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The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal

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I. INTRODUCTION

Of the western industrialized nations,¹ the United States is one of the most reluctant to recognize any legal obligation to provide minimum economic guarantees² to the poor.³ Some countries, including

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¹ See Ann Shola Orloff, The Political Origins of America's Belated Welfare State, in The Politics of Social Policy in the United States 37 (Margaret Weir et al. eds., 1988) (noting that compared with European countries that began to establish such provisions as early as 1883, the U.S. had very few welfare provisions before the passage of the Social Security Act of 1935).


³ I use the term "the poor" with a great deal of hesitation because of my great respect for, and admiration of, the work of Frances Fox Piven and Richard A. Cloward and their essential text, Frances Fox & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare (1971). Although Piven and Cloward never provide an explicit definition of this phrase, they do write of those "at the bottom of the economic order." Id. at xiv. I do not refer to the static, identifiable, or visible segment of the population that is presently situated at the bottom of the socio-economic ladder. Rather, I speak of "the poor" as an historic category of those at the "bottom of the economic order," that exists in all contemporary societies and expands and contracts depending on the strengths and weaknesses of political forces mobilized to defend their interests. See generally David Piachaud, Down But Not Out: Why the Term "Underclass" Is No Help in Understanding Social Ills, Times Lit. Supp. (London), Jan. 24, 1997, at 3,
the United States, have various statutory entitlements assuring minimum welfare. Many countries, unlike the United States, have federal constitutional entitlements. Other than the United States, almost all western industrialized countries are legally and politically committed to minimum welfare guarantees.

This federal reluctance to mandate constitutional guarantees of minimum welfare exacerbates the economic inequality of the U.S. income structure. Further, this inequality aggravates the long-standing

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4 (noting that in Britain, approximately half of those who were in the bottom tenth of income distribution in 1991, were above this level three years later).

In the contemporary U.S., it would be easy to proffer a head count of "the poor" by counting the recipients of various forms of governmental largesse, supplemented with an estimation of the homeless population. However, I also include those millions whose economic condition is so insecure that the loss of employment, for however limited a time, will plunge them into the ranks of "the poor."

In 1989, an estimated 56 million Americans, about one in four, lived in poverty. See Stephen Loffredo, Poverty, Democracy and Constitutional Law, 141 U. PA. L. REV. 1277, 1316 n.171 (1993) (citing JOHN E. SCHWARTZ & THOMAS VOLGY, THE FORGOTTEN AMERICANS 61-63 (1992)). Schwartz and Volgy claim that federal poverty guidelines greatly underestimate the number of Americans who cannot afford basic necessities such as food, clothing and shelter. They further estimate that "egregious aspects of inadequate nutrition, in terms of abject deprivation, could be eliminated through an appropriation of less than 10 billion dollars, an amount equal to a fraction of one percent of the federal budget for fiscal year 1993 and an even smaller fraction of the gross national product." Id. at 1321. See also Peter Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 HASTINGS L.J. 1, 8-18 (1987).

4. For an overview of the various federal statutory entitlement programs and how they function, see HELEN HERSHKOFF & STEPHEN LOFFREDO, ACLU GUIDE TO THE RIGHTS OF THE POOR (1997).

5. In noting the dearth of explicit provisions protecting minimal welfare provisions in the U.S. Constitution, I do not mean to downplay or counter arguments that such rights should be teased out of its text. See, e.g., Frank Michelman, On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).


7. As of June 30, 1994, the International Covenant has been ratified by 129 countries. See MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, CULTURAL AND SOCIAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT app. III (1995). This number includes the vast majority of western countries. Id. Only Liberia and the United States have signed but not ratified the covenant. Id.

racial tensions and animosities that have plagued this country since its foundation. We must examine our inability to implement constitutional welfare rights in the context of the rich culture of justiciable political and civil rights found in our national discourse and international political practice. 8

While the United States does not currently experience the poverty known in other parts of the world, we are by no means immune to its existence, which is compounded by its disproportionate racial effects. 10 Although we have experienced a decrease in the percentage of African Americans living below the federally defined poverty line, many major cities contain poverty pockets where the percentage of poor African American families increased from 30 to 50% between 1970 and 1990. 11 Clearly, unless we take affirmative economic action, the so-called "underclass" is in no danger of disappearing.

8. The United States has ratified the International Covenant on Civil and Political Rights ("ICCPR") which recognizes rights similar to those guaranteed by the Bill of Rights and the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. See International Covenant on Civil and Political Rights, U.N. GAOR, 21st Sess., at arts. VI-XXVII (1966), in CENTER FOR THE STUDY OF HUMAN RIGHTS, TWENTY-FIVE HUMAN RIGHTS DOCUMENTS, supra note 2, at 17, 18-23. Although the ICCPR has been declared non-self executing and requiring enabling legislation before it can be enforced directly in the U.S. Courts, being a signatory has allowed the U.S. to raise issues concerning political and civil rights more forcefully with other countries as part of its foreign relations.

9. In a 1972 article, Ralph K. Winter noted, "black Harlem is one of the world's wealthiest communities — fifth or so in per capita income of all communities outside of North America and Europe. What is considered poverty in America is considered almost great wealth everywhere else." Ralph K. Winter, Jr., Poverty, Economic Equality, and the Equal Protection Clause, 1972 SUP. CT. REV. 41, 80 (1972).

10. Even with the social, political and legal advances of the civil rights movement, the proportion of African Americans to whites below the poverty line is approximately three to one, the same as in 1959. While the number of poor African Americans has increased by 686,000 in thirty years, the number of white poor has declined by 4 million. In 1992, 42.7% of all African American households earned less than $15,000, as compared to only 21.6% of white households. While the average African American per capita income relative to white has risen slightly (from 53% in 1967 to 58% in 1992) the gap in average net worth per household is much greater. Whites enjoy a three to one advantage. In 1967, 16% of African American households made more than $35,000 dollars compared to 36.6% of white households. In 1992, 25.8% did so as compared to 46.6% of white households. See George M. Fredrickson, Land of Opportunity, in N.Y. REV. OF BOOKS, Apr. 4, 1996, at 4 (reviewing Jennifer L. Hochschild, Facing Up to the American Dream: Race, Class, and the Soul of the Nation (1995)).


12. The term "underclass" has been used to refer to "the most disadvantaged segments of the urban black population who are outside the mainstream of American occupational systems, primarily families from below the poverty level, recidivist criminals, second and third generation welfare dependent persons and homeless persons." See Leonard Harris, Agency and the Concept of the Underclass, in THE UNDERCLASS QUESTION 33-34 (Bill E. Lawson ed., 1992).
Not only the inner city underclass is affected by income inequality and the fluctuations of the economy. Many young American families of all races have experienced negligible income growth over the past twenty-five years. Disturbingly, the income growth they have experienced has cost leisure and family time. Young males trying to raise families, buy homes, send children to college, and prepare for a secure retirement are particularly affected. The inability of many middle income families to accomplish these goals, once heralded as the "American Dream," has resulted in attacks on government, affirmative action, women's rights, immigrants, and the overall welfare state.

This article asserts that the continuing existence of poverty pockets throughout the United States, coupled with economic stagnation and financial insecurity for large numbers of working people, indicates structural flaws in our society. These must be addressed by the human and civil rights community with the same vigor with which that community has historically addressed political and civil rights.

I propose that creating a culture more willing to provide minimum welfare guarantees requires reassessment and supplementation of the fundamental propositions which undergird the national and international quest for human and civil rights. These propositions have hitherto successfully facilitated the establishment of meaningful political and civil rights in the United States. However, they have less suc-


14. See Lester C. Thurow, The Boom That Wasn't, N.Y. TIMES, Jan. 18, 1999, at A17 (noting that "median family incomes . . . haven't risen since the early 1970s, yet the average wife is working 15 more weeks a year than she did back then [and] [r]eal wages for 80 percent of the male labor force are below where they used to be").

15. See Skocpol & Greenberg, supra note 13, at 4, 56, 58.

16. Many will challenge this assertion, preferring to believe that urban poverty and economic insecurity have always been, and always will be necessary ingredients of daily life in modern societies. Some would go further and argue that poverty and insecurity are necessary to keep the engines of production moving. Noting the prevalence of this state of mind in the 17th century, Lewis Mumford observed that:

[D]estitution had been accepted as the normal lot for a considerable part of the population. Without the spur of poverty and famine, they could not be expected to work for starvation wages. Misery at the bottom was the foundation for luxury at the top. As much as a quarter of the urban population, it has been estimated, consisted of casuals and beggars: it was this surplus that made for what was considered by classic capitalism to be a healthy labor market, in which the capitalist hired labor on his own terms, or dismissed workers at will, without notice, without bothering as to what happened to either the worker or the city under such inhuman conditions. Lewis Mumford, The City in History 432-33 (1961).
cessfully introduced into our national political culture the norms of economic and social rights that have informed the international human rights movement since the Second World War.

The first of these propositions holds that fundamental human rights are most secure when established at the federal, as opposed to the state or local level. This notion emerged during Reconstruction,¹⁷ and has endured through the Civil Rights era. In the 1950s and 1960s, state and local authorities' failure to respond to localized racial violence frustrated African American efforts to secure political and civil rights.¹⁸ Absent coercive federal authority, state and local officials ignored their primary legal obligations to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the civil rights statutes promulgated under their authority.

A corresponding proposition maintains that a counter-majoritarian federal judiciary will ostensibly protect legal rights even if these rights lack support from the politically representative branches of government. This was demonstrated by the courageous federal judges and lawyers who fought private and institutional racism in the courts of the United States.¹⁹

The third proposition rests on the same counter-majoritarian presumption as the preceding propositions. National and international human rights should not be subject to the dictates of the popular political process and are best safeguarded by federal constitutional guarantees. Federal authorities must be relied upon to protect human rights in spite of shifting political winds. In addition, we must develop a parallel system of international human rights guarantees which exceeds

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the protective scope of federal and state law in the United States. To the extent feasible, these international guarantees must be made binding on federal and state authorities to ensure the human rights ignored by federal authorities and to create rights where none have existed before.

Over the years, human rights advocates have assumed the continuing stability of these propositions in their efforts to secure economic rights. They have, with varying degrees of success, argued for congressional ratification of international treaties and engaged in economic rights litigation. However, this paradigm has failed to yield a culture of economic rights in the United States, as ironically demonstrated by the United States’ recognition of various international civil and political rights compacts, while becoming a nation of glaring economic inequalities.

I believe we need to supplement the approaches outlined above. In addition to addressing these issues primarily at the federal level, I advocate intense local activity. I believe we must direct more effort towards grassroots political activity, which addresses the more politically representative branches of government, instead of placing pri-


23. For example, the United States has recently passed welfare “reform” legislation that will cut federal support for poor families by about $7 billion annually over the next five years. This includes a $300 million cut in child nutrition programs at a time when one out of four or five live below the poverty level. Martha Honey, Guns ‘R’ Us, In These Times, Aug. 11, 1997, at 16, 17; Jeff Madrick, In the Shadows of Prosperity, N.Y. REV. OF BOOKS, Aug. 14, 1997, at 40, 41 (reviewing Andrew Hacker, Money: Who Has How Much and Why (1997)). This type of legislation has been denounced as “[some] of the most regressive legislation passed by any developed society since World War II.” See Letter to the Editor from Robert Bellah, Professor of Sociology at the University of California, Berkeley, in N.Y. Rev. of Books, Nov. 28, 1996, at 65. The congressional decision to end Aid to Families With Dependent Children (“AFDC”) was the first time a section of the Social Security Act was repealed. This fairly indicates the distance American society has come since passage of the Act. But see Reich, supra note 13, at 3 (suggestion by former Secretary of Labor that the original intent was to “smooth the passage from welfare to work with guaranteed health care, child care, job training, and a job paying enough to live on” but was changed because Clinton “feared he could not justify a reform that would, in fact, cost more than the welfare system it was intended to replace”).
mary reliance on the federal judiciary for creative textual constructions of the Constitution. I propose that local activists use extant international guarantees as aspirational guideposts to define the nature of economic, cultural and social rights. More importantly, our demands for these rights must become more legally and politically substantive. These include constitutional conventions, ballot initiatives, and organized grassroots demands for selected economic rights such as housing, health care, education, jobs, welfare, or whatever best suits the geo-political environment.24

Any economic rights theory must recognize the United States as a highly developed capitalist economy, with governmentally regulated “free markets.”25 Our demand economy has historically increased productivity, provided consumers with a wide variety of consumer items, and enabled many people to lead lives that allow them meaningful opportunities to exercise their talents. Recent economic indicators show that not only are unemployment rates lower than they have been in several years, but that they are well below that of other western democracies.26 However, these positive economic indicators have disguised pervasive middle class income stagnation over a twenty-year period. This has caused the middle class to demand substantial reductions in both taxes and government spending on programs designed to provide minimum welfare guarantees.27 As a consequence, the middle class is torn between its desire to participate fully in a booming yet

24. Cf. Louis Henkin, International Human Rights and Rights in the United States, in HUMAN RIGHTS IN INTERNATIONAL LAW 49 (Theodore Meron ed., 1984) (criticizing heavy reliance on courts and suggesting the need for legislative planning and spending in creation of economic and social rights); Margaret Weir and Marshall Ganz, Reconnecting People and Politics, in SKOCPOI & GREENBERG, supra note 13, at 149, 151 (“[T]o succeed, a new progressive politics must be grounded in organized citizenry rooted in specific communities and at the same time linked together in larger networks with the capacity to deliberate about, develop and carry out local, state, and national strategies.”); Karen M. Paget, The Battle for the States, in id. at 172, 191-94 (highlighting necessity to engage in state level political struggles for social welfare guarantees).


27. See Louis Uchitelle, Flat Wages Seen as Issue in ’96 Vote: Only the Wealthy Can Claim Gains, N.Y. TIMES, Aug. 13, 1995, at 26 (noting Republican strategy to end economic stagnation and balance the budget by eliminating federally financed job training, tax incentives for education, head start programs, and subsidized student loans).
precarious economy, and its sporadic recognition of the need to support itself and the less fortunate through federal social programs.\textsuperscript{28} The future of minimum welfare guarantees will therefore largely turn on how this segment of the population perceives its responsibility.

