.⁷⁵ Government officials make it a point to either put quotation marks around the word "rights," whenever it follows "economic, social and cultural," or insert "so-called" beforehand.⁷⁶ The Reagan administration made explicit that, in the eyes of the U.S. government, "human rights" meant only "political rights and civil liberties."⁷⁷ The administration omitted any references to economic and social rights in its official documents.⁷⁸

69. See Stark, *supra* note 10, at 84; see also Lawrence, *supra* note 68, at 587.

70. See *supra* note 6 and accompanying text.

71. See Nickel, *supra* note 64, at 15. It is difficult to see why vagueness should preclude recognition of economic rights, for many rights contained in the federal Bill of Rights and state constitutions are equally vague. See Stark, *supra* note 10, at 99-100 (noting that state courts "have long been required to interpret language at least as open-ended").

72. See Stark, *supra* note 10, at 80.

73. See *infra* Part II.B.1-3.

74. Alston, *supra* note 63, at 366 (internal quotation marks omitted).

75. *Id.* at 367.

76. *Id.*

77. *Id.* at 372.

78. *Id.*

This practice continues to this day.⁷⁹ The explanation for it is that, by recognizing economic rights, the government “waters down” civil and political rights and undermines individual liberty.⁸⁰ Notably, American civil society groups and non-government organizations (“NGOs”) share this view.⁸¹

Contrary to these views, the UN General Assembly has proclaimed that, “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent.”⁸² This principle was affirmed at the World Conference on Human Rights in Vienna.⁸³ As Professor Smita Narula stated, “[t]he right to food . . . is interdependent with civil and political such as the rights to life, to self-determination, and the right to information.”⁸⁴ After all, “[w]ithout food the right to life would be rendered meaningless.”⁸⁵

When the implications of full implementation of one set of rights over another are considered, it becomes apparent that the UDHR drafters were correct in producing one document instead of two, for human beings cannot achieve their full potential in a system that lacks a comprehensive human rights approach.⁸⁶ In the words of FDR, “freedom is no half-and-half affair.”⁸⁷ The drafters of the ICESCR and ICCPR explained the proposed differences between the covenants: civil and political rights were justiciable, capable of immediate enforcement, and were focused against the state;⁸⁸ whereas economic, social, and cultural rights were not enforceable by the courts, required progressive

79. See, e.g., U.S. DEP’T OF ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2012) [hereinafter COUNTRY REPORTS], available at <http://www.state.gov/documents/organization/207973.pdf> (neglecting to make any mention of economic or social rights).

80. Alston, *supra* note 63, at 373.

81. See *id.* at 390 (quoting LOWELL LIVEZEY, NON-GOVERNMENTAL ORGANIZATIONS AND THE IDEAS OF HUMAN RIGHTS 89 (1987)) (discussing a study which found that “the organizations of the international human rights movement do not interpret economic needs as rights”).

82. GA Res. 421 (V) E, pmbl. para. 3, UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775, at 43 (Dec. 4, 1950).

83. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter World Conference on Human Rights] (“[A]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”).

84. See Narula, *supra* note 66, at 732.

85. *Id.*

86. See generally U.N. GAOR, 10th Sess., U.N. Doc.A/2929 (July 1, 1955) (explaining the reasoning behind the decision to adopt one document rather than two); see also SUNSTEIN, *supra* note 17, at 19 (observing that the New Deal brought a widespread recognition that “[n]o one really opposes government intervention” and that “[m]arkets and wealth depend on government”).

87. Speech Before the 1936 Democratic National Convention, *supra* note 1.

88. U.N. GAOR, 10th Sess., ¶¶ 9-10, U.N. Doc.A/2929 (July 1, 1955).

implementation, and called for state intervention.⁸⁹ Still, the drafters acknowledged that “[w]ithout economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.”⁹⁰

U.S. politicians and delegates frequently assert that economic rights are foreign to “Western” concepts of rights.⁹¹ But this is not an accurate characterization: the only Western country that has not recognized the legitimacy of economic rights is the United States.⁹² Thus, the debate is “between the United States on the one hand, and most of the rest of the world on the other.”⁹³

2. Individual Liberties and the State

A slightly more sophisticated argument justifying the primacy of civil and political rights is based on the role of the state vis-à-vis these rights.⁹⁴ Theoretically, civil and political rights only require that the state refrain from interfering with individual liberties.⁹⁵ Hence, “[t]hey can . . . be implemented with immediate effect and with limited strain on state resources.”⁹⁶ Economic and social rights, on the other hand, “can only be implemented gradually and at great cost to the state.”⁹⁷ Economic rights place an affirmative duty on government to intervene in the personal affairs of its citizens and engage in forced appropriation of resources from one (better-off) segment of the population to another (worse-off) segment.⁹⁸ Allegedly, this cheapens the idea of rights and opens the door to government tyranny.⁹⁹

This argument, however, ignores the important practical reality that civil and political rights, such as the right to counsel, require substantial state expenditure.¹⁰⁰ This is apparent from the costs incurred while “setting up and training the police force, the military and the judiciary.”¹⁰¹ This view also ignores the fact that some social and

89. *Id.*

90. *Id.* ¶ 8.

91. See Alston, *supra* note 63, at 375.

92. *Id.*

93. *Id.* at 376.

94. See Narula, *supra* note 66, at 774.

95. See *id.*

96. *Id.*

97. *Id.*

98. See SUNSTEIN, *supra* note 17, at 198.

99. See *id.*

100. See *infra* note 101 and accompanying text.

101. Special Rapporteur on the Right to Food, *Economic, Social and Cultural Rights: The Right to Food*, ¶ 37, Econ. & Soc. Council, Comm’n on Human Rights, U.N. Doc. E/CN.4/2002/58

economic rights can be implemented immediately and at low cost to the taxpayers, such as minimum wage laws or guarantees of the right to form trade unions.¹⁰²

Another argument proposes that America's preference for civil and political rights indicates a difference in values.¹⁰³ Namely, "liberty rights reflect an individualist political philosophy that prizes freedom, welfare rights a communitarian or collectivist one that is willing to sacrifice freedom."¹⁰⁴ This argument rests on the premise that government interference is antithetical to freedom.¹⁰⁵ But this position is untenable in modern society, where rights are not merely high ideals but "public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being."¹⁰⁶ Thus, "[a]ll rights are positive rights."¹⁰⁷ Even as the classic negative rights—to life, liberty, and property—are meant to protect the individual from the government, enforcement of these rights is impossible without some form of government.¹⁰⁸ Enforcement requires public expenditures on education, training, monitoring, policing, and litigating, all of which are immensely expensive and impossible without affirmative government involvement.¹⁰⁹

Many fears about the ICESCR surfaced during the U.S. ratification debate: it was posited, for instance, that "acceptance of the Covenant would bring with it an enormous and incalculable commitment to an expanding, centralized welfare state with reduced liberties for the individual," and that "the Covenant would constitute a giant step toward a socialist state."¹¹⁰

(Jan. 10, 2002) (by Jean Ziegler) [hereinafter Ziegler Report].

102. Narula, *supra* note 66, at 774.

103. DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE 1-2 (1998), *reprinted in* STEINER & ALSTON, *supra* note 61, at 257.

104. *Id.* at 259.

105. See STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 1-2 (1999), *reprinted in* STEINER & ALSTON, *supra* note 61, at 260.

106. *Id.*

107. *Id.* at 261.

108. See, e.g., U.S. CONST. amends. V, XIV. Consider, for instance, the right to be free from deprivation of property without due process of law. *Id.* Had government left the enforcement of property rights to the people, a likely scenario would have been an "institutionalized black market, in which property rights depend on recognition by . . . local leaders—village elders, warlords, Mafia heads, or anyone strong enough to fight well." SUNSTEIN, *supra* note 17, at 199.

109. See SUNSTEIN, *supra* note 17, at 200.

110. Alston, *supra* note 63, at 378 (quoting *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong. 111, 169 (1979) [hereinafter *International Human Rights Treaties*] (statements of J.P. Anderegg, Professor, Colum. Law Sch., and Phyllis Schlafly, Chairman, Stop ERA) (internal quotation marks omitted)).

Yet, a serious legal analysis of the Covenant will reveal that there is hardly “any[] substance to such interpretations.”¹¹¹ This becomes especially clear considering that, even from the U.S. perspective, much of the ICESCR promotes relatively uncontroversial obligations, some of which trace their history to FDR’s policies.¹¹² Among them are rights concerning conditions of work, equal pay for similarly situated workers, protection of the family, and social security.¹¹³

Finally, another objection to ICESCR rights is that the enforcement of such rights is the province of experts within the respective area of the particular economic right.¹¹⁴ By this logic, however, “civil and political rights issues should be seen as the exclusive domain of criminologists, trade unionists, psychologists, physicians, pediatricians, the clergy, communications experts and others.”¹¹⁵ This suggests that sounder objections to economic rights must lie elsewhere.¹¹⁶

3. The Question of Justiciability

Yet another criticism of ICESCR rights is that they are non-justiciable, that is, unenforceable by courts.¹¹⁷ Unlike individual rights contained in the ICCPR, economic rights are programmatic in that they require lengthy legislative deliberation that courts are not equipped to engage in.¹¹⁸ Critics argue that “it remains far simpler for courts to prohibit than to prescribe,” and that court enforcement of affirmative obligations results in a “judicial nightmare.”¹¹⁹

The Committee on Economic, Social and Cultural Rights (“ESCR Committee”), the UN body charged with ICESCR implementation worldwide, responded to these concerns by stating that, because human rights are indivisible and interdependent, it would be arbitrary to draw the line of justiciability merely on the basis that they are contained in different covenants.¹²⁰ If economic, social, and cultural rights are equal to civil and political rights “they must be considered the same in nature

111. *Id.* at 378.