I begin my analysis with a survey of how the urban indigent were treated prior to ratification of the Constitution. Municipal welfare guarantees began with early American variations of Elizabethan Poor Laws.\textsuperscript{29} These local supports laid the foundation for extensive state constitutional provisions governing minimum welfare provisions, which by and large remain in effect today.\textsuperscript{30} In the period prior to ratification of the Constitution, state legislatures protected the interests of those who argued that the Constitution would create a wealthy class of aristocrats and industrialists. They feared that this new class would seek to mobilize wealth for themselves and depoliticize local struggles for economic protection by preventing states from providing minimum welfare provisions. After ratification, only in times of acute national crisis such as the Civil War, Reconstruction, and the Great Depression, has the federal government assumed responsibility for anything resembling economic rights, or minimum welfare guarantees. Indeed, President Johnson’s “Great Society” was perhaps triggered by urban rebellions in the ghettos of America’s major cities. Although constitutional and international scholars have long argued for minimum federal welfare guarantees, absent fundamental national crises, minimum welfare guarantees have been relegated to the battleground of state politics.

\begin{itemize}
\item \textsuperscript{28} Only 14\% of Americans oppose the welfare system because “it costs too much tax money.” Sixty-five percent of respondents stated that the worst thing about welfare is that it “encourages people to adopt the wrong lifestyle and values.” Eighty-five percent said that they would be satisfied with the welfare system if recipients “were required to do something in exchange for their benefits, even if just raking leaves or cleaning roads.” \textit{See The Zero Hour, In These Times}, May 13, 1996, at 6.
\item \textsuperscript{30} Poor Relief and economic rights are not the same thing. As Larry Cata Backer has argued, the poor relief “static” paradigm which still governs most welfare analysis “accepts the social and economic order as a given – poor law programs do not challenge the status quo.” \textit{See Backer, supra} note 29, at 886.
\end{itemize}
II. POOR LAWS IN THE COLONIAL ERA

A. Municipalities

Compared to England, colonial America did not have large concentrations of "deserving" poor. The poor in the colonies never reached more than 10% of the total population, whereas in England the percentage of people regularly, or at least occasionally, dependent on public charity at times reached as much as 50% of the total population. Only one-fifth of the English population owned land compared to two-thirds of the white colonial population. The remaining third who did not were mostly recent immigrants and young men awaiting their inheritance or an opportunity to move and acquire property.

Of course, ownership of property was limited to white males and the privileges of being white increased substantially following the violent dispossession of Native Americans. In 1619, African Americans first entered the colonies largely as indentured servants. As late as 1651, small numbers of African Americans were assigned land upon the completion of their servitude. However, many African Americans found themselves bondservants for life in the 1640s. By 1661, Virginia began passing legislation creating slaves for life, a practice soon followed by the other colonies.

Thereafter, freedmen could be found throughout the slave south and in seaport cities, where they sometimes found employment. Others, still enslaved, sometimes received meager pay for working as slaves. In states such as South Carolina, slave owners were mandated by law to provide their slaves with food and care. Failure to


32. More than 60% of the population owned no property. Wood, supra note 31, at 122-23.


meet these legal obligations led to stiff fines that were used to benefit poor whites living in the area.37 To lessen this burden, slaveowners often trained their slaves and rented out their labor. This practice was especially prominent in Charleston, South Carolina, where African Americans made up almost 40% of the overall population. Here, slaves competed with white workers and dominated certain trades. As a result, hiring out slaves became a profitable business for slave owners.38

The overall strength of the colonial American economy did not mean that all whites lived in relative affluence. Poverty was not unknown to white colonial America and became manifest in different times to different degrees: sometimes reaching crisis proportions, sometimes receding to less overwhelming levels.39 Unemployment was relatively uncommon, and the average job paid a living wage.40 Nonetheless, pockets of poverty existed all along the eastern seaboard.41 In response, local authorities developed means of support.

By the 1850s, New England had a significant number of transients. This situation transgressed upon the “culture of paternal dependency,” a system under which everyone belonged somewhere.42 In this “culture,” those who stayed in town for three or four months were seen as members of the community. The community then assumed responsibility for their welfare. Disruption of this “culture” led to the development of “settlement laws,” designed to divide those entitled to community assistance from those not so entitled. These laws established qualifications for residence, and instructed municipalities on enforcement procedures so that the available relief would be given to needy residents rather than the outsiders.43 These laws made local authorities responsible for the poor.

40. GARY B. NASH, ARTISANS AND POLITICS IN EIGHTEENTH CENTURY PHILADELPHIA 243, 245 (1986).
41. In Deadham, Massachusetts “the lowest fifth of the society at Deadham lived in ‘scrabbling inadequacy,’ where one man in ten had as assets little more than his strong back.” See KENNETH Lockeridge, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS 151 (1970).
42. WOOD, supra note 31, at 130.
43. A number of different approaches were used to enforce the settlement laws. In 1809, New Hampshire towns would support paupers not technically settled, but would then bring suit against the “town of settlement” to recover its costs. See LAWRENCE M. FRIEDMAN, A HISTORY
Localities and private donors provided subsistence assistance to the indigent. However, compared to other municipal expenditures, the sums were not significant. Colonial attempts to care for the indigent were limited and devoid of extensive investigation or elaborate procedures. Families were responsible for their members. However, the elderly, the disabled, and the widowed were boarded in neighboring households; a practitioner provided medical care at public expense.

Settlement laws were buttressed by “warning out,” which absolved the community of responsibility for those who could not claim residency. “Warning out” also had roots in community fears and mistrust, and was used to confront those who could potentially disrupt the safety and security of the community. The numbers of persons “warned out” increased notably in the 1750s, and included disabled veterans, the post-war jobless, and those without property.

The public workhouse movement emerged in England in 1723. Common at the time was the belief that those who did not work should not eat. Once a workhouse was established in a particular town, thousands of impoverished persons were taken off relief and made to work. Like prison with hard labor, the workhouse was designed to punish the deviant, incarcerate the dependent, and aid en-

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OF AMERICAN LAW 215 (2d ed. 1985) (noting that decades of litigation made the law of settlement one of the most “intricate” areas of colonial jurisprudence).

44. DAVID A. ROTHMAN, THE DISCOVERY OF THE ASYLUM 31 (1971). The leading providers of private donations were charities, including church groups such as the Quakers and Presbyterians. Id.

45. During the 1760s, of Boston’s 15,000 residents, the almshouse helped an average of 250 annually; at least three times as many residents not living in the almshouse received some assistance. Id. at 6.

46. Id. at 31.

47. Id.

48. “Warning out” originated during the King Philip’s War of 1675. It was designed to discourage needy war refugees from coming to Boston. See NASH, supra note 39, at 173, 185.

49. TRAITNER, supra note 29, at 19, 21-22. Even though some towns warned out almost every new arrival, Lawrence Friedman notes that warning out was not banishment, but a disclaimer of responsibility. See FRIEDMAN, supra note 43, at 90. See also THOMAS BENTON, WARNING OUT IN NEW ENGLAND 16 (1911); STEPHEN FOSTER, THEIR SOLITARY WAY: THE PURITAN SOCIAL ETHIC IN THE FIRST CENTURY OF SETTLEMENT IN NEW ENGLAND 141 (1971).

50. FRIEDMAN, supra note 43, at 217.

51. BENTON, supra note 49, at 46; FOSTER, supra note 49, at 141 (noting the passage of ordinances forbidding residents to entertain strangers without permission, and requiring bond of prospective inhabitants). In Philadelphia and Boston, there were large increases in those “warned out” during and after the Seven Years War from 1756-1763.

52. As expressed by Cotton Mather, “for those that indulge themselves in Idleness, the Express Command of God unto us, is That you should Let them Starve.” See id. at 119, 121 (quoting COTTON MATHER, DURABLE RICHES (1695)).
forcement of settlement laws. The threat of incarceration at hard labor was thought to discourage poor beggars from entering the community.\textsuperscript{53} Notably, workhouses were uncommon in the colonies and compared with England, Americans spent very little on them.\textsuperscript{54}

The almshouse, on the other hand, was not just another name for the workhouse. Its task was to lodge, feed, and perhaps employ those in need. It was instituted to mitigate the costs of providing relief by eliminating direct costs for housing. Following Boston's lead, Philadelphia and New York resorted to the use of almshouses, where the poor were boarded at public expense beginning in the 1730s.\textsuperscript{55} The few towns that maintained almshouses used them only as a last resort.

B. Urban Areas

1. Philadelphia

Excepting a 1720s depression, Philadelphia's fortunes grew steadily from 1681 to the late 1750s.\textsuperscript{56} As in most colonial cities, the poor consisted primarily of the elderly, the disabled, veterans, and immigrants. Between 1750 and the Revolution, major economic and social dislocation in urban areas occurred. Large numbers of Americans entered the revolutionary era without property, opportunity, or the ability to obtain the necessities of life without public aid. During this period, the number of inhabitants admitted to the Philadelphia almshouse, housing only forty residents shortly after being built in 1732, increased by more than 900 persons.\textsuperscript{57} In response to increased expenditures in 1763, Philadelphia transported poor migrants out of the city.\textsuperscript{58} During the 1760s, Philadelphia's poverty rate was five percent, a fivefold increase in one generation.\textsuperscript{59} In addition, the numbers of taxpayers described in tax records as "insolvent," "poor," "runaway," or simply "no estate" increased to one in ten.\textsuperscript{60}

In response, the city maintained a system of "out-relief," funded through taxes, which allowed the poor to remain in their homes. However, in 1767 a number of Quaker merchants dismantled the "out-relief" system and replaced it with a "bettering house," where

\begin{flushleft}
54. Id. at 25, 30-31.
55. See Nash, supra note 39, at 173, 214.
56. See id. at 214, 245.
57. See id. at 214-15.
58. Id. at 206 n.42.
59. Id. at 184.
60. Id. at 188.
\end{flushleft}
the poor would be confined. This was expected to be cheaper and to teach better work habits to the poor. This approach was greatly resented by the poor because it implied that their poverty was the result of their own moral failure.61

2. New York

In 1683, New York passed legislation directing local officials "to make provision for the maintenance and support of the poor,"62 which was supplemented in 1788 by further legislation requiring that "[e]very city and town shall support and maintain their own poor."63 The earliest record of provisions made for New York's poor shows thirty-five people receiving aid; almost all either orphaned, elderly, or disabled.64 However, in 1702 a yellow fever epidemic killed 10% of New York's population. As a result, there was a 62% increase in per capita expenditure on the poor between 1698 and 1713. A household census taken shortly after the epidemic revealed that 17.5% of all families in the town were headed by single women, a chief factor in New York's decision to double the amount of aid to the poor.65 A 1713 census found sixteen poor persons, including two children, one soldier's wife and two adult males. Throughout that year, twenty people were aided by the churchwardens. By 1714 the number increased to twenty-eight.

The first almshouse in New York was built in 1736, providing relief to approximately forty people.66 By the early 1760s, the population of New York had increased by half while the poverty rate had increased more than fourfold.67 In January 1765, the churchwardens informed the common council that the monies raised for relief of the indigent "have long since been expended," and that the problems of the poor had reached the point where "unless more money was made available immediately, the impoverished must unavoidably perish" for want of food and firewood.68 Before the revolution, New York spent three times the amount that it spent in the 1740s for poor relief. The

61. Id. at 256.
63. FRIEDMAN, supra note 43, at 213.
64. NASH, supra note 62, at 71.
65. Id. at 72.
66. NASH, supra note 39, at 181.
67. Id. at 183, 214.
68. NASH, supra note 40, at 254.
cost of poor relief was “one of the largest items on the town budget.”69 These increases took place even though churches and charitable organizations increased their donations.70

3. Boston

As early as 1700, Boston officials created work relief programs for the poor, allowing them to earn income in facilities provided and supervised by public authorities. However, by the 1740s, Boston was no longer able to provide enough work for those who sought it.71 In 1749, using private money, the first workhouse was built in one of the largest buildings in the city.72 However, the number of occupants never exceeded fifty because the Boston poor, mostly widows with young children, refused to be taken from their homes.73 During the 1740s, about 100 persons annually had no choice but to enter the Boston almshouse.74

Beginning in the late 1730s and peaking in the 1750s, Boston witnessed substantial increases in poverty.75 A threefold increase in expenditures for the poor took place between 1729 and 1737.76 In 1753, the town petitioned the legislature for assistance because poor relief had risen to “over 10,000 pounds a year . . . besides private charity.”77 In 1752, during a period of high unemployment and economic depression, the Boston overseers of the poor reported that relief was double that of any town of similar size “upon the face of the whole earth.”78

The cost of caring for the poor was reduced through the creation of larger almshouses and workhouses, and by phasing out the costly relief system.79 In 1734, the almshouse held eighty-eight persons and by 1742 the number had risen to 110.80 In the third quarter of the century, the number of poor in Boston continued to rise. Within one generation, the rate of poverty had climbed from about nine per thousand to between twenty-seven and thirty-six per thousand. In some

69. NASH, supra note 39, at 181; ROTHMAN, supra note 44, at 320 n.10.
70. NASH, supra note 39, at 181.
71. Id. at 121.
72. Id. at 122.
73. Id.
74. Id.
75. Id. at 181.
76. Id.
77. Id.
78. Id. at 173.
79. Id. at 181.
80. Id. at 183.
wards, the number of households receiving out-relief reached 15% between the years of 1769 and 1772, a percentage considerably higher than that of Philadelphia or New York. In order to prevent these numbers from getting larger, Boston "warned out" those who sought to come into the city.

Although the population of Boston remained at about 16,000 from 1735 to the Revolution, the number of adult families capable of paying taxes declined from a high of more than 3,600 in 1735, to a low of about 2,400 around mid-century. The loss of more than a thousand taxpayers indicated the declining fortunes of more than one thousand householders – almost one third of the city’s taxpaying population. Town officials were convinced that the decrease in the number of adults able to pay taxes was caused by an increase in the number of people who had fallen to the subsistence level or below. On the eve of the revolution, poverty in Boston had grown to encompass approximately one-fifth of the population.

4. Virginia

Virginia, along with England and the other colonies, assumed responsibility for the care of those physically unable to support themselves, including large numbers of the wandering poor. In 1723, the legislature empowered courts to return vagrants from whence they came or force them to work. If servant labor could not be found, they were punished with thirty-nine lashes. Some argued that poverty could be limited by increasing the servant wages or lowering the price of food. However, these ideas were rejected by those who felt that workers only work when hungry and that higher wages or cheaper food would only result in more time lost in drunkenness. This discourse suggests that government officials were less concerned with

81. Id. at 185.
82. Id. at 186.
83. Id. at 187.
84. Id.
85. Id. at 195. See also Jesse Lemisch, The American Revolution from the Bottom Up, in Toward a New Past: Dissenting Essays in American History (Barton J. Bernstein ed., 1969) (citing evidence of a "propertyless proletariat" comprising 14% of adult males in 1687 and 29% in 1771).
87. Id. at 339.
88. Id. at 323.
eliminating poverty than disciplining the poor, and various steps were taken which ensured that the numbers of poor would not diminish.89

In 1668, Virginia created county workhouses modeled after those in England. The workhouses took “poor children from indigent parents to place them at work in the workhouses,” a move that may have been motivated less by the spread of poverty than the need for labor.90 This accomplished two purposes: it put children into a work force that was desperately short of labor, and it reduced indigent parents’ child rearing responsibilities, thereby forcing them back into the ranks of servants.91

The Virginia poor were also used to staff military expeditions.92 In 1736 they guarded the Georgia frontier, and in 1741 hundreds of the poor were recruited as part of the English expedition against Cartagena in the West Indies. Indeed, in 1754, George Washington began his military career attacking the French in the Ohio valley leading “those loose idle and persons that are quite destitute of house and home.”93 However, as the eighteenth century wore on, Virginia’s poor and lower classes benefited from growth in the world tobacco market. The very rich in Virginia provided benefits to the poor to assure that all whites remained aligned against African Americans.94

C. Summary

Clearly, urban poverty was a constant presence in colonial America. It increased significantly in each of the large colonial cities in the period leading up to the Revolution and the drafting of the Constitution.95 In addition to the gradual increases in poverty there was intense stratification as the cities grew larger and more commercialized.96 By the time of the Revolution, many urban areas had developed clearly defined classes of the genuinely wealthy and the genuinely impoverished,97 and the responsibility for caring for the poor was a local responsibility.

89. Id. at 324.
90. Id. at 327.
91. Id.
92. Id. at 340.
93. Id.
94. Id. at 343-46.
96. See Morris, supra note 31, at 26.
97. NASH, supra note 39, at 174; TRATTNER, supra note 29, at 32.
III. ECONOMIC RIGHTS AND THE FRAMING OF THE CONSTITUTION

As a result of the American Revolution, the United States took the first step towards establishing a regime of federal protection for human rights. The Revolution was fought for the right of national self-determination, which was later enshrined in international human rights instruments. This right was expressed by federal provisions that counteracted the states’ and Great Britain’s ability to act contrary to the right.

National self-determination did not affect state and local governmental responsibility for the poor, because the Articles of Confederation underscored the powers of the states as opposed to those of the federal government. Pursuant to the Articles, the federal government consisted of a simple one house legislature made up of state representatives, each of whom had one vote. Although there were some limitations on the powers of the states, the federal government was provided with very few affirmative powers. The federal government had neither taxing nor commerce powers, nor was there provision for the creation of an Executive or Judicial branch of government. Instead, executive responsibilities were delegated to a Committee of the States, and disputes were to be resolved by ad hoc, temporary courts.

This extremely “state-centered” document was explicitly designed to preserve the sovereignty of the states. Moreover, it as-

98. See, e.g., U.N. CHARTER arts. 1, 2, 55 in CENTER FOR THE STUDY OF HUMAN RIGHTS, TWENTY-FIVE HUMAN RIGHTS DOCUMENTS, supra note 2, at 1, 2.
100. See THE DECLARATION OF INDEPENDENCE (articulating reasons for terminating colonial relationship with Great Britain); ARTICLES OF CONFEDERATION (prohibiting states from entering into agreements with foreign or domestic states without the consent of the United States).
101. TRATTNER, supra note 29, at 41.
102. ARTICLES OF CONFEDERATION, art. V.
103. For example, the states were prohibited from engaging in foreign affairs, maintaining armies in excess of those authorized by the federal government, and waging war without the approval of the United States, unless invaded. See id. at art. VI. The United States was authorized, inter alia, to engage in foreign relations, maintain an army and wage war, and resolve disputes between states. See id. at art. IX.
104. Id. at arts. IX, X.
106. See ARTICLES OF CONFEDERATION, art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States Congress assembled.”).
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sured that the people of one state would be entitled to all the privileges of the people of the other states, unless one was unfortunate enough to be either a slave, a fugitive from justice, a vagabond, or a pauper.\textsuperscript{107}

That poor whites were disenfranchised along with slaves and criminals in our foundational constitutional document should not surprise us. Despite local responsibility for the poor, there prevailed during this era a strong ideology that public out-relief or private charity for widows and their children was money "worse than lost."\textsuperscript{108} Many believed that poverty and the threat of starvation were the only incentives to get common people to work. Operating on the assumption that people only worked out of necessity, and that "freedom" was primarily the "freedom from labor,"\textsuperscript{109} it was deemed indisputable that the less money one had, the harder one would work.\textsuperscript{110} Even influential members of the clergy believed poverty had social benefits, and saw it as a God-given opportunity for people to do good.\textsuperscript{111} These views informed the framers of the Constitution as they began their meetings in Philadelphia.\textsuperscript{112}

In 1913, Charles Beard put forth his infamous economic interpretation of the Constitution.\textsuperscript{113} Beard maintained that the Constitution was written, designed, and implemented by financial interests who were adversely affected by the structure of the Articles of Confederation. According to Beard's interpretation, the framers were an elite group representing moneyed commercial interests, who acted without popular authorization and contrary to the established means of amending the Articles of Confederation. They put together a system of government "based upon the concept that fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."\textsuperscript{114} Pursuant to Beard's thesis, the Constitution was then ratified by a group consisting of no more than one-sixth of the adult male population. The line of cleavage "was between

\textsuperscript{107} Id. at art. IV.
\textsuperscript{108} See \textsc{Nash}, supra note 39, at 132.
\textsuperscript{109} See \textsc{Wood}, supra note 31, at 34.
\textsuperscript{110} Id. at 136.
\textsuperscript{111} Boston clergyperson Samuel Cooper believed that helping the needy was the highest Christian virtue. See \textsc{Rothman}, supra note 44, at 7.
\textsuperscript{112} \textsc{Wood}, supra note 31, at 136.
\textsuperscript{113} See \textsc{Charles Beard}, \textsc{An Economic Interpretation of the Constitution} (1986).
\textsuperscript{114} Id. at 324.
substantial personality interests on one hand and small farming and
debtor interests on the other.” 115

Predictably, Beard’s book unleashed a storm of controversy. Presidents Taft and Harding denounced the book, and it was banned in Seattle, Washington. Nicholas Murray Butler, President of Columbia University where Beard taught, practically declared it obscene. 116 However, historians have respectfully debated Beard’s work. The thesis has confounded the traditional left-right divide, with some conservatives expressing agreement, and some leftists expressing criticism. 117 That there was a relationship between an individual’s socio-economic position and political behavior at the Constitutional Convention, is generally undisputed. 118 In the words of Gordon Wood, one of the leading historians of the era, “the constitution was intrinsically an aristocratic document designed to check the democratic tendencies of the period.” 119

Beard was not the first writer to argue that various elites in American society approached the Constitution motivated primarily by economic self-interest. His observations are consistent with those members of the Constitutional Convention who sought to secure the ownership and protection of property for themselves and others. 120 The articulated rationale for placing such protection at the center of government affairs was the notion that possession of property provided a means for protecting individuals from government authoritarianism. 121 Consequently, many of the states at the time of the Constitutional Convention restricted the right to vote to those who owned real property. 122 Additionally, James Madison, Alexander Hamilton and John Marshall asserted that one of the key reasons for

115. Id. at 324-25.
117. See Herbert Aptheker, On the Bicentennial of the Constitution: A Marxist View, in id. at 247, 248, 250 (noting agreement with the Beard thesis by “eminent conservative” historian John W. Burgess, but asserting that the Beard thesis is “partial,” “onesided,” and “oversimplified”).
120. Both the Constitutional Convention and a large majority of white 18th century Americans viewed the protection of property rights as the primary role of government. See Forrest McDonald, The Constitution and Hamiltonian Capitalism, in How Capitalistic Is the Constitution 49 (Robert A. Goldwin & William A. Schamba eds., 1982).
122. Id.
calling a constitutional convention was to protect economic liberties violated by the states under the Articles of Confederation. The Convention successfully accomplished this goal.\textsuperscript{123}

Under these circumstances, it is problematic to cite the Constitutional Convention of 1787 as the genesis of federal guarantees of minimum economic welfare.\textsuperscript{124} Because of their class background, it seems unlikely that Convention members would argue for such provisions.\textsuperscript{125} Further, the proposed governmental framework was designed to make it difficult to establish national economic and social rights by imposing restraints on the exercise of state and national power.\textsuperscript{126} The new Constitution made it difficult to enact national solutions for national problems because the states’ police power was limited to public health, safety, morals and welfare.\textsuperscript{127}

The new Constitution was, in many respects, a product of different class orientations toward the poor. In general, the Federalists were concerned with the threat that the poor posed to the rich, and fought for provisions that would perpetuate the control of the wealthy over those without property.\textsuperscript{128} The Anti-Federalists, on the other hand, demanded a society in which there would be “no extremes of wealth, influence, education or anything else.”\textsuperscript{129} They sought a model of government that would come as close to direct democracy as possible. In this model, each citizen would feel a direct responsibility

\textsuperscript{123} Id. at 113.  
\textsuperscript{127} Id. at 27.  
\textsuperscript{128} See Jennifer Nidelsky, \textit{Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy} 93-94, 142-49 (1990) (citing Richard Morris’ view that there was no way to eliminate the poverty of a whole group in society or even of bringing about a means of more just distribution without “infringing on the rights of property and thus undermining both the economy and the republic”); Jennifer Nidelsky, \textit{Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution}, 96 Harv. L. Rev. 340, 347 n.25, 348 (1982) (arguing that the Federalists believed in the public good, “but they had faith in only the elite’s capacity to define and pursue it,” and noting the Federalists’ assumption that inequality of wealth is inevitable and that one of the essential conditions of prosperity is preventing the poor from ruining the economy and undermining the republic by trying to expropriate the property of the rich).  
\textsuperscript{129} Nidelsky, supra note 128, at 344 (citing 1 \textit{The Complete Anti-Federalist} 20 (Herbert J. Storing ed., 1980)).
for, and an attachment to the government.\textsuperscript{130} The Anti-Federalist vision was frustrated by the creation of a structure which ultimately undermined participatory democracy by removing basic issues from popular understanding and control.\textsuperscript{131}

What motivated the Federalists to so restrain state power in the economic arena? Joyce Appleby notes that many state constitutions drafted in the wake of the Declaration of Independence concentrated governmental power in state legislatures, and these democratic bodies were filled with ordinary men elected by ordinary voters.\textsuperscript{132} These legislatures took action on controversies over land grants, electoral districts, and tax policies in ways that were sympathetic to large popular majorities in over half of the states. The interests of the elites were disregarded. In western state legislatures, farm representatives fought for increased access to land and the establishment of land banks. They also postponed the elimination of public debt until more personal financial security had been achieved.\textsuperscript{133} The price of necessities such as bread were set by regulation, as were rates for inns, taverns, and ferrymen. Laws regulated marketing practices, required inspection of many goods, and prohibited, taxed, or gave bounties to the movement of others and established the allowable interest rate on loans. Some legislatures also exercised rights to interfere in buying, selling, and lending, even after deals had been transacted.\textsuperscript{134} Wealthy individuals suffered particularly during the Revolutionary War. State governments confiscated nearly $100 million of property without just compensation or due process. This was almost half the value of real property in the country.\textsuperscript{135}

The Ex Post Facto, Bill of Attainder, and Contract clauses of the Constitution were designed by the framers to limit the exercise of the states’ traditional police powers.\textsuperscript{136} Although the Federalist Papers critiqued the Articles of Confederation’s structural weaknesses, state legislatures, which represented some of the excesses of democracy, concerned the colonial society’s elite.\textsuperscript{137} Even though limiting private
property rights and extensive regulation of the economy were accepted practices, the Federalists were determined to confine the power of state legislatures. By destroying the economic powers of the states, the Federalists radically altered the texture of state politics. In doing so they contained the poor’s threat to the wealthy by securing basic property rights. Moreover, they replaced active popular political involvement by a mobilized population with an efficient, well-run government devoted to a system of private property rights. Although free to pursue their private interests, the people would be relegated to the margins of politics. Reliance on private gain would generate an inequality that the new Constitution would encourage and entrench by concentrating both wealth and power in the hands of the few. By establishing a highly stratified system of representation and an elite federal judiciary, most contested issues were removed from the sphere of politics. The United States would be built under a “government channeled, government encouraged, and sometimes government subsidized system of private enterprise for personal profit,” which also ratified slavery for what then appeared to be in perpetuity.

To secure ratification by state governments, the Bill of Rights was added to the Constitution. This marked the second major contribution of the United States to what was later to become the developing law of international human rights.

A. Civil War and Its Aftermath

Notwithstanding the addition of a Bill of Rights, the framers’ constitutional system was constantly challenged by the institution of slavery. The post-bellum enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, and their legislative companions was intended to establish, as a matter of federal law, the human right to civil equality for all persons born in the United States, regardless of race. This was the third time that the Federal Government, in response to a na-

138. Donald J. Pisani, Promotion and Regulation: Constitutionalism and the American Economy, in THE CONSTITUTION AND AMERICAN LIFE, supra note 126, at 80, 97-98.
139. Appleby, supra note 132, at 145.
140. See Nidelsky, Confining Democratic Politics, supra note 128, at 348.
141. See McDonald, supra note 120, at 71.
tional crisis, established what became a fundamental, internationally recognized human right.\footnote{144} The Reconstruction Congress moved to eradicate a system which prohibited African Americans from competing as equals in the free markets with the following measures: the end of slavery and the badges and incidents thereof, the establishment of legal equality and citizenship for African Americans, and the franchise. The attempt was not entirely successful. Both the Reconstruction Amendments and Civil Rights statutes were in response to a national crisis that necessitated massive federal intervention to create and sustain human rights. This program could not be implemented without a constant federal military presence.\footnote{145} Yet, this new regime of civil, political, and racial equality was designed to establish federal guarantees of social and economic benefits to former slaves.\footnote{146} Once again however, such guarantees were relegated to the state legislatures with the demise of Reconstruction.