112. *Id.* at 369.

113. ICESCR, *supra* note 6, arts. 7-10, at 6-7; *see* Alston, *supra* note 63, at 369.

114. Alston, *supra* note 63, at 375.

115. *Id.*

116. *See id.*

117. *See* STEINER & ALSTON, *supra* note 61, at 275; Stark, *supra* note 10, at 118 (stating that courts are “plainly unsuited” to enforce economic rights due to lack of “resources, institutional support, and expertise”).

118. *See* STEINER & ALSTON, *supra* note 61, at 277; Ziegler Report, *supra* note 101, ¶¶ 35-36.

119. Stark, *supra* note 10, at 118.

120. United Nations, Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rights, General Comment No. 9, ¶ 10, U.N. Doc. E/C.1998/24 (1998).

and justiciable.”¹²¹ As mentioned, several ICESCR rights are capable of immediate enforcement, for instance, the right to be free from discrimination and the right to free primary education.¹²²

In cases dealing with budgetary appropriations, a judiciary need not assume the role of legislator; instead, its role is to “remind the government that it is under a duty to do x: it should not tell the government *how* to fulfil this duty, precisely so as to allow for greater scope in democratic decision-making.”¹²³ Judges are already engaged in deciding questions pertaining to resource allocation.¹²⁴ In the United Kingdom, for instance, courts oversee education, housing, and health care.¹²⁵ This has to some degree caused the government to adjust its policies, indicating that the courts have been somewhat successful.¹²⁶ The justiciability of economic rights will become more apparent as courts develop a more substantial body of jurisprudence in dealing with their enforcement.¹²⁷

C. *Economic Rights in U.S. Courts*

Contrary to commonplace assertions that economic rights are nonjusticiable, there have by now been numerous cases, both internationally and in the United States, where these rights have been successfully litigated.¹²⁸ In the United States, both state and federal courts have entertained the notion of economic rights.¹²⁹ What follows is an examination of several cases illustrating the American judiciary’s approach to economic rights litigation.

1. State Constitutional Litigation

Many state constitutions recognize economic rights, and state courts are frequently called on to enforce them.¹³⁰ One of the more

121. Ziegler Report, *supra* note 101, ¶ 33.

122. See ICESCR, *supra* note 6, arts. 3, 13, at 5, 8; STEINER & ALSTON, *supra* note 61, at 277.

123. Cécile Fabre, *Constitutionalising Social Rights*, 6 J. POLIT. PHIL. 263, 281 (1998), reprinted in STEINER & ALSTON, *supra* note 61, at 278.

124. *Id.*

125. *Id.*

126. *Id.*

127. Ziegler Report, *supra* note 101, ¶ 37.

128. See, e.g., *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977) (finding unconstitutional a statute that restricted indigents’ access to welfare benefits); see also CHRISTOPHE GOLAY & MELIK ÖZDEN, *THE RIGHT TO FOOD* 20 (2005), available at <http://www.cetim.ch/en/documents/Br-alim-A4-ang.pdf> (discussing a line of Swiss cases that have recognized the right to food as included under the Swiss national constitution).

129. See *infra* Part II.C.1–2.

130. SUNSTEIN, *supra* note 17, at 122.

famous cases in this category is *Tucker v. Toia*,¹³¹ brought in New York.¹³² There, the New York Court of Appeals invalidated as unconstitutional a law that restricted indigents' access to welfare benefits.¹³³ The law required that, in order to obtain benefits, individuals under twenty-one years of age must reside with a "parent or legally responsible relative."¹³⁴ In reaching its decision, the court relied on article XVII, section 1 of the New York State Constitution, which states: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."¹³⁵ The Court of Appeals proclaimed that, "[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."¹³⁶ But this was not a usurpation of the legislature's power, because, in fulfilling its absolute obligation to "provide for the aid, care and support of persons in need," the state had discretion as to "the manner and the means" it employed to carry out this duty.¹³⁷

In *Barie v. Lavine*,¹³⁸ the New York Court of Appeals exercised judicial restraint in interpreting the same constitutional provision.¹³⁹ The court had to decide whether the suspension of assistance to persons who unjustifiably refused to accept employment was constitutional, and concluded that it was because the legislature deemed such persons not to be needy.¹⁴⁰

The New Jersey Supreme Court has also engaged in economic rights adjudication: in *Southern Burlington Country NAACP v. Township of Mount Laurel*,¹⁴¹ the plaintiffs challenged a zoning ordinance on grounds that it unconstitutionally excluded low-income residents from obtaining housing in the municipality.¹⁴² The court agreed, stating that denial of housing in this case was a constitutional violation.¹⁴³ Specifically, the state could not use its police power in a way that

131. 371 N.E.2d 449 (N.Y. 1977).

132. *See id.*

133. *Id.* at 449.

134. *Id.* at 450.

135. N.Y. CONST. art. XVII, § 1; *Tucker*, 371 N.E.2d at 451.

136. *Tucker*, 371 N.E.2d at 451.

137. *Id.* at 452.

138. 357 N.E.2d 349 (N.Y. 1976).

139. *Id.* at 349, 352.

140. *Id.*

141. 456 A.2d 390 (N.J. 1983).

142. *Id.* at 413.

143. *Id.* at 410.

conflicts with the general welfare of its residents.¹⁴⁴ Because the state did employ its power in such a manner in Mount Laurel, the municipality violated the plaintiffs' rights to substantive due process and equal protection.¹⁴⁵ To remedy the situation, the court adopted a series of innovative mechanisms,¹⁴⁶ the most significant of which was the appointment of a three judge panel to monitor the compliance with the affordable housing mandate.¹⁴⁷

These cases show that state courts in the United States are (1) competent to adjudicate economic rights and (2) capable of exercising judicial restraint and according proper deference to the legislature on the specific means of protecting economic rights.¹⁴⁸

2. Federal Constitutional Litigation

The U.S. Constitution is the oldest constitution in the world that is still in force.¹⁴⁹ Considering that economic rights largely came into existence in the twentieth century, it is not surprising that the text of the U.S. Constitution makes no mention of these rights.¹⁵⁰ But the meaning of the Constitution has changed over time and, as the idea that human beings are entitled to basic material guarantees gained prominence, the U.S. Supreme Court interpreted the Constitution to provide some measure of economic rights to the American population.¹⁵¹

While the U.S. Constitution does not contain any express protections of economic rights, during the colonial period the position that the needy deserved public assistance was "widely accepted."¹⁵² In that period, the population of the United States consisted mainly of laborers who settled the New World, and the economy was

144. *Id.* at 415.

145. *Id.* at 490.

146. *See id.* at 480. One such mechanism was the appointment of a special master to assist trial courts. *Id.*

147. *Id.* at 419.

148. *See supra* Part II.C.1. The New Jersey Supreme Court explained its far-reaching decision as follows: "[W]hile we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution." *Mount Laurel*, 456 A.2d at 490.

149. SUNSTEIN, *supra* note 17, at 105.

150. *See id.*

151. *See id.* at 105-06. The Great Depression and World War II provided a strong impulse to ensure that destitute conditions of such magnitude did not happen again: accordingly, FDR recognized that "[f]reedom from fear is eternally linked with freedom from want," and "[p]eople who are hungry and out of a job are the stuff of which dictatorships are made." Franklin Delano Roosevelt, U.S. President, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in SUNSTEIN, *supra* note 17, at 235; *see also* SUNSTEIN, *supra* note 17, at 83.

152. SUNSTEIN, *supra* note 17, at 118-19.

agricultural.¹⁵³ Thus, “starvation and dislocation were practically impossible,” and there was no need for economic rights.¹⁵⁴

All of this changed with the industrial revolution and the growth of powerful businesses.¹⁵⁵ The Great Depression marked a decisive point in history, the latest “constitutional moment” where the American society was forced to reassess its basic values.¹⁵⁶ Welcoming this challenge, FDR declared that “[i]f, as our Constitution tells us, our Federal Government was established among other things, ‘to promote the general welfare,’ it is our plain duty to provide for that security upon which welfare depends.”¹⁵⁷ The President sought to fulfill that duty through aggressive legislation now known as the New Deal.¹⁵⁸ Initially, the Supreme Court stood in the way of FDR’s programs, striking down a significant portion of the New Deal legislation.¹⁵⁹ Over time, the Court reversed course, allowing some of the most important pieces of New Deal legislation to not only survive, but to solidify in American society as “constitutive commitments.”¹⁶⁰

As New Deal programs were becoming more established in the American social fabric after World War II, the U.S. Supreme Court began to entertain the idea of constitutional protection for these legislative commitments.¹⁶¹ Thus, in the late 1950s and 1960s, the Supreme Court read several economic rights into the U.S. Constitution in decisions like *Gideon v. Wainwright*¹⁶² and *Goldberg v. Kelly*.¹⁶³ The source of this jurisprudence came from an “obscure” decision from 1941, *Edwards v. California*,¹⁶⁴ where the Court held that a law prohibiting people from bringing indigents into California violated the Commerce Clause of the Constitution.¹⁶⁵

The Court invoked *Edwards* in *Griffin v. Illinois*,¹⁶⁶ where the Court held that “trial transcripts (or their equivalent) [had to be

153. *Id.* at 69-70.

154. *Id.* at 70 (internal quotation marks omitted).

155. *Id.*

156. *Id.* at 59.

157. Franklin Delano Roosevelt, U.S. President, Message to Congress on the Objectives and Accomplishments of the Administration (June 8, 1934) (quoting U.S. CONST. pmbl.), available at <http://www.ssa.gov/history/fdrstmts.html#message1>.

158. SUNSTEIN, *supra* note 17, at 40-41.

159. *Id.* at 54.

160. *Id.* at 99-100.

161. *Id.* at 154.

162. 372 U.S. 335 (1963).

163. 397 U.S. 254 (1970); see SUNSTEIN, *supra* note 17, at 156, 161.

164. 314 U.S. 160 (1941).

165. *Id.* at 171, 174; see U.S. CONST. art. I, § 8, cl. 3; SUNSTEIN, *supra* note 17, at 154.

166. 351 U.S. 12 (1956).

provided] at no cost to poor people appealing their criminal convictions.”¹⁶⁷ A series of decisions followed in which the Court accepted other claims dealing with economic entitlements.¹⁶⁸ In *Gideon*, the Court held that indigent defendants were entitled to assistance of counsel in criminal cases.¹⁶⁹ The Court then extended this requirement to divorce cases in *Boddie v. Connecticut*.¹⁷⁰ In *Harper v. Virginia Board of Elections*,¹⁷¹ the Court couched its decision in the language of economic rights when it struck a state poll tax and established a heightened review for classifications drawn on lines of wealth.¹⁷²

This trend continued in *Shapiro v. Thompson*,¹⁷³ where the Supreme Court declared unconstitutional a California law that required one-year residency to receive welfare benefits, and in *Memorial Hospital v. Maricopa County*,¹⁷⁴ where the Court struck down an Arizona law that required one-year residency to receive emergency medical treatment.¹⁷⁵ Finally, in *Goldberg v. Kelly*, the U.S. Supreme Court all but recognized welfare benefits as a form of constitutional property, holding that due process requires the government to provide an evidentiary hearing before it can terminate welfare benefits.¹⁷⁶

But this trend came to a halt when the Supreme Court underwent major staff changes.¹⁷⁷ The election of Richard Nixon, combined with developments that forced a series of retirements from the Supreme Court, was a decisive historical contingency.¹⁷⁸ Nixon appointed four justices to the Court whose views were largely aligned with conservative ideals that did not recognize the legitimacy of economic rights.¹⁷⁹

It should be noted, however, that none of the core principles in the Supreme Court’s decisions dealing with economic entitlements have been expressly overruled.¹⁸⁰ Thus, “[a]s the law now stands, it would be much too simple to say that the American Constitution does not

167. *Id.* at 19; SUNSTEIN, *supra* note 17, at 156.

168. *See* SUNSTEIN, *supra* note 17, at 156.

169. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

170. 401 U.S. 371, 374 (1971); *see* SUNSTEIN, *supra* note 17, at 157.

171. 383 U.S. 663 (1966).

172. *Id.* at 664, 666, 670; *see* SUNSTEIN, *supra* note 17, at 158-59.

173. 394 U.S. 618 (1969), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

174. 415 U.S. 250 (1974).

175. *Id.* at 252-53; *Shapiro*, 394 U.S. at 621-22; *see also* SUNSTEIN, *supra* note 17, at 159-60.

176. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *see* SUNSTEIN, *supra* note 17, at 161-62.

177. SUNSTEIN, *supra* note 17, at 108.

178. *Id.*

179. *Id.*

180. *See id.* at 171.

recognize social and economic rights.”¹⁸¹ It is possible that one day this line of decisions will experience a revival; the U.S. Constitution is, after all, “a flexible instrument, one that allows for a great deal of change over time.”¹⁸² With perceived economic injustices becoming more widespread, perhaps another wave of change is not far off.¹⁸³

III. TOWARD ICESCR IMPLEMENTATION IN THE UNITED STATES

Although the need for a viable safety net may be apparent to most people, the need to implement it through an international treaty is less so.¹⁸⁴ This Part explores the reasons why ICESCR ratification would be beneficial for the United States.¹⁸⁵ It discusses problems with the current strategy of the American human rights community and considers how that strategy should change.¹⁸⁶ Finally, should the ICESCR be ratified, this Part examines the nature of the obligations that would flow from it.¹⁸⁷

A. Reasons for Implementation

Following the ICESCR’s and the ICCPR’s entry into force in 1976, U.S. ratification of both covenants seemed to be on track.¹⁸⁸ President James Earl “Jimmy” Carter, Jr. signed both documents in 1978 and submitted them to the Senate for its advice and consent.¹⁸⁹ The Senate’s attitude was less than receptive: it met the ICCPR with deep reservations, and the ICESCR with outright hostility.¹⁹⁰ Eventually, the Senate ratified the ICCPR in 1992.¹⁹¹ The ICESCR, on the other hand, has been neglected to this day.¹⁹²

The ICESCR, however, is not a complete nullity in the United States: the President’s signature indicates at least a political willingness

181. *Id.*

182. *Id.* at 59.

183. See, e.g., Colin Moynihan, *Charges Are Dropped for 14 Demonstrators*, N.Y. TIMES, Feb. 18, 2012, at A19 (discussing an Occupy Wall Street defendant who participated in a demonstration on the Brooklyn Bridge and illustrating the manifestations of popular discontent with the current economic system).

184. See *infra* Part III.A.

185. See *infra* Part III.A.

186. See *infra* Part III.B.

187. See *infra* Part III.C.

188. Alston, *supra* note 63, at 365.

189. *Id.*

190. See *id.* at 366, 369-70, 372.

191. Stark, *supra* note 10, at 86.

192. See Status of ICESCR, *supra* note 6.

to be bound by the Covenant.¹⁹³ Under customary international law, signing a treaty obligates the signatory state to “refrain from acts which would defeat the object and purpose of a treaty.”¹⁹⁴ Thus, should the U.S. government decide to start systematically *depriving* its citizens of basic economic rights, it would be in breach of the ICESCR.¹⁹⁵

Ratifying one covenant but not the other is a reflection of the U.S. stance on what constitutes legitimate human rights.¹⁹⁶ However, this undermines the broad understanding that human rights are indivisible and interdependent.¹⁹⁷ What does, for example, the right to privacy mean to the homeless, or freedom of the press to the illiterate? Civil and political rights are indispensable to citizenship, but they are not more than nominal privileges if citizenship does not also entail security from desperate conditions.¹⁹⁸

Perhaps this position is not the main source of controversy that the ICESCR debate has stirred: as the New Deal era and the 1960s Supreme Court decisions show, economic rights may be guaranteed without acceding to an international treaty.¹⁹⁹ The question, then, is why should the United States ratify the ICESCR instead of launching a purely domestic program aimed at securing the same rights?

Ratification (and the passage of implementing legislation) has several benefits.²⁰⁰ To begin with, it frames the understanding of basic entitlements as a matter of human rights.²⁰¹ Just as the Bill of Rights was a concerted effort at securing individual liberties, the ICESCR provides a comprehensive national structure for ensuring economic security.²⁰² Thus, ratification would “create a cultural expectation about what government ought to do.”²⁰³

It has been said that, “the amount of assistance provided to the disadvantaged in society [is] a good measurement of civilization.”²⁰⁴ In

193. See Melish, *supra* note 13, at 398.

194. Vienna Convention, *supra* note 53, art. 18, at 336.

195. See Narula, *supra* note 66, at 742.

196. Alston, *supra* note 63, at 389.

197. See World Conference on Human Rights, *supra* note 83, ¶ 5.

198. See SUNSTEIN, *supra* note 17, at 162 (citing *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970)).

199. See *supra* Part II.C.2.

200. See *infra* note 201 and accompanying text.

201. See ICESCR, *supra* note 6, pmb. para. 3, at 5 (recognizing that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”).

202. See VOLUNTARY GUIDELINES, *supra* note 36.

203. SUNSTEIN, *supra* note 17, at 103.

204. United Nations, Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rights, Supp. No. 4, at 26, U.N. Doc. E/1988/14, E/C.12/1988/4, U.N. Doc. E/C.12/1999/5 (1988) (internal quotation marks omitted).

this regard, the United States is far ahead of some developing nations that have ratified the ICESCR.²⁰⁵ It possesses a substantial measure of public awareness of the enumerated rights, enforcement of those rights, and existing legislation aimed at protecting those rights.²⁰⁶ The United States also has the political will and popular support for the rights enumerated in the ICESCR, if not for the Covenant itself.²⁰⁷

In his insightful article, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, Professor Alston criticized American advocates of ICESCR ratification for misrepresenting its consequences for the American social welfare system.²⁰⁸ Because the United States' record on economic rights is already at least as good as in other developed nations, the argument goes, it would not need to make any significant changes.²⁰⁹ But this is manifestly not the case, as various studies show, deep structural defects in U.S. social policy.²¹⁰ The child poverty rate, for example, is much higher in the United States than in other industrialized countries.²¹¹ While it is beyond the scope of this Note to list all the problems that the ICESCR seeks to remedy, other examples include lack of universal health coverage,²¹² weak labor organization,²¹³ and an unsustainable food system.²¹⁴ Hence, there is good reason to believe that enforcement of ICESCR provisions would provide significant benefits to the U.S. population.²¹⁵

205. See *infra* note 206 and accompanying text.

206. See, e.g., Stark, *supra* note 10, at 97-98, 103 (observing that state courts have found that "their people are constitutionally entitled to free public education, welfare, affordable housing, health benefits, and abortions," and concluding that "there is enough common ground, and there are sufficient similarities in climate and culture, for international conceptions of economic rights to take root and flourish in the United States").