Notwithstanding its failure to fully integrate African Americans into American society, the Constitution served its intended purpose throughout the 19th and early 20th centuries by establishing a legal regime which facilitated economic growth through laissez-faire economic policy.\footnote{147} The growth of the corporation allowed the state to forego government and taxation as means to spur economic development, and replaced private initiative as the motivation for the manufacture of products.\footnote{148}

The massive growth of corporations prompted calls for federal regulatory control over them, and over two dozen bills were introduced in Congress to do so.\footnote{149} Supporters claimed national incorpora-

\footnote{144} Cf. Universal Declaration of Human Rights, art. 7, in Twenty-Five Human Rights Documents, supra note 2, at 7; ICCPR arts. 8, 26, in id. at 19, 26.

\footnote{145} This federal support was relinquished as a consequence of the Hayes-Tilden Compromise of 1876 and the withdrawal of federal troops from the South. See Foner, supra note 17, at 575-601.

\footnote{146} For example, in 1865, the Freedman's Bureau was established to provide former slaves and white refugees with medical care, education, oversight of employment contracts and land deals. Freedmen's courts assumed jurisdiction over cases where one or both parties were ex-slaves. Although it was implied that southern land would be seized and conveyed to former slaves in lots of 40 acres, this did not happen. However, some former slaves were able to obtain land in Florida, Arkansas, and Georgia pursuant to the Southern Homestead Act of 1866. See John Hope Franklin and Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 227-34 (7th ed. 1994).

\footnote{147} Pisani, supra note 138, at 80.

\footnote{148} Id. at 94.

\footnote{149} Theodore Roosevelt, the National Civic Federation, and the National Association of Manufacturers were among those who supported such legislation. See id. at 104. See also
tion could regulate both the size and the operations of corporations, while opponents denounced these plans as attacks on the states’ right to regulate corporations and argued that federal regulation was impractical.\textsuperscript{150} Because the federal and state governments were too weak to regulate the economy until the 1930s and the emergence of the New Deal,\textsuperscript{151} towns as well as states competed in countless ways to attract business. These measures included taxes, usury laws, and corporate charters. They also competed for public buildings, post offices and land offices, new roads, canals, and rail lines. As discussed below, this competition to attract business by lowering taxation rates complicated attempts to secure national economic rights.

B. The Depression and the New Deal

Renewed efforts to force the national government to secure economic entitlements took place in the 1930s, when world war and economic depression again produced national crises that required national remedies.\textsuperscript{152} President Roosevelt acknowledged this urgency in his 1941 Eighth Annual Message to Congress, where he spoke of four freedoms: freedom from want, freedom from fear, freedom to exercise speech and expression, and freedom to exercise one’s religion. Later, in his 1944 Eleventh Annual Message to Congress, Roosevelt spelled out the meaning of freedom from want, indicating that it encompassed “[t]he right to a remunerative job . . . [t]he right to earn enough to provide adequate food and clothing and recreation, . . . [t]he right to adequate medical care . . . [t]he right to adequate protection from the fears of old age, sickness, accident, and unemployment; and the right to a good education.”\textsuperscript{153} Roosevelt meant these ideas to become the nucleus of a “second bill of rights to the Constitution, one that would include social welfare rights, in order to create a

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\textsuperscript{150} Id.

\textsuperscript{151} Id.


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new basis of security and prosperity . . . for all regardless of station, race, or creed."

Roosevelt's vision was informed by the groundbreaking economic rights legislation of the New Deal era, such as the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act. These laws for the first time interposed the federal government into the heretofore private struggles between working people and employers. In response to the depredations caused by the deteriorating economy, in 1939 Roosevelt instructed the National Resources Planning Board to sponsor a series of investigations concerning employment, relief, social insurance, housing, and urban development. Three years later, a Board Committee concluded that an "American standard" of economic security was a right of every citizen. The Committee argued that the federal government should provide a job for all those who could not find work in the private economy, and called for a "right to shelter." However, none of these proposals came to fruition.

A final burst of federal activity in the direction of creating various forms of federally guaranteed minimum welfare guarantees took place in the 1960s. While our perspective on the period may be too short to consider it a "crisis" of the magnitude of those that I have hitherto discussed, the 1960s was clearly a period of domestic and international upheaval. This stemmed from domestic social movements for racial and gender equality, greater economic opportunity for all, and changes in foreign policy including demands for the withdrawal of United States armed forces from Vietnam. Importantly, the 1960s witnessed substantial growth in social welfare spending. The growth between 1964 and 1972 was from 25.4% of the federal budget to 41.3% and from 4.3% of gross national product to 8.8%. These

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154. This legislation was not without its drawbacks. The Social Security Act, for example, excluded agricultural and domestic workers from its provisions dealing with unemployment and old age insurance, thereby eliminating coverage of approximately 65% of working African Americans, who were still primarily engaged in southern rural agricultural work. Orloff, supra note 1, at 37, 77.

155. See Edwin Amenta & Theda Skocpol, Redefining the New Deal: World War II and the Development of Social Provision in the United States, in POLITICS OF SOCIAL POLICY, supra note 1, at 81, 83, 86-94, (discussing COMMITTEE ON LONG RANGE WORK AND RELIEF POLICIES: SECURITY WORK AND RELIEF POLICIES (1942)).

156. Id. at 88, 92; Foner, supra note 17, at 233-34.

157. See Amenta & Skocpol, supra note 155, at 149, 156-62.

expenditures financed "several hundred legislative initiatives including civil rights for blacks, victory in the war on poverty, enhanced educational opportunity, improved health care for the elderly, a more acceptable quality of urban life, better environmental protection, and improved protection for consumers."159

Indeed, the 1960s were probably the high point for affirmative governmental policy supporting social welfare rights in the Twentieth Century, an edifice which has been gradually cut away since that time.160

IV. LEGAL SOURCES FOR A REJUVENATION OF ECONOMIC RIGHTS

In American history, federal provisions of minimum welfare guarantees have been few and far between, taking place primarily in periods of profound national crisis. During such periods, federal resources provide the crucial coercive force that makes economic protections a valued and coherent counterpart to the private market. In the absence of such crises, the responsibility for protecting such rights has rested with the state governments. Nonetheless, numerous calls for federal participation in non-crisis times do continue. These have taken the form of creative constructions of the Constitution, and claims that the United States should ratify international instruments mandating such guarantees. While these debates are ongoing and will hopefully result in more active federal involvement in the realization of a true regime of economic rights protections, there is clearly a need for additional approaches.

A. The Scholarly Debates

Since the 1960s, ideas encouraging federal rights to a job, adequate income, health care, and education have only very slowly started to take hold in the United States. Spurred by the absence of laws in this field, a number of scholars have debated whether the Constitution creates some kind of right to economic subsistence. Because a number of Supreme Court decisions have clearly refused to hold that the Constitution imposes minimum welfare obligations,161 the de-

159. Id.
160. See, e.g., Hershkoff & Loffredo, supra note 4, at 1314-30; What Reagan Is Doing To Us (Alan Gartner et al. eds., 1982).
161. See, e.g., Harris v. McRae, 448 U.S. 297, 323 (1980) (no affirmative government obligation to ensure resources to obtain contraceptives or send children to private schools); Lindsay v.
bated has centered around whether lower courts can and should find bases for such rights.

This debate began over twenty-five years ago when Professor Frank Michelman asked whether such economic guarantees might be rooted in the Fourteenth Amendment’s Equal Protection Clause. \(^{162}\) Articulating the right to such protection as one of “minimum protection against economic hazard,” he specified that “a claim to minimum protection would mean that persons are entitled to have certain wants satisfied—certain existing needs fulfilled—by government free of any direct charge over and above the general obligations to pay general taxes (and perhaps free of conditions referring to past idleness, prodigality, or other economic ‘misconduct’).”\(^ {163}\) Rooting such a claim within the Equal Protection Clause is not without difficulty. As Michelman noted,

In shaping the statement of our claims so as to fit the locutions of the equal protection clause, we must find an ‘inequality’ to complain about; and the only inequality turns out to be that some persons, less than all, are suffering from inability to satisfy certain ‘basic’ wants which are presumably felt by all alike. But if we define the inequality that way, we can hardly avoid admitting that the injury consists more essentially of deprivation than discrimination, that the cure lies more in provision than equalization, and that the reality of injury and need for cure are to be determined largely without reference to whether the complainant’s predicament is visibly related to past or current government activity.\(^ {164}\)

Akhil Amar has taken a different approach, focusing on the Thirteenth Amendment.\(^ {165}\) Reading this Amendment as a determination that no degraded caste of people shall exist in the United States, he views this assurance as necessarily entailing a right to minimum subsistence and minimum shelter. Congress has a duty to enforce this

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\(^{162}\) See Frank Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

\(^{163}\) Id. at 13.

\(^{164}\) Id.

right by appropriate legislation under Section Two of the Amendment. 166

The ideas of Michelman and Amar by no means exhaust the range or depth of the discussion. However, all who have addressed this issue start from two similar premises. First, they seek support for their arguments solely in the Reconstruction era Amendments to the Constitution, 167 perhaps in recognition that the framers were loath to place such obligations upon the federal government. Second, each of the authors acknowledges the slim likelihood that their theories will persuade the current United States Supreme Court. 168 A further unifying thread to these arguments is an unfortunate failure to provide a place for the poor to participate in their own liberation; essentially leaving them and their struggle for economic security to lawyers and judges. 169

Theorists from all points on the political spectrum have argued against a reading of the Constitution that imposes minimum welfare provisions upon federal or state governments. 170 In regard to Michelman's equal protection theory, Ralph Winter notes the absence of state action and a judicial standard for determining when the economic rights are satisfied. Further, a separation of powers problem inheres in such a reading of the Constitution because courts can neither define nor enforce such rights without usurping the legislative and executive roles. Moreover, he observes that judicial vindication of these rights would be illegitimate and undemocratic because nothing in our common law or Constitution indicates any acceptance of such governmental obligation. Further, he asserts that claims of such rights are misdirected, not in the best interests of the rightsholders,

166. Id.
and immoral because they attack the basic liberties of those who would be called upon to satisfy them.\footnote{171} 

The theory of this article is not that socio-economic rights can or should be hewn from contemporary constitutional jurisprudence. Rather they should be fought for via direct political action by grass-roots political struggle for constitutional change by the poor and their political supporters. As such, this article does not enter into a discourse with Winter. What remains significant in Judge Winter’s article is his assertion that policymakers, including legislators, should not legislate economic guarantees.\footnote{172}

B. The Role of International Law

Because the federal judiciary has failed to accept the argument that minimum welfare guarantees ought to be teased out of the Constitution, many have sought to root such obligations in international law. Indeed, there are a number of international instruments that use explicit terminology to identify what I have been referring to as minimum welfare guarantees. However one describes these guarantees, they exist to eliminate the ravaging effects of global poverty. In this section, I examine three of the international instruments central to any discussion of how to create a culture of economic rights in the United States. The United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights (“International Covenant”), have emerged from the law-making process of the United Nations after the Second World War.\footnote{173} Each is a basis for establishing minimum welfare guarantees for the signatory countries that would otherwise have no juridical foundation. The rights contained in the Universal Declaration and International Covenant all have their origin in the United Nations Charter,\footnote{174} a foundational human rights instrument which “ushered in a new international law of human rights,”\footnote{175} and made its specific human rights provisions binding upon all member states. Below, I

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\footnote{172}{Winter, supra note 170, at 9, 72, 83.}


\footnote{174}{See U.N. Charter, in Center for the Study of Human Rights, Twenty-Five Human Rights Documents, supra note 2.}

provide a brief history of these instruments and the rights they contain.

1. The United Nations Charter

The U.N. Charter was a product of the U.N. Conference on International Organizations held in San Francisco in 1945 and the Dumbarton Oaks preparatory conference in Washington in 1944.\textsuperscript{176} At these meetings, the United States, together with the United Kingdom, the Soviet Union, and China, worked to put together a set of internationally binding legal norms that included human rights provisions. The United States' contributions to this endeavor derived from a draft International Bill of Rights prepared in 1942. This document acknowledged that governments exist for the benefit of the people and for the promotion of their common welfare in an interdependent world. It further stated that all persons who are willing to work, as well as persons who through no fault of their own are unable to work, have the right to enjoy such minimum standards of economic, social, and cultural well-being as the resources of the country, effectively used, are capable of sustaining.\textsuperscript{177} These ideas, which had been articulated in President Roosevelt's speeches outlining the "Four Freedoms," were later incorporated into the Atlantic Charter, which was announced on August 14, 1941 by Roosevelt and Winston Churchill.\textsuperscript{178} The United Nations Charter and the Universal Declaration of Human Rights used concepts from the Atlantic Charter, but raised the Atlantic Charter to the level of international rights and duties\textsuperscript{179} by adding additional rights to economic progress and social security.

During the U.N. Charter discussions, U.S. Secretary of State Edward Stettinus referred to Roosevelt's Four Freedoms speech, explaining that freedom from want encompassed the right to work, the right to social security, and the right to opportunity for advancement.\textsuperscript{180} In

\textsuperscript{176}See Lauren, supra note 173, at 166-71.
\textsuperscript{177}Id. at 35.
part because of Stettinus' intervention, Article One of the U.N. Charter identifies a primary purpose of the U.N. as working "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all . . ." while Article Fifty-Five of the Charter mandates that the United Nations promote higher standards of living, full employment, conditions of economic and social progress and development, and universal respect for, and observance of, human rights and fundamental freedoms. These purposes are buttressed by Article Fifty-Six, which imposes upon all U.N. members obligations to take joint and separate action for the achievement of purposes set forth in Article Fifty-Five. However, attempts by economic rights advocates to utilize these principles to establish a juridical foundation for federal welfare rights guarantees are stymied by court decisions which hold that the human rights provisions of the U.N. Charter are non-self-executing. This precludes U.S. courts from enforcing their provisions in the absence of prior implementing legislation by Congress.