207. Stark, *supra* note 10, at 104; see also *supra* note 22 and accompanying text.

208. Alston, *supra* note 63, at 381.

209. *Id.*

210. *Id.*

211. *Id.*

212. See Robert Pear, *Enrollments for Insurance Start Oct. 1, Official Says*, N.Y. TIMES, Feb. 15, 2013, at A16. Universal health coverage is, of course, the focus of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.), but it will take several years to fully take effect and there are uncertainties regarding modes of implementation. See Pear, *supra*, at A16.

213. See Kane & Sherk, *supra* note 47.

214. See *infra* Part IV.B.3.d.

215. See ICESCR, *supra* note 6, art. 11, at 7 (recognizing and proposing enforcement of "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"). The ICESCR would help alleviate the hardship of many Americans plagued by stagnant wages and high unemployment. See *id.*; see also Paul Krugman, *How Fares the Dream?*, N.Y. TIMES, Jan. 16, 2012, at A23 (discussing how America became a "nation that judges people not by the color of their

Another feature of the ICESCR is its comprehensive approach to economic rights.²¹⁶ Even if the treaty provisions are non-self-executing, they do provide a national direction on issues of human rights promotion.²¹⁷ Ratification would bring the U.S. government into the international framework for ICESCR monitoring and enforcement.²¹⁸ For instance, the United States would be obligated to submit periodic reports to the ESCR Committee.²¹⁹ The United States would also be able to take advantage of international assistance in adapting the ICESCR to its domestic institutions.²²⁰

Finally, ratifying the ICESCR will have a strong symbolic effect because the United States would emerge from its much-criticized position as the only industrialized democracy not to have ratified the Covenant, and join the global consensus that economic rights are legitimate, not just “so-called,” rights.²²¹ Unlike countries that have ratified the ICESCR but have done next to nothing to implement it, the United States need not “make empty promises and . . . clothe those promises in the garb of formal guarantees.”²²² The vibrancy of American civil society and advocacy groups, as well as the U.S. courts’ receptiveness to interpreting international law instruments, give good reason to believe that the United States would take ICESCR rights seriously.²²³

Ratification would also deprive critics of U.S. foreign policy of a substantial part of their rhetorical ammunition.²²⁴ Currently, accusations of hypocrisy are frequently directed at the United States and charge that, despite officially making human rights promotion its leading foreign policy priority, the United States neglects to guarantee basic human rights to its own citizens.²²⁵ Thus, adopting the ICESCR will allow the

skin . . . but by the size of their paychecks”).

216. See generally ICESCR, *supra* note 6 (establishing economic rights and means for their enforcement).

217. See Alston, *supra* note 63, at 379 (quoting *International Human Rights Treaties*, *supra* note 110, at 169 (statement of Louis Sohn)).

218. See ICESCR, *supra* note 6, arts. 16-17, at 9.

219. See *id.*

220. See *id.* arts. 2(1), 23, at 5, 10.

221. See Alston, *supra* note 63, at 367; Stark, *supra* note 10, at 80.

222. Alston, *supra* note 63, at 377, 392.

223. *Id.* at 392-93.

224. See *infra* note 225 and accompanying text.

225. See, e.g., *Russia: Human Rights Report Criticizes U.S. and Others*, N.Y. TIMES, Dec. 29, 2011, at A8 (reporting that Russia’s Foreign Ministry “singled out the United States” and attacked as hypocritical the U.S. human rights record).

United States to reclaim its moral leadership and serve as an inspiration to human rights advocates worldwide.²²⁶

B. The Implementation Strategy

While there are significant obstacles in the way of full recognition of ICESCR rights in the United States, the challenge of implementation is not insurmountable.²²⁷ The key to adopting the ICESCR lies with developing strong advocacy and lobbying efforts, as well as devoting more scholarly attention to the ICESCR and its benefits.²²⁸

As discussed, many ICESCR provisions are already substantially implemented in the United States.²²⁹ The main obstacle is the group of rights established by Articles 11-14 of the ICESCR, including the primary focus of this Note—the right to adequate food.²³⁰ The difficulty with promoting these rights in the United States is that U.S. government “has categorically denied that there is any such thing as an economic, a social or a cultural human right.”²³¹

Another problem in the ICESCR implementation strategy is the tendency of some advocates to “portray the Covenant as though it did not differ significantly from the other treaties whose ratification was being advocated.”²³² This position ignores the fact that ratification would impose substantial obligations on the United States.²³³ If ratification is to be given serious consideration in the future, advocates should refrain from trying to “sell” the Covenant on dubious premises and engage in an honest debate that does not distort the consequences of ratification.²³⁴ This approach will “stimulate more careful consideration of the issues” and facilitate a “far more nuanced and broadly based ratification campaign.”²³⁵

Professor Alston suggests that, to achieve ICESCR implementation, a good starting point would be “to ascertain, as precisely as possible, the nature of the existing situation with respect to each right,” highlight the problems, and establish policies to solve them.²³⁶ In the context of the right to adequate food, for example, this would entail adopting

226. See *supra* note 225 and accompanying text.

227. See *infra* notes 229–42 and accompanying text.

228. Alston, *supra* note 63, at 392.

229. *Id.* at 369; see *supra* Part II.C.

230. ICESCR, *supra* note 6, arts. 11–14, at 7–9; Alston, *supra* note 63, at 369.

231. Alston, *supra* note 63, at 367.

232. *Id.* at 366.

233. *Id.* at 367–68.

234. *Id.* at 368.

235. *Id.*

236. *Id.* at 379.

“legislation requiring the various levels of government to collaborate periodically on a detailed survey of the nutritional status of the American people, with particular emphasis on the situation of the most vulnerable and disadvantaged groups and regions.”²³⁷ Based on this data, the government can then design “carefully targeted legislative, administrative and practical measures aimed at enhancing realization of the right.”²³⁸

In Professor Alston’s view, ratification proponents should seek the alliance of existing advocacy groups dealing with “women’s rights, homelessness, child abuse, malnutrition and access to education.”²³⁹ The voice of these groups would be significantly amplified if, instead of pursuing their separate causes, they united “under the rubric of economic, social and cultural rights,” collectively pushing for ICESCR ratification.²⁴⁰ In sum, the debate “needs to be much more internally focused” and framed as an issue of domestic policy.²⁴¹ Whether this approach succeeds or not, it would make the “long, arduous and uncertain” road to ICESCR ratification “a far more productive and satisfying journey.”²⁴²

C. Obligations

Article 2 of the ICESCR provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁴³

If the United States ratifies the ICESCR, it will have to fulfill certain obligations whether or not it passes implementing legislation.²⁴⁴ At the very least, it must provide “a minimum essential level of economic, social and cultural rights . . . regardless of the limitation of progressive realization.”²⁴⁵ Additionally, certain ICESCR rights must be

237. *Id.*

238. *Id.* at 379-80.

239. *Id.* at 392.

240. *Id.*

241. *Id.* at 393.

242. *Id.*

243. ICESCR, *supra* note 6, art. 2, at 5.

244. Ziegler Report, *supra* note 101, ¶ 42.

245. *Id.*

implemented immediately.²⁴⁶ Among these are the right to be free from discrimination, to form trade unions, to perform scientific research and engage in creative activity, the right of parents to choose schools for their children, and the right to free and compulsory education.²⁴⁷

As noted, the United States would also be obliged to submit reports on its progress to the ESCR Committee, initially within two years of ratification, and subsequently at five-year intervals.²⁴⁸ The UN publicizes these reports to ensure that the state party is making progress in implementing the Covenant provisions.²⁴⁹ Despite the requirement of *progressive* realization, implementing ICESCR rights cannot be indefinitely postponed.²⁵⁰ Instead, the word “progressively” should be given the same interpretation as the U.S. Supreme Court’s “with all deliberate speed” standard explained in *Brown v. Board of Education*.²⁵¹

It is thus apparent that ratification of the ICESCR would entail substantial obligations for the United States.²⁵² This should not be taken to mean that the United States would have to answer to a tyrannical international order.²⁵³ The ICESCR envisions that a democratic process and creative adaptation to national institutions are essential for successful implementation of the Covenant.²⁵⁴ This much is evident: should the United States ratify the ICESCR, the biggest winner will not be government tyranny or global socialism or the UN; it will be the American people.²⁵⁵

IV. THE RIGHT TO ADEQUATE FOOD IN THE UNITED STATES: A STUDY

The above discussion focused on the compatibility of ICESCR rights with U.S. political and cultural institutions.²⁵⁶ Having demonstrated the benefits of implementing the ICESCR, the question becomes how to adopt the Covenant’s provisions in a way that is most consistent with the unique structure of government in the United

246. Alston, *supra* note 63, at 380.

247. *Id.*

248. ICESCR, *supra* note 6, art. 17, at 9; Alston, *supra* note 63, at 370.

249. See STEINER & ALSTON, *supra* note 61, at 306.

250. Alston, *supra* note 63, at 379.

251. 349 U.S. 294, 301 (1955); see ICESCR, *supra* note 6, art. 2, at 5; Alston, *supra* note 63, at 379.

252. See Alston, *supra* note 63, at 380.

253. See *id.* at 384 (quoting ROBERT W. LEE, THE UNITED NATIONS CONSPIRACY 108 (1981)).

254. See ICESCR, *supra* note 6, art. 1, at 5 (guaranteeing the right to self-determination, including determination of political status).

255. See *supra* notes 253-55 and accompanying text; see also, e.g., ICESCR, *supra* note 6, art. 11, at 7 (establishing the “right to an adequate standard of living” and “continuous improvement of living conditions” for all people).

256. See *supra* Part III.

States.²⁵⁷ Because it is beyond the scope of this Note to analyze how every element of the ICESCR should be incorporated into U.S. law, the following discussion will focus on a specific right—the right to adequate food.²⁵⁸

First, this Part examines the current international framework dealing with promotion and enforcement of the right to adequate food.²⁵⁹ Second, it lays out a blueprint describing what adoption of the right to adequate food in the United States would likely entail.²⁶⁰ The scheme proposed in this Part does not purport to be a comprehensive guide for implementation; it is simply an attempt to illustrate the nature of the obligations the United States may expect to undertake in enforcing economic rights.²⁶¹

A. *The Right to Adequate Food: An Overview*

The right to adequate food is contained in article 11 of the ICESCR, and provides in relevant part that:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate food*, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing *the fundamental right of everyone to be free from hunger*, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources²⁶²

257. See *supra* Part III.A. What sets the United States apart is simultaneous vertical (executive/legislative/judicial) and horizontal (state/federal) separation of powers, representative democracy, a system of checks and balances, and a common law legal system. See generally U.S. CONST. (delineating power between the state and federal governments of the United States).

258. See ICESCR, *supra* note 6, art. 11, at 7.

259. See *infra* Part IV.A.

260. See *infra* Part IV.B.

261. See *infra* Part IV.B.

262. ICESCR, *supra* note 6, art. 11, at 7 (emphasis added).

Jean Ziegler, the first UN Special Rapporteur on the Right to Food,²⁶³ defined the right to adequate food as:

[t]he right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.²⁶⁴

Professor Narula posits that article 11 of the ICESCR “encompasses two separate, but related norms: the right to adequate food and the right to be free from hunger.”²⁶⁵ The difference between them is that, while the right to adequate food is a “relative” standard, the right to be free from hunger “is ‘absolute’ and is the only right to be qualified as ‘fundamental’ in both the ICCPR and the ICESCR.”²⁶⁶

The ESCR Committee provided a detailed view on the nature of states’ obligations with respect to the right to adequate food in General Comment 12.²⁶⁷ The Committee reaffirmed the basic principle of indivisibility of human rights and stated that promoting the right to food requires a simultaneous “adoption of appropriate economic, environmental and social policies . . . oriented to the eradication of poverty.”²⁶⁸ Hunger and malnutrition in most places where they occur are not caused by “lack of food but lack of *access to* available food,” which also explains why they occur in developed countries.²⁶⁹

This is true of the United States—the wealthiest nation in the world.²⁷⁰ Because property rights are so well protected in the United States, a person with no money to buy food cannot simply take it from someone else, as this would constitute stealing.²⁷¹ Should that person attempt to grow his own food, he would need land, which also belongs

263. See Ziegler Report, *supra* note 101, ¶ 1.

264. *Id.* ¶ 26 (internal quotation marks omitted).

265. Narula, *supra* note 66, at 706 (citing Philip Alston, *International Law and the Human Right to Food*, in *The Right to Food* 6, 32 (Philip Alston & Katarina Tomasevski eds., 1984)).

266. *Id.* at 706 (quoting ICESCR, *supra* note 6, art. 11, at 7 and *THE RIGHT TO FOOD: GUIDE THROUGH APPLICABLE INTERNATIONAL LAW*, at xviii (Katarina Tomasevski ed., 1987)).

267. United Nations, Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rights, General Comment No. 12, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter General Comment 12].

268. *Id.* ¶ 4.

269. See *id.* ¶ 5.

270. See *GDP (Current US\$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2010+wbapi_data_value+wbapi_data_value-last&sort=desc (last visited July 18, 2013). The U.S. economy is more than twice the size of China, which is second in this respect. See *id.*

271. See SUNSTEIN, *supra* note 17, at 21-22.

to someone else and is also protected by property rights.²⁷² Thus, “[t]he law stands between food availability and food entitlement.”²⁷³

Despite the troubling nutritional findings in the United States, it is highly implausible that a famine would occur here.²⁷⁴ There would certainly be massive public upheaval, as the democratic system of government in the United States ensures that major crises invariably have great political reverberations.²⁷⁵ But absent a drastic event such as a famine, the right to adequate food is not meaningless in the United States, for it requires much more than a provision of “a minimum package of calories, proteins and other specific nutrients.”²⁷⁶

The goal of the right to adequate food implementation is for everyone to have “physical and economic access at all times to adequate food or means for its procurement.”²⁷⁷ The notion of adequacy implies sustainability of food, which means it would be available “for both present and future generations.”²⁷⁸ The food must not only be sufficient, but also sustainably produced, equitably distributed, and safe to eat.²⁷⁹ States parties to the ICESCR are required to “move as expeditiously as possible” toward implementing the right to adequate food.²⁸⁰

The most significant part of General Comment 12 deals with the nature of states parties’ responsibilities regarding the right to adequate food.²⁸¹ The ESCR Committee delineated what are effectively four key obligations: to *respect* existing access to adequate food; to *protect* access to food from interference by other individuals or enterprises; to *facilitate* people’s access to “resources and means to ensure their livelihood, including food security”; and to *provide* adequate food to people who are “unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.”²⁸²

272. *Id.* at 22.

273. AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 166 (1981).

274. See ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 (2012), available at <http://www.ers.usda.gov/media/884525/err141.pdf> (finding that 14.9 percent of households “were food insecure at least some time” in 2011); see SUNSTEIN, *supra* note 17, at 184 (citing SEN, *supra* note 273, at 154-66) (noting that “in the history of the world, no famine has ever occurred in a nation with a free press and democratic elections”).

275. See SUNSTEIN, *supra* note 17, at 184 (citing Amartya Sen, *Freedoms and Needs*, NEW REPUBLIC, Jan. 10, 1994, at 31, 31).

276. General Comment 12, *supra* note 267, ¶ 6.

277. *Id.*

278. *Id.* ¶ 7.

279. See SMITH & VAN DEN ANKER, *supra* note 64, at 136.

280. General Comment 12, *supra* note 267, ¶ 14.

281. See generally *id.* (establishing the obligations of states in relation to the right to adequate food).

282. *Id.* ¶ 15.

In implementing the right to adequate food, a state has significant leeway in the approach it takes to conform to existing laws and institutions.²⁸³ A state party is required, however, to “take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food.”²⁸⁴ Thus, the state would have to formulate a “national strategy to ensure food and nutrition security for all,” and to assess the amount of resources it has to devote to this task.²⁸⁵

Among the measures a state should consider are: (1) creating an institution wholly devoted to promoting the right to adequate food that would draw on “all available domestic expertise relevant to food and nutrition”; (2) passing a “framework law” articulating basic purposes and benchmarks of the policy; and (3) requesting international assistance from other states or UN agencies to help with the drafting of legislation.²⁸⁶ The legislation should be comprehensive in scope, targeting “all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security.”²⁸⁷

B. Implementing the Right to Adequate Food in the United States: A Blueprint

This Subpart first shows that the right to adequate food should be implemented at the federal level.²⁸⁸ It then briefly describes the Voluntary Guidelines for implementing the right to adequate food, which will be used for analyzing the policies that the United States would need to pursue.²⁸⁹ The Subpart concludes with an analysis of the most relevant Guidelines for the United States and of the effect their adoption would have on U.S. institutions.²⁹⁰

1. The Basic Framework

It is notable that the formulation of “the right to adequate food,” like many others in the ICESCR, is traceable to FDR.²⁹¹ Specifically, it

283. *Id.* ¶ 21.

284. *Id.*

285. *Id.*

286. *Id.* ¶¶ 24, 29-30.

287. *Id.* ¶ 25.

288. *See infra* Part IV.B.1.

289. *See infra* Part IV.B.2.

290. *See infra* Part IV.B.3.

291. SUNSTEIN, *supra* note 17, at 86.

comes from one of Roosevelt's administrative bodies—the National Resources Planning Board (“NRPB”)—which was tasked with promoting economic security in the United States.²⁹² The NRPB lasted for only ten years, but its proposals laid the groundwork of what came to be known as FDR's Second Bill of Rights.²⁹³ Hence, FDR's belief that “modern society, acting through its Government, owes the definite obligation to prevent the starvation or dire want of any of its fellow men and women who try to maintain themselves but cannot.”²⁹⁴ What follows, then, is a proposal on how this obligation may be fulfilled.