A number of scholars have come up with approaches to counter this interpretation. Some have taken the position that the human rights clauses of the Charter should be deemed self-executing, by reason of the mandate of Article VI of the Constitution, which declares treaties and "laws of the United States" to be the "supreme Law of the Land." If they are correct in their approach, the U.N. Charter provisions would supersede earlier federal law, by reason of the last in

182. Id. art. 56, at 2.
183. Id.
184. See Frovola v. U.S.S.R., 761 F.2d 370, 374 n.5 (7th Cir. 1985); Sei Fujii v. State, 242 P.2d 617 (Cal. 1952); Sipes v. McGhee, 25 N.W.2d 638, 644 (1947) (Charter human rights provisions "merely indicative of a desirable social trend and an objective devoutly to be desired by all well thinking peoples").
time rule, and state law by reason of the Supremacy Clause.\textsuperscript{187} If the treaty is not self-executing, Congress would simply have to pass implementing legislation to give these provisions meaningful effect.\textsuperscript{188}

The other approach adopted by scholars is to claim that the terms of the U.N. Charter are judicially enforceable as part of customary international law, arguing that such law is "part of our law, and must be ascertained and administered by the courts of justice of the appropriate jurisdiction, as often as questions of right depending upon it are duly presented by it for their determination."\textsuperscript{189} This argument has produced a tidal wave of debate.\textsuperscript{190} What stands indisputable is that the international human rights provisions in the U.N. Charter have significantly effected American jurisprudence in the early post-war era.\textsuperscript{191} Sadly, they have not yet successfully been a means to create federal minimum welfare guarantees in the later post-war era.\textsuperscript{192}

2. The Universal Declaration of Human Rights

The Charter contained neither a definition of human rights nor a means for their implementation. In response, the preparatory commission of the United Nations, its executive committee, and the General Assembly, recommended that the Economic and Social Council, itself created by Article Sixty-Eight of the U.N. Charter, establish a committee to formulate an International Bill of Rights.\textsuperscript{193} In 1946, the Council established the Commission on Human Rights that undertook this task. After two sessions between 1947 and 1948, the Commission completed a comprehensive draft that has become known as the Universal Declaration of Human Rights. To further the purposes of the U.N. Charter, in 1948 the General Assembly adopted the Universal Declaration which was "intended to be an aspirational non-binding

\begin{itemize}
  \item \textsuperscript{187} International Human Rights in Context: Law, Politics, Morals 742 (Henry J. Steiner & Philip Alston eds., 1996); Whitney v. Robinson, 124 U.S. 190, 194 (1888).
  \item \textsuperscript{188} Asakura v. Seattle, 265 U.S. 332, 341 (1924); Ware v. Hylton, 3 U.S. 198, 236-37 (1796).
  \item \textsuperscript{189} See The Paquette Habana, 175 U.S. 677, 700 (1900); Sohn, supra note 180, at 12; Theodore Meron, Human Rights and Humanitarian Norms As Customary International Law 82 (1989) (the Charter's human rights principles, so elaborated, have become a part of customary international law).
  \item \textsuperscript{190} See Bradley & Goldsmith, supra note 21.
  \item \textsuperscript{192} Id. at 902.
\end{itemize}
common standard of achievement for all peoples and all nations." 194 The Declaration set forth the "basic principles" upon which subsequent conventions were to be based. 195 It contained articles covering civil and political rights, such as the right to be free of discrimination and to equal protection of the law, the right to be presumed innocent until proven guilty in a fair and public trial, freedoms of thought, religion, conscience, movement and assembly. It further guaranteed economic rights including the right to an adequate standard of living and the right to work, supplemented by other means of social protection including reasonable limitations on working hours and periodic holidays. 196 Finally, the Declaration guaranteed cultural rights, such as the right to a nationality, to education, and to the enjoyment of the arts and sciences. 197

Although the Universal Declaration of Human Rights was not meant to be a legally binding instrument, 198 some commentators claim that whatever the intentions of the authors may have been, the Declaration is now part of customary international law.

3. The International Covenant on Economic, Cultural, and Social Rights

The International Covenant has its roots in the U.N. Declaration on Human Rights, 199 drafted by the Commission on Human Rights 200 in an almost twenty-year process. In 1976, the International Covenant was entered into force, and another decade passed before the Covenant was provided with a supervisory body that "was worthy of the name." 201 After an International Bill of Rights drafting committee rejected the inclusion of all the rights listed in the Universal Declaration, 202 the Commission on Human Rights' draft omitted the social and economic rights considered by the Economic and Social Council in the summer of 1950. 203 This draft was then submitted to the third

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194. Hannum, supra note 20, at 131, 137.
195. Id. at 138.
196. Universal Declaration, supra note 144, at arts. 22-28. See also Morsink, supra note 193, at 131-238.
197. Universal Declaration, supra note 144, at arts. 15, 21, 26, 27.
201. Craven, supra note 3.
202. Id. at 12.
committee of the General Assembly which passed a resolution mandating inclusion of economic and social rights "in accordance with the Universal Declaration of Human Rights" by a vote of 23-17 with ten abstentions.204

This vote to include economic rights was frustrated by the western states205 success in again dividing the document into two covenants: the Covenant on Civil and Political Rights, and the Covenant on Economic, Cultural and Social Rights. Each covenant had different means for monitoring and enforcement.206 The States were to give the Covenant on Political and Civil Rights immediate effect through legislative or other measures and make available effective remedies to any person whose rights had been violated.207 In contrast, each party to the International Covenant agreed to take only economically practicable steps.208 While since 1977 the U.N. Human Rights Committee can hear individual petitions for violations of civil and political rights,209 the International Covenant can only examine reports submitted by states-parties in annual seasons.210 Neither committee has the authority to order sanctions against non-complying countries.

The International Covenant is the most significant statement of aspirations for a regime of minimum welfare guarantees protected by international law.211 It addresses the affirmative right to work,212 to remuneration providing all workers a "decent living for themselves and their families"213 to be free from hunger,214 to the enjoyment of "the highest available standard physical and mental health,"215 to edu-

204. Id.
206. KAUFMAN, supra note 199, at 74-78.
207. International Covenant on Civil and Political Rights, GAOR, 2200A (XXI), at arts. 2(2), (3) (1966), in TWENTY FIVE HUMAN RIGHTS DOCUMENTS, supra note 2, at 17, 18.
208. Id. at art. 2(1).
209. See id. at arts. 1-2.
210. INTERNATIONAL HUMAN RIGHTS IN CONTEXT, supra note 187, at 264.
213. Id. at art. 7a(ii).
214. Id. at art. 11.2.
215. Id. at art. 12.1.
cation, and to take part in cultural life and enjoyment of the benefits of scientific progress and its applications.\textsuperscript{216} Adopted by the United Nations in 1966, the International Covenant has been ratified by 132 states-parties,\textsuperscript{218} including the vast majority of western states,\textsuperscript{219} and forms a part of the domestic law in many of the signatory countries.\textsuperscript{220} Indeed, of the twenty-two states other than the United States in the West European and regional groupings, only three have not ratified the covenant.\textsuperscript{221} Although signed and sent to the Senate by President Carter, the International Covenant has never been ratified by Congress. In his ratification message to the Senate, Carter attached a series of reservations, declarations and understandings.\textsuperscript{222} Carter stated that the covenant "sets forth rights, which while for the most part are in accord with United States law and practice, are nevertheless formulated as statements of goals to be achieved progressively rather than implemented immediately."\textsuperscript{223} He insisted that Article Two, Paragraph One and Article Eleven import no legally binding obligation to provide aid to foreign countries,\textsuperscript{224} and that Article Two, Paragraph Two allowed the government to make reasonable distinctions based upon citizenship.\textsuperscript{225} Citing Article Two, Paragraph Three, Carter stated that everyone has the right to own property, alone as well as in association with others, and that none shall be arbitrarily deprived of his property.\textsuperscript{226} Moreover, he insisted that under international law, any taking of private property must be non-discriminatory, for a public purpose, and accompanied by prompt, adequate

\textsuperscript{216} Id. at art. 13.1.
\textsuperscript{217} Id. at art. 15.1.
\textsuperscript{218} See International Human Rights in Context, supra note 187, at 1230. For lists of states-parties, see Craven, supra note 3, at app. III.
\textsuperscript{220} See Craven, supra note 3, at 28.
\textsuperscript{221} See Alston, supra note 219, at 365.
\textsuperscript{223} See President's Human Rights Treaty Message to the Senate, 14 WEEKLY COMP. OF PRES. DOC. 395 (Feb. 23, 1978).
\textsuperscript{224} U.S. Ratification, supra note 222. Article 2, Paragraph 1 states:

Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, 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.

See Craven, supra note 3.
\textsuperscript{225} U.S. Ratification, supra note 222.
\textsuperscript{226} Id. at 94-95.
and effective compensation.227 In regard to Articles Six through Nine, Carter stated that some of the standards established under these articles may not be readily translated into legally enforceable rights, while others are in accord with U.S. policy, but have not yet been fully achieved.228 This was especially the case with Articles Eleven through Fifteen of the International Covenant, which necessitated a declaration of their non-self-executing nature.229 These reservations provoked the criticism that if adopted under their conditions, the entire purpose of the treaty would be undermined.230

The Senate Committee on Foreign Relations held hearings in 1979, looking at four international human rights treaties: the International Covenant, the International Covenant on Civil and Political Rights ("ICCPR"), the International Convention on the Elimination of All Forms of Race Discrimination ("ICERD"), and the American Convention on Human Rights. Regarding the International Covenant, Carter administration officials made clear in testimony before the Senate Committee that the International Covenant would not alone create any immediate rights and was fully consistent with overall U.S. policies and supported ratification of all four treaties.231 Those who testified before the Senate supported ratification of all four treaties. These groups included bar associations, public interest organizations, international human rights groups, church organizations, and well recognized professors of international law.232 Given

227. Id. at 95.
228. Id. at 96.
229. Id. at 97.
230. Professor David Weissbrodt claimed that Carter’s message raised issues that were either "trivial, unnecessary, violative of international law, or a combination of the above," and argued that the reservations were either designed to allow the administration to argue that there were no legal or constitutional impediments to ratification, or that government lawyers had “lost sight of the reasons for ratifying the Covenant in the first place.” See David Weissbrodt, United States Ratification of the Human Rights Covenants, 63 MINN. L. REV. 35, 77-78 (1978). Although much of Weissbrodt’s criticisms were directed to reservations concerning ICCPR, clearly some applied to ICCSR. See id. at 53-62, 63-72.
231. Warren Christopher explained, ICESCR looks to the future, it commits states to take steps toward the future realization of certain economic, social and cultural goals for the individual. These goals are ones to which the United States has long been committed including the right to work, to social necessities, to physical and mental health, to education, and to freedom from hunger. Id. at 21.
232. The treaties were supported by a number of legal organizations: the American Bar Association, the American Association of the International Association of Jurists; International Human Rights Law Group, the National Association for the Advancement of Colored People, and the ACLU. Labor and human rights monitoring groups testified in support, including the AFL-CIO, Helsinki Watch, Amnesty International, and the International League for Human Rights. Large numbers of religious denominations testified in support, such as the National
these factors, one may rightfully wonder why ratification of the International Covenant not only failed but essentially ground to a halt.\textsuperscript{233}

No Senate Committee discussions reveal members’ views about the treaties before them, and no full Senate discussion left a record of floor debates. However, it is possible to get some sense of how the more vocal members of the Senate Committee felt about the treaties. Senator Jacob Javits indicated that he was concerned about whether the treaties could be deemed “self-executing,”\textsuperscript{234} and how they would affect domestic law.\textsuperscript{235} Senator Jesse Helms expressed concern at the very beginning of the hearings about the effect of the International Covenant and the ICCPR on private property rights, noting that President Carter’s decision to sign the treaties before the Senate reversed the position of previous presidents. Helms further noted that American property abroad could be expropriated pursuant to International Covenant, in violation of the Universal Declaration.\textsuperscript{236}

Over time, U.S. officials have expressed numerous reservations about the International Covenant, maintaining that economic, cultural, and social rights are foreign to traditionally recognized American constitutional rights. These officials feel that these rights belong in a “qualitatively different category” from other rights, and they should not be seen as rights at all, but rather goals of economic and social policy. According to these arguments, economic and social rights are easily abused by repressive governments as justifications for violations of civil rights. During the Cold War, the Department of State viewed the International Covenant as a “socialist manifesto,”\textsuperscript{237}

\textsuperscript{233} The United States has since ratified the ICCPR, (See Text of the Resolution of Ratification, Apr. 2, 1992, 31 I.L.M. 648, 649 (1992)) giving the United States the “unique distinction” of being the only country in the world that has ratified ICCPR, but has not ratified ICESCR.


\textsuperscript{235} Id. at 126. Javits requested that experts examine whether the treaties were self-executing and their effect on domestic law. See id. at 275-316.

\textsuperscript{236} Helms criticized President Carter for signing ICESCR on the ground that it would “legitimize the unlawful expropriation without compensation or arbitrary seizure of Americans’ property overseas. Furthermore, ratification by the Senate would again for the first time have the United States formally acquiesce to Socialist and Marxist governments’ denial of basic individual economic rights.” INTERNATIONAL HUMAN RIGHTS IN CONTEXT, supra note 187, at 759-60.

\textsuperscript{237} See Stark, supra note 124, at 81.
and deemed the rights included therein to represent political, not legal commitments. These views confirm Alston's observation that many in the United States government refer to the International Covenant as the "covenant on Uneconomic, Socialist and Collective Rights."

In looking for a deeper and more historic explanation for U.S. antipathy to the International Covenant, a number of scholars have noted that the arguments raised against the ratification of the International Covenant closely resemble those put forth to defeat ratification of all human rights treaties since the Bricker Amendment in the 1950s. The amendments proposed by Senator Bricker of Ohio were designed to make it virtually impossible for the United States to adhere to any international human rights treaties. Bricker, operating in the context of the Cold War and in the aftermath of Senate consideration of the Genocide Convention, was motivated by concern that human rights treaty instruments would be used as a basis for ending racial segregation and discrimination in the United States. Bricker's campaign mobilized opposition to human rights treaties on the grounds that ratification would diminish basic constitutional rights, violate states' rights, promote world government, subject citizens to trial abroad, threaten the American form of government, en-

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239. See Alston, *supra* note 219, at 366.

240. In its principle version, the operative language of the amendment read:

Sec. 1: A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

Sec. 2: No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.

Sec. 3: A treaty shall become effective as internal law in the United States only though the enactment of appropriate legislation by the Congress.

Sec. 4: All Executive and other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article.

See *Kaufman, supra* note 199, at 96-103, 201-3. The Senate Judiciary Committee held hearings on the amendment in May and June of 1952, and ultimately voted the amendment out of Committee. However, the Senate adjourned without debating the issue. In January 1953, the amendment was reintroduced with the support of sixty-two Senators. Because passage of the amendment seemed likely, the Eisenhower administration, in a move calculated to defeat passage, promised that it would not accede to international human rights covenants or conventions. See Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *Am. J. Int'l L.* 341, 349 (1995).