A threshold question is what level of government should bear the primary responsibility of implementing the right to adequate food—state or federal.²⁹⁵ Given the ESCR Committee's instruction that the right to adequate food be secured by a framework law that covers all links in the food production chain, the federal government is better suited for this job.²⁹⁶ Moreover, in an increasingly globalized and technical food supply system, delegating implementation to the states would create the danger of destroying uniformity in industry standards and neglecting obligations due to budgetary constraints or political unwillingness.²⁹⁷

The U.S. Congress has clear authority to act in this area, both under the Commerce Clause of the Constitution and under its treaty power.²⁹⁸ If ratified, the ICESCR would be the “supreme Law of the Land,” on par with domestic federal laws and displacing any prior laws that are inconsistent with it.²⁹⁹ The existing federal food aid programs and food safety mechanisms in the United States are extensive and sophisticated.³⁰⁰ Therefore, a structure for the implementation of the right to adequate food is already in place.³⁰¹ The federal government's job, then, would be to build on that structure to achieve the progressive realization of the right to adequate food.³⁰²

292. *Id.* at 85.

293. *Id.*

294. *Id.* at 72 (quoting Franklin Delano Roosevelt, U.S. President, Radio Address on Unemployment and Social Welfare from Albany, New York (Oct. 13, 1932)) (internal quotation marks omitted).

295. *See infra* note 296 and accompanying text.

296. *See* General Comment 12, *supra* note 267, ¶ 29.

297. *See* SUNSTEIN, *supra* note 17, at 43.

298. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* art. VI, cl. 2.

299. *Id.* art. VI, cl. 2; *see* *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

300. Narula, *supra* note 66, at 793-94 (observing that the United States “supports efforts to ensure freedom from hunger” through, *inter alia*, “the Food Stamp Program, child nutrition programs, and the Special Supplemental Nutrition Program for Women, Infants, and Children”); *see also supra* note 22 and accompanying text.

301. *See supra* notes 291–99 and accompanying text.

302. *See supra* notes 298–301 and accompanying text.

2. A Note on Methodology

To better promote the right to adequate food, the UN in 2000 created a new position—the Special Rapporteur on the Right to Food.³⁰³ The current Special Rapporteur, Olivier de Schutter, described what a national program for the right to adequate food should include.³⁰⁴ Among the necessary elements are framework laws, civil society and active political parties, accountability, well-resourced institutions, access to an independent judiciary, and exchange of best practices.³⁰⁵ The first appointed Special Rapporteur, Ziegler, advised that the right to food should be recognized as justiciable and enforcement mechanisms be strengthened in order for states to account for violations of the right to food.³⁰⁶

In 2009, state representatives from across the globe convened in Rome for the World Summit on Food Security, where they pledged to “strive for a world free from hunger where countries implement the Voluntary [G]uidelines for the progressive realization of the right to adequate food in the context of national food security.”³⁰⁷ The Voluntary Guidelines were adopted under the auspices of the UN Food and Agriculture Organization (“FAO”) in 2004 “to support Member States’ efforts to achieve the progressive realization of the right to adequate food.”³⁰⁸ The magnitude of this event is reflected in the fact that the FAO’s General Council, which has adopted the Voluntary Guidelines, consists of 187 member states.³⁰⁹

What follows is an examination of pertinent Voluntary Guidelines provisions and brief proposals on how to best implement them.³¹⁰ It remains to be seen whether the United States will embrace the right to adequate food or the ICESCR as a whole.³¹¹ The aim of the discussion

303. Ziegler Report, *supra* note 101, ¶ 1.

304. See OLIVIER DE SCHUTTER, COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH 13-14 (2010), available at http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_01_May_2010_EN.pdf.

305. *Id.*

306. Ziegler Report, *supra* note 101, ¶ 29.

307. DE SCHUTTER, *supra* note 304, at 2 (quoting World Summit on Food Sec., *Declaration of the World Summit on Food Security*, ¶ 16, WSFS 2009/2 (Nov. 16-18, 2009)) (internal quotation marks omitted).

308. VOLUNTARY GUIDELINES, *supra* note 36, at iii.

309. DE SCHUTTER, *supra* note 304, at 3.

310. See *infra* Part IV.B.3.

311. See Narula, *supra* note 66, at 795. Professor Narula remarks on the inconsistency of U.S. policy on this issue on the international plane. *Id.* at 794-95 & 794 n.546. Domestically, there are signs that some minimal entitlements relating to food exist in such contexts as prisons; internationally, however, the United States refuses to recognize the right to adequate food. *Id.* at 795. At the UN General Assembly vote on the right to food, the United States was the only country to vote against the resolution. *Id.*

below is to show that doing so would be compatible with existing U.S. institutions and would bring real benefits to American society.³¹²

3. Realizing the Right to Adequate Food

The following discussion is organized by specific measures outlined in the Voluntary Guidelines.³¹³ The application of the Voluntary Guidelines to the U.S. legal system is not meant to be exhaustive; instead, it is intended as an illustration of the various tools the United States may use to implement the right to adequate food.

a. Democracy and the Rule of Law

Guideline 1 directs the state to promote the freedom of opinion, expression, information, press, assembly, and association in order to enhance accountability and transparency of government structures.³¹⁴ It also mandates that all members of society be accorded equal protection of the law and authorizes the state to help individuals obtain legal assistance.³¹⁵ As these are traditional “negative” freedoms, the Voluntary Guidelines thus underscore the indivisibility of human rights.³¹⁶ Since the U.S. Constitution already guarantees these rights, the United States’ progress in this area would most likely be deemed sufficient.³¹⁷

b. Economic Development Policies and Safety Nets

Guideline 2 deals with the causes of food insecurity, the “nutrition situation,” and food safety assessment.³¹⁸ It urges states to adopt a “holistic and comprehensive approach to hunger and poverty reduction,” by guaranteeing “access to adequate food as part of a social safety net.”³¹⁹ Guideline 14 advocates a cyclical model for food assistance to the needy where as much food as possible would be drawn from local producers.³²⁰ Such assistance should “bridge the gap between the nutritional needs of the affected population and their ability to meet those needs themselves.”³²¹

312. *See infra* Part IV.B.3.

313. *See infra* Part IV.B.3.a–g.

314. VOLUNTARY GUIDELINES, *supra* note 36, Guideline 1, at 9.

315. *Id.*

316. *See supra* note 63 and accompanying text.

317. U.S. CONST. amends. I, V–VI, XIV.

318. VOLUNTARY GUIDELINES, *supra* note 36, Guideline 2, at 10.

319. *Id.*

320. *Id.* Guideline 14, at 25–26.

321. *Id.* at 26.

To assist the poor in procuring food, the U.S. federal government administers the Supplemental Nutrition Assistance Program ("SNAP"), commonly known as food stamps.³²² In 2012, over 46,000,000 individuals participated in the Program.³²³ Recently, the Food and Nutrition Service, which administers SNAP, started a pilot program that provides incentives for SNAP beneficiaries to buy healthy foods.³²⁴

However, in the United States, almost fifteen percent of households are food insecure.³²⁵ To conform to the Voluntary Guidelines, the SNAP program would have to be expanded and its requirements modified to allow a broader pool of needy individuals to take advantage of its services.³²⁶ In pursuing the eradication of hunger, the cyclical model of Guideline 14 should work reasonably well in rural areas of the United States, where food sources are more accessible than in cities.³²⁷

c. Strategies and Institutions

Guideline 3 recommends adopting a "national human-rights based strategy" for ensuring the right to adequate food.³²⁸ The state should collect data on the existing status of the right to adequate food, after which it should formulate strategies and set targets for progressively realizing this right.³²⁹ Guideline 3 advocates an approach focused on promoting sustainability and facilitating small-scale farming and fishing.³³⁰ Besides authorizing existing government agencies and offices to implement these policies, the state should also consider establishing a national human rights institution or ombudsperson to oversee these programs.³³¹

322. *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/snap> (last visited July 18, 2013); see also *SNAP & Emergency Food Programs*, NYC HUMAN RESOURCES ADMIN., <http://www.nyc.gov/html/hra/html/services/snap.shtml> (last visited July 18, 2013).

323. *Supplemental Nutrition Assistance Program Participation and Costs*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/pd/SNAPsummary.htm> (last visited July 18, 2013).

324. See *Healthy Incentives Pilot (HIP) - Basic Facts*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/snap/HIP/qa-s.htm> (last updated Feb. 6, 2013).

325. COLEMAN-JENSEN ET AL., *supra* note 274, at 6 tbl.1A.

326. See Mark Bittman, *Hunger in Plain Sight*, N.Y. TIMES OPINIONATOR (Nov. 27, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/11/27/hunger-in-plain-sight> (arguing for the expansion of the SNAP program).

327. See FOOD, INC.: HOW INDUSTRIAL FOOD IS MAKING US SICKER, FATTER AND POORER—AND WHAT YOU CAN DO ABOUT IT 116 (Karl Weber ed., 2009) [hereinafter FOOD, INC.]; see also VOLUNTARY GUIDELINES, *supra* note 36, Guideline 14, at 25-26.

328. VOLUNTARY GUIDELINES, *supra* note 36, Guideline 3, at 11.

329. *Id.*

330. *Id.* at 12.

331. *Id.* Guideline 5, at 14; see *id.* Guideline 18, at 31.

In the United States, the basic legal framework for implementing the right to adequate food is already in place.³³² It includes legislation such as the Federal Meat Inspection Act,³³³ the Poultry Products Inspection Act,³³⁴ and the Agricultural Marketing Agreement Act of 1937,³³⁵ as well as a system of regulatory oversight of the food industry by agencies like the Food and Drug Administration and the U.S. Department of Agriculture.³³⁶ The United States also has a government office dedicated to promoting human rights—the Bureau of Democracy, Human Rights, and Labor (“DRL”), which is part of the Department of State.³³⁷ While the regulatory agencies overseeing the food industry ensure compliance with domestic laws, the DRL would evaluate the situation from a human rights-based perspective.³³⁸ To enhance the ability of the current oversight system to ensure respect for the right to adequate food, the U.S. government would have to strengthen the authority of these administrative bodies and reduce the disproportionate influence of food industry lobbyists in drafting consumer protection legislation.³³⁹

332. See, e.g., *Fraust v. Swift & Co.*, 610 F. Supp. 711, 714 (W.D. Pa. 1985) (declining to hold that peanut butter, as a matter of law, is not unreasonably dangerous with regard to small children); *CFSAN - What We Do*, FDA, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CFSAN/WhatWeDo/default.htm> (last updated Apr. 11, 2012) (stating the FDA Office of Foods’ purpose is “promoting and protecting the public’s health by ensuring that the nation’s food supply is safe, sanitary, wholesome, and honestly labeled”); see also Jonathan Bloom, *An Abundance of Food, Wasted*, WELL (Nov. 27, 2008, 10:08 AM), <http://well.blogs.nytimes.com/2008/11/27/an-abundance-of-holiday-food-wasted/> (“America grows more than twice the amount of calories needed to keep its population fed.”).

333. Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 601-95 (2006)).

334. Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as amended at 21 U.S.C. §§ 451-71 (2006)).

335. Pub. L. No. 75-137, 50 Stat. 246 (1937) (codified as amended at 7 U.S.C. §§ 671-74 (2006)).

336. See Federal Meat Inspection Act, 21 U.S.C. §§ 601-95 (2006) (tasking the Food and Drug Administration with inspection of meat products); Poultry Products Inspection Act, 21 U.S.C. §§ 451-71 (2006) (tasking the U.S. Department of Agriculture with inspecting all poultry products); see also SUNSTEIN, *supra* note 17, at 63.

337. See *Bureau of Democracy, Human Rights, and Labor*, U.S. DEP’T OF ST., <http://www.state.gov/j/drl/index.htm> (last visited July 18, 2013).

338. See *supra* notes 332–37 and accompanying text.

339. See *FOOD, INC.*, *supra* note 327, at 36–37, 54, 80, 212.

d. Market Systems

In regulating food production, the state should seek to promote both economic growth and sustainable development, prevent uncompetitive practices in markets, encourage corporate social responsibility, and protect the environment.³⁴⁰ Presently, the U.S. food production system is not sustainable.³⁴¹ The main problem lies in the fact that the major food producers impose costs on the environment and the population for which they are not required to pay.³⁴² The government would have to design rules to force food companies to internalize these costs.³⁴³

One especially important type of externality that the food system produces is greenhouse gas emissions.³⁴⁴ While the global warming discussion centers around hybrid cars and solar panels, the food system contributes almost one-third of the total greenhouse gas emissions into the atmosphere.³⁴⁵ The source of emissions is primarily methane from livestock, but there is also pollution associated with transportation and the petroleum-intensive production of synthetic fertilizers.³⁴⁶

Lack of competitiveness in the business environment is also an issue in the United States.³⁴⁷ There are only a handful of major companies that produce and distribute food, creating a consolidated market that restricts the ability of new actors to compete, leading to inefficiencies.³⁴⁸ Hence, the United States would need to take action to make the market more open and competitive in order to comply with the Voluntary Guidelines.³⁴⁹

Finally, even though the U.S. Constitution protects the freedom of speech, the corporate dominance of the U.S. food market threatens this

340. VOLUNTARY GUIDELINES, *supra* note 36, Guidelines 4-5, at 13-14.

341. *See Toward a Healthy, Sustainable Food System*, AM. PUB. HEALTH ASS'N (Nov. 6, 2007), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1361>.

342. *See id.*

343. *See id.*

344. *See* FOOD, INC., *supra* note 327, at 119-120.

345. *See* MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 198 (2006) ("[I]f the sixteen million acres now being used to grow corn to feed cows in the United States became well-managed pasture, that would [be] . . . the equivalent of taking four million cars off the road.").

346. *See* FOOD, INC., *supra* note 327, at 120. The problem is further exacerbated by the fact that methane is twenty times more potent at trapping heat than is carbon dioxide. *Overview of Greenhouse Gases: Methane Emissions*, EPA, <http://www.epa.gov/methane> (last visited July 18, 2013).

347. *See* Tom Philpott, *Mythbusting: Cheap Food Does Not Equal Higher Quality of Life*, GRIST (Dec. 16, 2010, 5:57 AM), <http://grist.org/food/food-2010-12-15-cheap-does-not-equal-to-higher-quality-of-life>.

348. *See* FOOD, INC., *supra* note 327, at 36-37.

349. *See* VOLUNTARY GUIDELINES, *supra* note 36, Guidelines 4-5, at 13-14.

freedom.³⁵⁰ A wall of secrecy surrounds the few major food companies that control the market.³⁵¹ Under pressure from industry lobbyists, thirteen states have enacted food disparagement laws, which make it easier for corporations to sue those who criticize their products.³⁵² To remedy the problem, the U.S. government could begin by passing a mandatory disclosure law that would require food companies to provide information about their practices.³⁵³

e. Legal Framework

Guideline 7 addresses the issue of legal enforcement of the right to adequate food.³⁵⁴ The state is expected to implement this right in domestic law by incorporating it into constitutions, bills of rights, or legislation.³⁵⁵ The state should also enable administrative and judicial mechanisms “to provide adequate, effective and prompt remedies accessible, in particular, to members of vulnerable groups.”³⁵⁶

To conform to this requirement, the United States would have to adopt a completely new legal theory that would allow plaintiffs to bring suit for right to food violations.³⁵⁷ This, however, should not pose an insurmountable problem: as discussed, U.S. courts have adjudicated economic rights in the past.³⁵⁸ Additionally, experience from other countries shows that the right to adequate food is fully compatible with judicial enforcement.³⁵⁹ Thus, the United States would satisfy Guideline 7 by passing a law that guarantees the right to adequate food, which individuals would then be able to enforce in court.³⁶⁰

350. U.S. CONST. amend. I; see *FOOD, INC.*, *supra* note 327, at 8, 28.

351. See *FOOD, INC.*, *supra* note 327, at 37.

352. See *Food-Disparagement Laws: State Civil & Criminal Statutes*, FOODSPEAK (Mar. 19, 1998), <http://cspinet.org/foodspeak/laws/existlaw.htm>. One such high-profile defendant was Oprah Winfrey, who was sued for discussing the food companies' responsibility for the outbreak of mad cow disease. See *Tex. Beef Group v. Winfrey*, 201 F.3d 680, 682 (5th Cir. 2000). Eventually, Winfrey prevailed, but the episode sent a clear message to those unhappy with the food system. See *FOOD, INC.*, *supra* note 327, at 36.

353. See *supra* notes 350–52 and accompanying text.

354. VOLUNTARY GUIDELINES, *supra* note 36, Guideline 7, at 15–16.

355. *Id.*

356. *Id.* at 16.

357. See *supra* notes 355–56 and accompanying text.

358. See *supra* Part II.C.

359. See, e.g., *DE SCHUTTER*, *supra* note 304, at 11–12 (describing a South African case where the court held that a group of traditional fishermen's loss of fishing rights violated their right to food and ordered that rights to fish for certain fish species be granted).

360. See VOLUNTARY GUIDELINES, *supra* note 36, Guideline 7, at 15–16.

f. Food Safety and Consumer Protection

Guideline 9 directs the state to reduce risk of food-borne disease by national legislation and regulation.³⁶¹ The state is “encouraged to adopt scientifically based food safety standards, including standards for additives, contaminants, residues of veterinary drugs and pesticides, and microbiological hazards, and to establish standards for the packaging, labeling and advertising of food.”³⁶² Guideline 9 also envisions consumer protection measures from “misrepresentation in the packaging, labeling, advertising and sale of food” by furnishing appropriate information on purchased food and ensuring recourse for harm sustained by unsafe food.³⁶³

According to the Centers for Disease Control and Prevention, “foodborne diseases have been estimated to cause 6 million to 81 million illnesses and up to 9,000 deaths each year.”³⁶⁴ To provide remedies for harms sustained due to unsafe food products, individuals in the United States may sue food companies under the theory of product liability.³⁶⁵ This provides individual redress and serves as a deterrent for the companies’ use of unsafe ingredients.³⁶⁶ Nevertheless, the U.S. government would most likely have to do more to reduce the risk of food contamination at farms, cattle ranches, and factories.³⁶⁷ Possible measures may include improving sanitary conditions to reduce the risk of manure and other harmful substances from getting into the finished food product, and reducing the use of toxic pesticides, insecticides, and herbicides.³⁶⁸ This would not only make farm foods safer to eat, but would also protect farmworkers from being poisoned by these harmful

361. *Id.* Guideline 9, at 19-20.