242. See id. at 310.
hance Communist influence, infringe on domestic jurisdiction, create self-executing obligations, and increase international entanglements.

Although these concerns have not entirely precluded U.S. ratification of human rights treaties, they have prompted attachment of reservations to the ratifications that seriously undercut their effect. Louis Henkin has summarized the effect of these reservations:

1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. United States adherence to an international human rights treaty should not effect-or-promise change in existing United States law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights treaty to which the United States adheres should be subject to a 'federalism' clause so that the United States could leave implementation of the Convention largely to the states.
5. Every international human rights agreement should be non-self-executing.243

As Henkin notes, the net effect of these principles is to "achieve virtually what the Bricker Amendment sought and more."244

If Henkin is right about these principles, it seems extremely unlikely that the U.S. will ratify the International Covenant soon. If it is ratified, it too will be crippled by reservations. This appears to be the case, even though some have publicly supported ratification,245 and former Secretary of State Warren Christopher indicated his support for the International Covenant.246

The dearth of legislative or executive activity concerning the International Covenant makes it unlikely that the United States will seriously consider the numerous other international instruments which contain social welfare guarantees. The United States ignores even

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244. Id. at 349.
those that it has signed, such as the International Convention on the Elimination of All Forms of Racial Discrimination, which "guarantees the right of everyone, without distinction as to race or color or national or ethnic origin" to the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, to housing, to public health, medical care, social security and social services, education and training, and equal participation in cultural activities.247

V. THE ROLE OF THE STATES

A. Current State Obligations

Since neither the U.S. Constitution nor international law have yet been construed to create federal minimum welfare guarantees, we must go back to the original protector of the poor – state law. Historically, state and local governments have played the primary role in assuming responsibility for those unable to care for themselves.248 This continues to be the case today.249 The language of state statutory and constitutional law often contains explicit intentions to provide minimum welfare guarantees. These have frequently provided the basis for court decisions upholding state economic rights.250 These cases were argued by crusading lawyers working at all levels of state legal systems.251 Indeed, one of the foremost scholars of state constitutional jurisprudence noted, "the concept of public entitlement was part of the state constitutional jurisprudence from its inception."252 A look at the minimum welfare provisions guaranteed by state constitutions shows that such protections are substantial. A large number of

247. Id. at 5.e (i)-(vi).
248. Irving Bernstein, Americans in Depression and War, in 1 The Lean Years: A History of the American Worker (1960).
249. See Stark, supra note 124, at 92-94.
252. State Constitutional Law: Cases and Materials (Robert F. Williams ed., 1988). See also Bert Neuborne, State Constitutions and the Evolution of Positive Rights, 20 Rutgers L.J. 881, 898 (1965) (many state constitutions can be deemed "communitarian" or even "populist" since they are enabling documents which recognize that it is the responsibility of the states to deal with education, food, shelter and health care).
court decisions have held that individuals are entitled to state-provided minimum welfare guarantees.253

Despite the existence of these statutory and constitutional provisions and their judicial constructions, many state governments have failed to provide necessary minimum economic guarantees. The inhabitants of these states will be forced to do without if there are no federal assurances. Moreover, in times of structural change or economic downturn, the poor often find themselves scapegoated and see their state benefits reduced. To the extent that such rights are not enshrined in the state constitution, the poor have often been the first to be cast aside by legislative revocation of state benefit schemes. Because tax revenues generally pay for socio-economic benefits, states have tremendous incentive to reduce or eliminate benefits and shrink the tax burden on individual and corporate taxpayers.254

Between 1990 and 1994, seventeen states reduced or eliminated their aid for non-elderly poor people without dependent children, and in Ohio, Michigan, Illinois and Pennsylvania alone, more than 350,000 general assistance recipients had their benefits cut off.255 Michigan cut off single adults who were previously entitled to welfare benefits. The state of New Jersey, with the consent of the Secretary of U.S. Dept. of Health and Human Services, imposed a "family cap" which eliminated a standard increase in benefits for any child born to beneficiaries of the Aid to Families of Dependent Children program. After challenges by the ACLU, this drastic change was upheld by the courts.256 Similar proposals have been put forth by the states of Georgia, Arkansas, Massachusetts, and Wisconsin.257 The Welfare Reform Act of 1996 mandated that welfare recipients move from welfare to jobs. Since its passage, the situation has become more dire for the poor.

The various states' benefit levels vary widely.258 In 1993, Rhode Island gave a mother with two children an annual cash grant of $6,793, whereas South Carolina offered a household of the same size $2,263.

253. See Stark, supra note 124.
255. See David Hatchett, In Short, In THESE TIMES, June 12, 1995, at 6.
258. See Hacker, supra note 11, at 12.
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While some of these discrepancies reflect legitimate cost of living variances, others are designed to punish the resident poor and discourage others from moving to the state, similar to the "warning out" tactics of the colonial era.259

B. Enhancing State Obligations

Because there are as yet no federal or international minimum welfare guarantees, advocates for such rights must work to enhance current state obligations. This can be accomplished via direct ballot initiatives, constitutional conventions, and constitutional commissions. These mechanisms have been increasingly used to bypass state electoral and legislative logjams for the purpose of changing or setting social policy. In this section, I evaluate their potential to force a public discussion of minimum welfare guarantees in the United States. Can these procedures successfully spark debate and implementation of economic rights guarantees in the states that do not provide such guarantees? Can such a debate move federal authorities to reconsider their approach to International Covenant and human rights treaties generally? I address these questions below.

1. Statutory Ballot Initiatives

Statutory initiatives allow mobilized sectors of the population to place issues on state electoral ballots simply by demonstrating through a petition process that significant numbers of people wish to express their voice on an issue.260 Similar to the ballot initiative is the referendum process that allows citizens to ratify legislation previously enacted by the legislature.261 There are three kinds of referenda: "mandatory," "voluntary," and "popular." "Mandatory" or "compulsory" referenda require the legislature to submit certain bills to the electorate for approval. "Voluntary" referenda give the legislature

259. Rudolph Giuliani in 1993 declared that he would "end welfare by the end of this century completely." He proposed that this would rid his state of many of its poor people. Their departure, he said, would be a 'natural consequence' of a reduction in benefits. See New York Welfare Cuts Won't Spur an Exodus, Greensboro News and Rec., May 10, 1995, at A14. The United States Department of Agriculture has concluded that New York city routinely violated the law by denying poor people the right to promptly apply for food stamps, failing to make applications available, failing to screen families for emergency food needs, and cutting off food stamps to needy families who were still eligible for those benefits. See Rachel L. Swarns, U.S. Audit Is Said to Criticize Giuliani's Strict Welfare Plan, N.Y. Times, Jan. 20, 1999, at A1.


the choice of whether to send enacted measures to the electorate. "Popular" referenda allow the electorate to use petition campaigns to force the legislature to submit legislation to the electorate for approval that would not otherwise be submitted pursuant to the compulsory or voluntary referenda.262

These various forms of "direct democracy" have their roots in the western states, bastions of the "Progressive Movements" in the early twentieth century.263 These movements used popular initiatives and referenda because they viewed political parties, state legislatures, governors, city councils and mayors as part of a corrupt political party system.264 The Progressive Movement's reforms were designed to give people direct input into the lawmaking process. When they were successful, they caused a fundamental shift in American politics, providing individual citizens greater leverage over political parties and elected officials.265 Until the 1940s, the initiative was used for various types of social reform, including efforts to eliminate "social and economic distress." Numerous attempts to introduce redistributive measures were made, including efforts in California to establish pension programs.266

Achieving social reform through direct democracy appeals to those who advocate minimum welfare guarantees for a number of reasons. The recent evisceration of minimum welfare provisions has occurred unopposed because the poor do not take part in the representative political process and, thus, have relinquished a legitimate means of defending their interests. Because the poor do not form a powerful enough voting constituency to curry the favor of major political parties, they are denied the political representation enjoyed by the rich. Some have suggested that because of this reality,

262. Eule refers to these referenda provisions as "complementary direct democracy" because they require legislative action, in addition to electoral approval, before the law becomes effective. Eule, supra note 260, at 1512.


266. Magleby, supra note 261, at 16 n.12; Schmidt, supra note 263, at 18-20.
legislative and executive acts that affect the poor should be subject to close judicial scrutiny. Both the Republican and the Democratic parties are beholden to large financial donors whose interests are not furthered by providing minimum welfare guarantees to the poor. Therefore, as long as economic rights reform is sought through our two-party system, incumbents will continue to focus on the wishes of the well-financed groups and individuals who have helped them achieve power and office through massive financial contributions.

In addition, a strategy seeking to obtain minimum welfare guarantees through the two-party system is hindered by America’s political past. Historic voting patterns make it extremely unlikely that those who most consistently exercise their right to vote in national elections would support minimum welfare guarantees. Those who would support such guarantees constitute a poor and small fraction of the electorate who are often too politically alienated to participate in candidate elections.

These voting patterns are exacerbated by structural features of candidate elections. The extreme costs of political campaigns, the continuing legal protection for private financing of election campaigns, and “winner take all” election rules, such as the “first past the post system” and the “single member plurality” rule virtually assure that non-mainstream political parties which successfully represent large minorities in candidate elections will be deprived of electoral representation.

The wealthy tend to vote and are unlikely to vote against their economic interest. The economically successful resist economically redistributive programs because they believe that their personal economic success is due to their individual economic initiative instead of

267. See Loffredo, supra note 3.


269. It has been estimated that a presidential race costs between $600 million and $1 billion, and that it now takes $5 million to run a successful Senate campaign (in some states as much as $30 million) and that even a seat in the House can cost $2 million. Ronald Dworkin, The Curse of American Politics, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19 (citing Max Frankel, T.V. Remedy for a T.V. Malady, N.Y. TIMES, Sept. 8, 1996, at 36-38 (1996)).


any governmental largesse.\textsuperscript{272} Moreover, the wealthy tend to vote Republican rather than Democratic,\textsuperscript{273} partially because the Republican party has often been the first to reduce government welfare spending.\textsuperscript{274}

Today's arguments for direct democracy echo those articulated by progressive reformers earlier in the century. Ballot initiatives on economic rights issues bypass candidate elections and the two-party system. If one is able to obtain enough signatures, one can put issues directly before the electorate. In states that require legislative action before an issue may appear in a ballot, the impediments discussed in the text would still exist. However, in sixteen states, citizens can bypass the legislature entirely through the initiative process and put issues directly on the ballot. In most of these states, citizen initiatives require the signatures of only 5 to 10\% of the electorate and can be passed by a majority vote.\textsuperscript{275} This allows those who are not professional politicians to initiate major public debate on economic reform.\textsuperscript{276} As such, grassroots movements and local activists can influence political change. Unquestionably, ballot initiatives have the potential to force local discussion of important issues that directly concern the people.\textsuperscript{277}

However, recent empirical studies question whether these arguments have been borne out in practice. They raise concerns that ballot initiatives may have been co-opted by the same socio-economic interests that have dominated candidate elections and party politics. There is a great cost attached to the first step of all ballot initiatives: the gathering of signatures on a petition.\textsuperscript{278} Some states require many

\textsuperscript{272} There is some evidence that these views are even prevalent among lower income groups. See Rodolfo O. de la Garza, The Effects of Ethnicity on Political Culture, in Classifying By Race 339 (Paul E. Peterson ed., 1995) (citing Stanley Feldman, Structure and Consistency in Public Opinion: The Role of Core Beliefs and Values, 32 Am. J. Pol. Sci. 416 (1983)).


\textsuperscript{274} See Skocpol & Greenberg, supra note 13, at 1, 7.

\textsuperscript{275} See May, supra note 263.

\textsuperscript{276} Magleby, supra note 261, at 15-17.

\textsuperscript{277} Philip Weiser, Note, Ackerman's Proposal for Popular Constitutional Lawmaking: Can it Realize His Aspirations for Dualist Democracy, 68 N.Y.U. L. Rev. 907, 926 (noting that there are more opportunities for grass roots politics at the state level than at the national level). See also Schmidt, supra note 263, at 25-30 (summarizing benefits of direct democracy as a more accountable government, greater citizen participation, a better informed electorate and a safeguarding against the concentration of political power in the hands of a few).

\textsuperscript{278} Magleby, supra note 264, at 36-44.
signatures to ensure the credibility of the process. In addition, ballot initiative laws may require that the petition signatures be geographically dispersed throughout the state and notarized. Meeting ballot initiative requirements is very expensive, and has generated an "initiative industry" which mobilizes volunteers, consultants, pollsters, and media consultants.

Once the signature requirement is met, the initiative either goes directly on the ballot (direct initiative) or is placed before the state legislature, which then has the opportunity to enact legislation, (indirect initiative). If an economic rights issue were to appear on the ballot, the next question is whether those groups most likely to vote for economic rights initiatives will show up at the polls. After all, the initiative process is meant to re-empower the voters who are alienated from the two-party system's candidate campaigns. Most studies conclude however, that voters who participate in state ballot initiatives are demographically similar to those who participate in candidate elections. These voters tend to be well educated, affluent, and white. On a national scale, ballot initiatives have not demonstrated that they will bring new voters into the political process, perhaps because the initiatives are often extremely difficult to understand.