362. *Id.*

363. *Id.* at 20.

364. Paul S. Mead et al., *Food-Related Illness and Death in the United States*, 5 EMERGING INFECTIOUS DISEASES 607, 607 (1999).

365. See *Fraust v. Swift & Co.*, 610 F. Supp. 711, 712, 714 (W.D. Pa. 1985).

366. See Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 414 (1997).

367. See, e.g., Charles Benbrook, *Published Research on the Sources and Spread of E. coli O157*, ORGANIC CTR. (Sept. 2006), http://www.organic-center.org/science.safety.php?action=view&report_id=61 (discussing the contamination of beef with *E. coli* and noting that “switching beef cattle in a feedlot to a high-roughage diet for the last week before slaughter triggers a dramatic decline in *E. coli* O157 numbers”).

368. See GEOFFREY C. MREMA ET AL., *RURAL STRUCTURES IN THE TROPICS: DESIGN AND DEVELOPMENT* 231 (2011); see, e.g., POLLAN, *supra* note 345, at 153 (describing a case where apple growers used a substance called Alar, which turned out to be a carcinogen, to regulate growth).

substances.³⁶⁹ Finally, the government should demand that any imported foods meet the same safety standards as domestically produced foods.³⁷⁰ This would prevent food producers from simply moving production abroad in order to avoid strict regulation.³⁷¹

Another problem in the U.S. food system is the lack of transparency of food products.³⁷² Facts such as geographic origin of the food, relevant nutritional information, and content of any potentially harmful ingredients are undisclosed to the consumer.³⁷³ This problem is aggravated by loose standards for food marketing, which allows food distributors to make borderline-deceptive claims about their food products and exaggerate nutritional benefits while deemphasizing the unhealthy content.³⁷⁴ To remedy this problem, the government would need to mandate stricter labeling rules that aim to promote full disclosure of the ingredients a product contains and where the product originated.³⁷⁵

g. Nutrition

Guideline 10 is devoted to issues of nutrition.³⁷⁶ The state should “prevent overconsumption and unbalanced diets that may lead to malnutrition, obesity and degenerative diseases.”³⁷⁷ The state should correspondingly “increase the production and consumption of healthy and nutritious foods, especially those that are rich in micronutrients.”³⁷⁸

In the United States, the problem of inadequate nutrition is due in large part to the policy of subsidizing unhealthy foods.³⁷⁹ Thus, soft drinks are cheaper than natural fruit juices, and fast food is cheaper than

369. See *Pesticide Problems Are a Growing Concern*, GREEN FOOTSTEPS, <http://www.greenfootsteps.com/pesticide-problems.html> (last visited July 18, 2013).

370. See Brian L. Buhr, *Economics of Antitrust in an Era of Global Agri-Food Supply Chains: Litigate, Legislate and/or Facilitate?*, 15 DRAKE J. AGRIC. L. 33, 46 (2010) (describing the potential problems of an increasingly globalized food industry).

371. See *id.* at 54.

372. Lassiter, *supra* note 366, at 419 n.27.

373. See, e.g., *id.* at 419-20; see also FOOD, INC., *supra* note 327, at 42, 54, 80. In fact, such non-disclosure has received First Amendment protection. Cf. Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 665.

374. See Marion Nestle, *Has the White House Given Up on Standards for Food Marketing?*, ATLANTIC (Oct. 10, 2011, 11:02 AM), <http://www.theatlantic.com/life/archive/2011/10/has-the-white-house-given-up-on-standards-for-food-marketing/246420>.

375. See, e.g., *EU Sets Out New Food Labelling Rules*, MEAT SITE (June 17, 2010), <http://www.themeatsite.com/meatnews/12113/eu-sets-out-new-food-labelling-rules> (discussing the benefits of the European Union's strict food labeling rules).

376. VOLUNTARY GUIDELINES, *supra* note 36, Guideline 10, at 21.

377. *Id.*

378. *Id.*

379. Mark Bittman, *Bad Food? Tax It*, N.Y. TIMES, July 24, 2011, at SR1.

vegetables.³⁸⁰ Generally, the cheaper the food is, the worse it is for one's health.³⁸¹ This would have to be reversed: producers of healthy foods should receive tax breaks and direct subsidies, while the cost of producing harmful foods should at least reflect true market levels and at best be increased beyond that through increased taxation.³⁸²

In sum, many elements that are essential for securing the right to adequate food already exist in the United States. However, as the above discussion shows, there is substantial room for improvement.³⁸³ While the Voluntary Guidelines are not perfect,³⁸⁴ they are a good starting point for evaluating the status of the right to adequate food in a given state.³⁸⁵ The effort to realize the right to adequate food will have to build on the Voluntary Guidelines and focus on devising policies that adequately balance the interests of all parties concerned in an economically feasible way.³⁸⁶

V. CONCLUSION

Since the inception of the UN and the creation of the modern human rights regime, the United States has been active on the world stage in matters involving human rights.³⁸⁷ The United States has made great progress in the realm of civil and political rights, and this has brought it enormous benefits in the form of an open political discourse, an active voting population, and a relatively high political awareness of the populace.³⁸⁸

The United States has also been instrumental in preventing human rights abuses throughout the world and securing the creation of such

380. Jennifer LaRue Huget, *Junk Food Cheaper than Healthful*, WASH. POST (Aug. 17, 2010, 4:50 PM), http://voices.washingtonpost.com/checkup/2010/08/junk_foods_cheaper_than_health.html.

381. *See id.*

382. *See Bittman, supra* note 326, at SR1.

383. *See supra* Part IV.B.3.a–g.

384. *See generally* VOLUNTARY GUIDELINES, *supra* note 36 (failing to make any mention of animal welfare).

385. *See supra* Part IV.B.3.a–g; *see generally* VOLUNTARY GUIDELINES, *supra* note 36 (establishing guidelines for the implementation of the right to adequate food).

386. *See supra* Part IV.B.3.a–g.

387. *See supra* note 42 and accompanying text.

388. *See supra* note 42 and accompanying text; *see, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (finding a narrow definition of marriage was unconstitutional); SUNSTEIN, *supra* note 17, at 186–87 (noting that the majority of state constitutions in the United States recognize the right to education); *see also* text accompanying note 44.

documents as the Genocide Convention Implementation Act of 1987³⁸⁹ and the Rome Statute of the International Criminal Court.³⁹⁰ Annually, the Department of State releases its review of the world's nations' human rights record.³⁹¹ The U.S. government is the biggest contributor, in absolute terms, of aid to developing countries.³⁹² All in all, the United States has done much to promote human rights worldwide.³⁹³

But the United States could do more to protect human rights—especially economic rights—domestically.³⁹⁴ Ratifying and implementing the ICESCR would be an important step in the right direction.³⁹⁵ As many of the elements necessary for securing ICESCR rights already exist in the U.S. legal system, the solution lies in building political will and fostering favorable public opinion of economic rights.³⁹⁶

It has been observed that, “the literature on economic, social and cultural rights in U.S. publications is meager at best.”³⁹⁷ This Note is an attempt to fill this void and encourage public discourse on ICESCR rights. Building on FDR's vision, the international community has long accepted the idea that every human being has a right to be free from desperate conditions.³⁹⁸ Leaving people to fend for themselves in the name of liberty is not a tenable position, because liberty itself is in jeopardy when basic needs of a large segment of the population are neglected.³⁹⁹ Therefore, there is a need to dismantle the traditional hierarchy in which human rights are viewed and to embrace their

389. Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified as amended in 18 U.S.C. § 1091 (2006)).

390. July 17, 1998, 2187 U.N.T.S. 90; *see supra* note 12 and accompanying text.

391. *See, e.g.*, COUNTRY REPORTS, *supra* note 79 (reporting on the status of human rights practices around the world); *see also* Melish, *supra* note 13, at 390 n.5.

392. Economic Aid Statistics by Donor Country, NATIONMASTER, http://www.nationmaster.com/graph/eco_eco_aid_don-economy-economic-aid-donor (last visited July 18, 2013).

393. *See supra* notes 42, 388 and accompanying text.

394. *See Human Rights in the United States*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/countries/americas/usa> (last visited July 18, 2013) (“Human rights don’t start at the water’s edge – there’s urgent work to be done here at home.”).

395. *See* ICESCR, *supra* note 6, art. 11, at 7 (recognizing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”). Ratification of the ICESCR would help alleviate hardships of Americans plagued by stagnant wages and high unemployment. *See, e.g.*, Krugman, *supra* note 215, at A23.

396. Alston, *supra* note 63, at 393.

397. *Id.* at 388.

398. *See* SUNSTEIN, *supra* note 17, at 185.

399. *Id.* at 76.

indivisibility.⁴⁰⁰ Doing so would allow the United States to overcome the longstanding objections to ICESCR ratification and reaffirm its commitment to promoting human rights worldwide.⁴⁰¹

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400. See *supra* note 268 and accompanying text.

401. See *supra* Part II.B.

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