279. The vast majority of initiatives fail to get on the ballot because they did not attract the requisite number of signatures. Magleby, supra note 261, at 23; Louis J. Sirico, Jr. The Constitutionality of the Initiative and the Referendum, 65 IOWA L. REV. 637, 659, 661 (1980).
281. In November, 1998, California electors voted on a ballot measure concerning casino-style gaming on Indian lands on which the proponents and opponents together raised $60 million and spent $53 million. See Todd S. Purdam, Costly Fight Rages in California Over Indian Gambling Measure, N.Y. TIMES, Oct. 13, 1998, at A1, A15. This surpassed the previous spending record on a ballot initiative set two years ago of $57.3 million on a securities fraud proposal. Id.
283. See id. at 35.
284. Calantvano, supra note 273; Weiser, supra note 277, at 907, 925 (referenda at the state level have not resulted in thoughtful deliberation by the public, but rather manipulation of the electorate by well organized and well funded groups); Magleby, supra note 264, at 103 (citing Massachusetts study in which low income respondents indicated low voting rates on propositions).
285. Calantvano, supra note 273, 1502-03 n.183; Magleby, supra note 261, at 19, 33 (the ability of voters to cope with direct legislation is strongly correlated with high levels of education and interest and many poor, uneducated and younger voters thus remain disenfranchised); Cronin, supra note 263, at 77 (lower income voters often refrain from voting when the wording of ballot issues gets too complicated); Weiser, supra note 277, at 926 (electoral turnout is heavily biased toward more affluent voters).
286. Magleby, supra note 264, at 34.
287. See Magleby, supra note 261, at 24-25, 34, 39 (discussing a 1980 rent control initiative in which three fourths of California voters did not match their views on rent control with their vote on the proposition; 23% wanted to protect rent control but incorrectly voted "yes" and 54%
Historically, well-financed groups push ballot initiatives after their efforts failed in the legislature. Rarely do initiatives correlate with those topics that concern the general public.\textsuperscript{288} In particular, ballot issues are rarely concerned with the poor, the less educated, and those who lack political education or financial resources.\textsuperscript{289} Most citizen and grassroots groups concerned with these constituencies lack the resources or organizational commitment to get their issues on statewide ballots.\textsuperscript{290}

These drawbacks notwithstanding, ballot initiatives should not be condemned. According to Lee, ""[t]he initiative and referendum must be tested not against a theoretical model of democratic institutions but the real world of declining participation, weakened political parties, partisan legislative districting, and television-dominated election campaigns funded by massive contributions from special interests that also dominate legislative lobbying.""\textsuperscript{291} The obstacles to rational decision-making and self-help are not peculiar to the referendum process, but complicate the entire political system.\textsuperscript{292} Moreover, polls indicate that direct legislative devices retain their popularity with the general public, which seems to want more, not less of them.\textsuperscript{293}

2. Constitutional Initiatives, Commissions and Conventions

While the ballot initiative, as a means of ""direct democracy,"" can obtain state legislation on economic rights issues, it is unclear whether it can bring about results any more favorable than traditional political parties. I therefore examine other methods of direct democracy: constitutional initiatives, constitutional conventions, and constitutional commissions, which have been effective at the state level for constitutional as opposed to statutory reform. Because reforming a constitution is a far more serious matter than merely passing legislation, major constitutional reform is very rare in the twentieth century.

\begin{itemize}
\item \textsuperscript{288} For example, in 1992, voters indicated that the economy, unemployment and the deficit were the most important problems facing the nation and yet the 1992 direct legislation campaigns rarely focused on these issues. See Magleby, supra note 264, at 182, 184; Magleby, supra note 261, at 35.
\item \textsuperscript{289} Magleby, supra note 261, at 36.
\item \textsuperscript{290} Id.
\item \textsuperscript{292} Lowe, supra note 265, at 605-06.
\item \textsuperscript{293} Lee, supra note 291, at 58; CRONIN, supra note 263, at 4.
\end{itemize}
a. Legislative and Constitutional Initiative

The most common means to amend a state constitution is the state legislative initiative, which is used primarily for "minor" reforms and frequently requires popular ratification. As of 1993, over 90% of state constitutional amendments were adopted by use of the legislative initiative. The constitutional initiative is in many ways similar to the legislative initiative except that the constitutional initiative can only be changed by a subsequent vote of the people, whereas legislative initiatives may be amended by the legislature. The constitutional initiative is common, but not always used for "progressive" purposes. Although rights issues have rarely been raised in initiatives, and economic rights issues have not been raised at all, it is clear that where rights issues have been raised, voters have more frequently reduced, rather than expanded these rights. Proposals opposing busing, eliminating fair housing ordinances, establishing referenda on low-income housing, requiring English only, and restricting the rights of lesbians, gay men, and the criminally charged have passed. A substantial number of pro-rights measures have failed. Many successful proposals have urged conservative positions on lifestyle, morals, and race. Many others have targeted judicial decisions favorable to a liberal construction of social and economic rights. Finally, both the constitutional referendum and initiative carry with them the same structural voter participation problems as the statutory ballot initiative.

...
b. Constitutional Commissions

The constitutional commission is something of a hybrid mechanism for state constitutional reform. It seeks to avoid the potential "demagogy" of the direct referendum approach as well as the systems that channel all constitutional reform through party politicians. Commissions are usually selected by legislative or gubernatorial appointment, perhaps with the participation of the state's Chief Justice, and are charged with the task of assuming leadership for constitutional change. Constitutional commissions can also be appointed through private lobbying and may be entirely privately financed. Once appointed, constitutional commissions assume various responsibilities depending on the breadth of their constitutional charge, which may range from the mere study of constitutions, through making recommendations, to laying the groundwork for a constitutional convention.

c. Constitutional Conventions

Constitutional conventions are reserved for when the constitution has accumulated unnecessary detail or contains inconsistent or obsolete provisions; social and economic transformation requires constitutional modernization; the legislature is indifferent or actively opposed to any constitutional change, which becomes especially important when the change involves reapportionment, term limits, unicameralism, the initiative and referendum or fiscal reform; and issues are present that are too complex to be dealt with by voters through amendment. Conventions may be called to work on an agenda that has been previously limited by popular vote known as the "limited" convention. They may also be entirely open-ended and "unlimited." The unlimited convention, as can be imagined, presents the risk of a "runaway convention" where everything is up for grabs. Galie & Pobst refer to this as the "Pandora's Box" problem. Based on the evidence, however, they conclude that there is

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303. Galie & Pobst, supra note 280, at 41; Williams, supra note 302, at 11.
304. Williams, supra note 302, at 11.
305. Galie & Pobst, supra note 280, at 40, 42-44.
306. Id. at 35-36.
307. Id. at 39 (citing Francis H. Heller, Limiting a State Constitutional Convention: The State Precedents, 3 Cardozo L. Rev. 575 (1982)).
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little or no support for the view that state constitutional conventions, whether limited or unlimited, constitute a danger to the values that comprise the American democratic tradition. Most conventions held in the 20th century are more vulnerable to the criticism that they have been too cautious and unwilling to offer innovations.\textsuperscript{308} For this reason, voters have been less likely to approve the results of unlimited conventions. Of the twenty-three unlimited conventions held between 1938 and 1968, twelve were approved and eleven were defeated. Of the nine limited conventions held during the period, the work of eight was approved.\textsuperscript{309}

Constitutional conventions are subject to the majoritarian pressures that normally dominate the political process and drown out minority interests. For example, the delegate selection process can allow wealth to intrude as a factor in political decision-making. This is similar to normal electoral campaigns, and favors those traditionally benefited by the campaign election process and penalizes those traditionally disfavored.\textsuperscript{310}

However, before concluding that these mechanisms hold no promise for setting an economic rights agenda, I demonstrate how these devices may be strategically combined to achieve this end.

VI. THE ILLINOIS EXPERIENCE

The Illinois Constitution’s preamble reads: “[w]e the people, in order to provide for the health, safety and welfare of our people, eliminate poverty and inequality and assure legal, social, and economic justice.”\textsuperscript{311} This language was incorporated through a concerted effort by numerous delegates to the 1971 Illinois Constitutional Convention to include minimum welfare provisions within the Illinois Constitution. Fortunately there exists a rich documentation of how this lan-

\textsuperscript{308} Id. at 37-38.
\textsuperscript{309} Id. at 39 (citing ALBERT STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING 1938-1968 65-66 (1970)).
\textsuperscript{310} In New York, where voters recently rejected a constitutional convention, voters would have chosen three delegates from each of the state’s sixty-one state senate districts, with an additional person from each district to be elected as an at-large representative. The ACLU argued that this simple majority method of delegate selection would dilute the votes of non-white voters in violation of the Voting Rights Act, and result in a constitutional convention no different than the Republican-controlled state senate. See Alyssa Katz, Conventional Wisdom, VILLAGE VOICE, Nov. 4, 1997, at 23.
\textsuperscript{311} See ILL. CONST. preamble.
The Unhappy History

language found its way into the preamble to the foundational law of that state.

Illinois is a state where constitutional amendments may be added by a hybrid process which combines the constitutional initiative, constitutional commission, and the constitutional convention. The Committee for a Constitutional Convention was a 1960s subcommittee of the Constitutional Revision Committee of the Chicago Bar Association.312 The Committee for a Constitutional Convention was chaired by Otto Kerner, who convinced the public and the Illinois General Assembly that a constitutional convention should be put before the voters in November, 1968. As a direct consequence of the Committee’s educational efforts, 60% of the 4.7 million voters supported a convention.313 Although a majority of those voting supported a constitutional convention, many organized groups opposed the idea. The AFL-CIO argued that the convention would result in a regressive constitution, which would weaken the Illinois Bill of Rights.314 Preferring Illinois’ Bill of Rights to a replica of the federal Bill of Rights, the AFL-CIO warned that the convention would be controlled by business interests seeking to control revenue provisions.315 Other groups from the opposite end opposed the convention arguing that it represented “impending socialism.”316

In December of 1969, the constitutional convention opened in Springfield, Illinois. One-hundred-sixteen delegates were selected under rules that required non-partisan selections of two delegates from each of the fifty-eight state senate districts. Once assembled, the delegates were divided into committees by the convention president, Samuel Witwar.317 Pertinent here is the Bill of Rights Committee; perhaps the most controversial.318 Although the Committee was staffed in 1969, Witwar’s Committee was quite diverse, although imbalanced by gender and occupation. The procedure at the convention allowed all delegates to introduce “member proposals,” which were

313. Id. at 5-8.
315. Id.
316. Gertz & Pisciotte, supra note 312, at 65.
317. Id. at 24.
318. Id. at 78.
cleared by the legislative reference bureau for proper phrasing. Many of these proposals dealt with issues that members brought to the convention after discussions with concerned citizens or "pressure groups." They were then assigned by the convention president to the appropriate committee, which then prepared majority and minority reports.

The Bill of Rights Committee consulted many documents as they proceeded with their work. One of the key documents was a model state constitution, published by the National Municipal League. This document outlined traditional principles of constitutional drafting, of which almost all conformed to basic American political ideals, and emphasized simplicity and clarity. Convention members also received a series of research papers prepared by the constitutional research group.

Some of these papers explicitly discussed the incorporation of economic rights into the constitution. For example, a paper by Paul Kauper argued that economic and social rights require an analysis of free enterprise, socialism, and the welfare state. As such, they were "programmatic" rather than judicially enforceable. Therefore, they are best addressed by a legislative body, not framers of a constitution. In a separate paper, Frank Grad lamented that despite the emphasis on economic rights by Roosevelt in his "Four Freedoms" speech and the Universal Declaration of Human Rights, none of the recent state constitutions, except Puerto Rico, mentions these rights. Noting that the right "to be free from hunger and want, the right to medical care and dignified support through old age, the right to adequate food, clothing, and shelter, [and] the right to useful and creative work" have been recognized since the days of the New Deal, Grad

319. Id. at 45. In addition, proposals were analyzed by Dallin Oaks, committee counsel, and a staff of University of Chicago law students in memoranda referred to as Legal Research and Advisors' Memoranda. There were fifty such memoranda totaling approximately 660 pages. Id. at 57. Committee Counsel Oaks took the position that the memoranda should be considered confidential records of the committee, a proposal that was severely criticized by the press. Id. at 38.

320. Id. at 45.

321. Id. at 47.


323. Id.

324. These papers were later published as Con-Con: Issues for the Illinois Constitutional Convention (hereinafter "Con-Con") (Samuel K. Grove and Victoria Ranney eds., 1970).

argued that these rights "will be urged upon all constitution makers in the future." He saw these rights as being easy to include in constitutions if viewed as "mere[ly] [a] depository of general aspirations and contemporary pieties," and noted:

If, on the other hand, they view the bill of rights as a meaningful document in which every guarantee of a right carries with it the assurance of an effective remedy, then they will first attend to finding the remedy before articulating the right. A guarantee in a state constitution of adequate food, clothing, shelter, medical care, and security during old age is meaningless unless provision is made elsewhere in the constitution to make good on that guarantee . . . . If the integrity of the constitutional document is to be preserved, its guarantees must be meaningful and capable of fulfillment. A mere statement of the guarantee will not accomplish this purpose because there is no legal or constitutional method by which the legislature can be compelled to comply with such a constitutional mandate. Unless a method to fulfill the promise of social and economic rights is provided, their inclusion in the state constitution will at most provide a slogan or a rallying point for political action by the disadvantaged groups who, instead of new rights, will discover new disappointment. 326

An especially interesting paper was presented to convention delegates outlining different approaches that could be taken to solve urban problems. 327 The first approach discussed was a "brevity and flexibility" approach, under which the constitution says very little about specific urban problems. Under this model, the state government would possess the authority and responsibility to come up with solutions for public services, but neither the state powers nor the solutions would be enumerated as specific rights, an approach suggested by the model state constitution. 328

The second approach incorporates specific provisions within the constitution that relate to particular urban problems or issues. For example, Article VIII of the Hawaii Constitution mandates assistance

327. See James M. Banovetz, Constitutional Approaches to Urban Society: Empowering Governments to Resolve Urban Problems, in CON-CON, supra note 324, at 248. Banovetz adopts a broad reading of the phrase "urban problems" to include not just the issues that would normally be encompassed by the phrase, i.e., transportation, air and water pollution, land use planning, sewage and waste disposal, public safety, park and recreational opportunities and governmental organization. He also recognizes that the economic and social structure of the cities compels the addition of other concerns to this list, such as public education, housing, race relations, poverty, health, and welfare. Id. at 249, 250.
328. Id.
for persons unable to maintain a standard of living compatible with decency and health; housing for persons of low income as well as slum clearance and the development or rehabilitation of substandard areas; treatment, rehabilitation, and domiciliary care for people with disabilities; protection and promotion of the public health; efforts to conserve and develop objects and places of historic or cultural interest, sightliness, and good order, as well as the natural beauty of the state.  

The third approach is the statement of socio-economic goals articulated as rights. This approach words substantive provisions as "rights inherent in state citizenship. A listing of social rights would provide victims of social or economic deprivation with a viable basis for legal redress through the courts."  

As a result of these documents and discussions within the Bill of Rights Committee, a state protection of basic needs requirement was approved by the Committee in an 8-7 vote, but failed to get the necessary fifty-nine votes of the entire convention to be incorporated into the Illinois Constitution. The provision stated "it shall be the public policy of the state that all persons have adequate nourishment, shelter, clothing, and medical care and other needs of human life and dignity." One of the main concerns motivating those opposed to the provision was the argument, noted in the final report of the Committee, that there were no comparable provisions in any other state constitution.  

Another defeated proposal was to declare health a basic human right and created a government responsibility to ensure that all citizens can access quality health care, regardless of ability to pay. Additional attention was devoted to state responsibilities concerning education. Illinois' 1870 constitutional provision guaranteed only a common school education. Many education experts, witnesses, and committee members felt that this inadequately expressed the modern importance of education. These experts urged that the state should be constitutionally bound to do more, arguing that the state should pro-
vide a high quality education for all, regardless of race, religion, or disability.\(^{336}\)

The Committee's proposal stated:

The 'paramount' goal of the people of the state shall be the educational development of all persons to the limits of their capacities. To achieve this goal it shall be the duty of the state to provide for an efficient system of high quality public educational institutions and services. Education in the public schools to the secondary level shall be free. There may be such other free education as the general assembly provides.\(^{337}\)

A critic of the proposal denounced it as a "concept of educational responsibility unique in this country," because, by allowing education of all people to the "limits of their capacities," and providing that "education in the public schools throughout the secondary level shall be free," the provision provided free education to children and adults.\(^{338}\) This was precisely the intention of members of the Bill of Rights Committee who supported the proposal that became part of the constitution.\(^{339}\) However, when the issue came before the Supreme Court of Illinois, it was held that the language on financing was "merely hortatory," and not intended to state a specific command.\(^{340}\)

What eventually emerged from the Bill of Rights Committee was a proposed preamble to the Illinois Constitution which read: "We the people, in order to provide for the health, safety, and welfare of our people, eliminate poverty and inequality and assure legal, social, and economic justice."\(^{341}\) This language, which was adopted by the convention as a whole, is a specific addition to the language of the preamble that existed since 1870 and now forms the preamble to the Illinois Constitution. The common understanding is that the language means that the state government of Illinois is charged with "providing the opportunity for the fullest development of the individual."\(^{342}\)

336. Gertz & Pisciotta, supra note 312, at 287.
337. Id. at 290.
338. Id. at 292.
339. Id. at 289.
340. Blase v. State, 302 N.E.2d 46 (Ill. 1973) (construing later amendment to the Constitution which stated: "The State has the primary duty to finance the system of public educational institutions and services").
341. Ill. Const. preamble.
342. Gertz & Pisciotta, supra note 312. Gertz himself acknowledges that the language has also been derided as "not operative but simply hortatory sermons." Id. at 12-13. Moreover, the document that was most frequently consulted by the members of the Bill of Rights Committee, an annotated version of the current Illinois constitution, stated that "preambles have never evoked much political controversy, and strictly speaking are not operative parts of a constitu-
VII. FUTURE POSSIBILITIES

Of the states that have mandated constitutional provisions for the protection of economic rights, many require specific legislative action to trigger these provisions. Some state constitutions have such language in the preamble, which often limits their enforcement in the courts of the state absent further legislative action. International agreements providing for economic rights are either unsigned or have been declared non self-executing, and therefore non-justiciable without explicit congressional action. It is clear that prior to the operation of these provisions, there must be direct and explicit support from those political branches of government which are theoretically closest to the voting electorate. Will the American people use the means I have discussed to actualize economic rights guarantees such as those found in numerous international instruments?

Our nation's history provides some clues. On occasion the general public has become so engaged by socio-economic issues that elected officials responded with economic rights guarantees in order to prevent or forestall overall political crisis. These periods include Reconstruction (late 1860s), the New Deal (1930s), and the Great Society (1960s). During each era, change was propelled by recognition that a developing crisis was at hand, large sectors of the population were willing to mobilize for economic change, and implementation of economic reforms would alleviate or mitigate the effects of the crisis. Will similar crises in the future act as catalysts for the creation of economic rights?

Although the expiration of federal welfare mandates under the Welfare Reform Act will be a crisis for the poor, I believe that other domestic factors will reinvigorate calls for minimum welfare guarantees. These factors will also explain the political dynamics motivat-


344. As a direct consequence of the Welfare Reform Act, it is expected that 11 million American families, including 1.1 million children will drop below the poverty line. Eight million families with children, including many working families, will lose an average $1,300 in food stamps. See Martin Walker, Do Gooders Rally to the Plight of the Poor, Manchester Guardian Weekly, May 4, 1997, at 6; Ellen Goodman, The Sins of the Father, Manchester Guardian Weekly, Mar. 23, 1997, at 20; Andrew C. Revkin, A Plunge in Use of Food Stamps Causes Concern, N.Y. Times, Feb. 25, 1999, at A1. An unintended consequence of the Welfare Reform Act is the loss of Medicaid coverage for hundreds of thousands of low-income people in the United States because of faulty compliance with the law by state officials. See Robert Pear, Poor Workers Lose Medicaid Coverage Despite Eligibility, N.Y. Times, Apr. 12, 1999, at A1.
ing attacks on the poor such as the new "welfare reform." The chief factor is the continuing middle class income stagnation in the United States, a consequence of lagging productivity and overall economic inequality. While the number of the United States poor is by no means negligible, it is dwarfed by the number of middle and low income families that are finding it increasingly difficult to maintain or advance their standard of living. Programs tailored to assist these families should be high on any economic rights agenda and will be more politically palatable than programs perceived as only benefiting the poor. A progressive and pragmatic economic rights agenda will propose programs that benefit those trapped by income stagnation, as well as the jobless poor.

As in other industrialized nations, living standards in the United States tend to rise as a consequence of worker output or productivity, measured by dividing the nation's output by the nation's total hours worked. When workers produce more, the conditions are ripe for salary increases. Accordingly, in the last twenty-five years, the standard of living for the American middle class has not risen significantly, instead staying in line with the meager increases in productivity over the last quarter century. During the 1970s and 1980s, U.S. productivity grew at less than half its pace in the 1950s.

From the 1947 to 1973 post-war boom, U.S. wages increased slightly outpaced productivity gains. However, these gains were eroded from 1973 to 1982 when workers' wages rose at only half the rate of productivity, and from 1982 to 1994, when workers' wages rose only one-third as much. Compared to an average annual rate of growth of 2.25% between 1870 and 1973, labor productivity has risen at an average rate of only 1% a year since 1973. Throughout the 1990s, it has continued to rise at only 1% a year. This was true even in 1996 when overall economic growth was relatively high. Even in the private sector, where output per person of all non-farm workers rose by 25% between 1973 and 1995, real hourly earnings of production

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and other non-supervisory workers fell by 12%.\textsuperscript{347} Even during the current economic recovery, wage increases have yet to match productivity increases, making this the first time in American post-war history that real wages of most working Americans have failed to increase significantly during a recovery.\textsuperscript{348}

Stagnating wages have taken a tremendous toll on many middle income workers. The average weekly earnings of 80\% of working Americans, adjusted for inflation, fell by 18\% between 1973 and 1995 (from $315 a week to $258 per week).\textsuperscript{349} This decline has hit young men seeking to raise families particularly hard. For example, in 1970 an average new house cost twice a couple’s income; it now costs four times their income. New cars cost about half a young couple’s income, compared to only 38\% in 1970.\textsuperscript{350} The proportion of men twenty-five to thirty-four years old earning less than the poverty line increased from 13.6\% in 1969 to 32.2\% in 1993.\textsuperscript{351} The median real wage for full-time male workers fell from $34,048 in 1973 to $30,407 in 1993. These forces struck African American men particularly hard.\textsuperscript{352} Bureau of Labor statistics reveal that 36\% of African American men aged sixteen to thirty-four in 1997 were either unemployed, not looking for work, or in prison. Thus is born the stark statistical ratio of only forty employed African American men for every 100 African American women.\textsuperscript{353} Median wages for women did not start to fall until 1989, but are now falling for every group of women except the college educated.\textsuperscript{354}

These indicia of income stagnation and decline are camouflaged by figures from the U.S. Census Bureau and other sources documenting rising household income, since those figures are based on family members working longer hours for the same hourly pay.\textsuperscript{355}

\textsuperscript{347} See Madrick, supra note 23, at 40 (reviewing Andrew Hacker, Money: Who Has How Much and Why (1997)).

\textsuperscript{348} Head, supra note 346.

\textsuperscript{349} Id. at 47.

\textsuperscript{350} See Madrick, supra note 23, at 40, 41; Holly Sklar, Boom Times for Billionaires, Bust for Workers and Children, Z Magazine, Nov. 1997, at 32, 33.

\textsuperscript{351} The “poverty line” for a family of four was defined at cash income less than $16,400 in 1997. For a family of three, the figure is $12,802. See Pear, supra note 344, at A1, A25.


\textsuperscript{353} See Sylvia Nasar, Jobless Rate In U.S. Hits 29 Year Low, N.Y. Times, Apr. 3, 1999, at C1, C3.

\textsuperscript{354} Head, supra note 346, at 47.

\textsuperscript{355} See Madrick, supra note 23, at 42.
Dismaying ly, it is not higher wages, but extra time on the job that accounts for figures suggesting rising household income.\textsuperscript{356} This slide of middle class incomes has contributed to income inequality in the United States. The top 1\% of the population now owns 48\% of the nation's financial wealth, while the bottom 80\% owns only 6\%.\textsuperscript{357} a wealth differential more extreme than it has been in fifty years. The United States is the most economically unequal country in the advanced industrialized world.\textsuperscript{358} What makes this persistent inequality especially disconcerting is that it has occurred concurrent with increased job growth.\textsuperscript{359} According to some economists, this inequality will not be mitigated by job growth or general economic expansion without a massive infusion of higher paying jobs.\textsuperscript{360} However, in the 1991-1993 recession, more than 45\% of the jobs lost were higher paying white-collar jobs, double the number in the previous recession.\textsuperscript{361} Paradoxically, adding large numbers of high paying jobs to the economy can cause ripple effects deemed unfortunate by some economists. Large increases in the number of jobs lowers unemployment, but leaves fewer workers to fill needed positions.\textsuperscript{362} Employers must then raise wages to attract workers from other jobs, rather than from

\textsuperscript{356} Id.

\textsuperscript{357} See Gary Wills, A Tale of Two Cities, N.Y. REV. OF BOOKS, Oct. 3, 1996, at 16 (citing Edward N. Wolff, Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It (1996)) (noting that the average CEO makes 225 times the compensation earned by the employees under him).

\textsuperscript{358} Madrick, supra note 23, at 40, 41 (arguing that increasing inequality is rooted in structural characteristics of this economic era, not in deliberate governmental policies, and reflects the shift to a purer market economy and the erosion of institutions that once offset market forces); Kevin Sullivan, Cost of Economic Equality Questioned, MANCHESTER GUARDIAN WEEKLY, June 8, 1997, at 17 (noting remarks of former Labor Secretary Robert Reich that U.S. is characterized by a "chasm of inequality").

\textsuperscript{359} In January, 1999, 64.5\% of Americans had jobs, the largest percentage since the government began compiling employment numbers in 1948. The unemployment rate for January, 1999 was 4.3\%, close to the lowest rate in three decades. See Sylvan Nasar, January Gains in Jobs Doubled Forecast, N.Y. TIMES, Feb. 6, 1999, at C1.

\textsuperscript{360} John Schwarz asserts that since the 1950s, the U.S. has lacked a sufficient number of "good jobs," and that the shortfall is increasing despite strong economic growth. According to Schwarz, the "good job" pays at least $27,000 a year. See Louis Uchitelle, Opportunity Lost, N.Y. TIMES, Nov. 23, 1997 at 38 (reviewing John E. Schwarz, Illusions of Opportunity: The American Dream in Question (1997)).

\textsuperscript{361} This is in marked contrast to previous recessions where it was the blue collar, hourly paid worker who was laid off. See Daniel Bell, The Disunited States of America: Middle Class Fears Turn Class War Into Culture Wars, TIMES LIT. SUPP. (London), June 9, 1995, at 17.

\textsuperscript{362} According to long-standing assumptions, this begins to happen when unemployment dips below 5.5\% and overall growth in the economy exceeds 2.2\%. This has often been referred to as the "non-accelerating inflation rate of unemployment," or NAIRU. See Irwin M. Seltzer, Dangerous Curve: Is the Threat of Inflation Really Over?, TIMES LIT. SUPP. (London), June 20, 1997, at 10.
the smaller pool of the unemployed, who would ostensibly work for lower wages.\textsuperscript{363} The increase in the wages employers must pay forces them to increase prices on the goods they sell in order to retain profit margins. The increase in prices, coupled with the increase in wage payments sets off spiraling inflation, eroding the value of currency. To end the spiral, the Federal Reserve is empowered to take action slowing economic growth, usually through raising interest rates, thereby making it more expensive for businesses to borrow money.\textsuperscript{364} Businesses which cannot borrow money cannot increase production. As production slows, workers are laid off. If this happens on a large scale, consumer spending begins to decline and leads to more layoffs because fewer people are buying goods. As jobs become scarce, workers are willing to work for less money, goods become cheaper because there are fewer buyers, and inflation subsides.\textsuperscript{365}

High employment and inflation are anathema to stock market investors.\textsuperscript{366} High employment means higher wages for workers and lower profits for corporations. Lower profits for corporations means smaller returns for investors who own corporate stocks.\textsuperscript{367} On the other hand, bull runs on the stock market tend to encourage consumer spending (the so-called "wealth effect"), and causes economies to grow. This spending has the same effect as high employment, leading to the creation of jobs, a shortage of available workers, wage increases, and elevated prices for employers seeking to maintain profit margins and inflation. These situations can also lead to intervention by the Federal Reserve to raise interest rates to slow, or "cool," the economy.\textsuperscript{368} These interest rate hikes are designed to slow down economic growth and reduce speculation in the stock markets, but they also cause stock sell-offs as speculators seek to capture profits. These sell-offs reduce the value of stocks and mutual funds held by millions

\textsuperscript{365} This is referred to as the "Phillips Curve," marked by a trade off between unemployment and inflation. See Seltzer, \textit{supra} note 362, at 10.
\textsuperscript{366} See Jeff Madrick, \textit{The Worker's Just Reward}, N.Y. TIMES, Aug. 1, 1999, at 15.
\textsuperscript{368} See Seltzer, \textit{supra} note 362.
of people, mostly individuals and families planning for retirement.\textsuperscript{369} Many of these shareholders, the majority of the voting population in the United States,\textsuperscript{370} expect unreasonable returns on their investments.\textsuperscript{371} On the other hand, higher employment accompanied by low inflation, or even deflation, is good for investors because it often means lower interest rates and greater sales and profits because working consumers have increased purchasing power.\textsuperscript{372}

For these reasons, demands for a federally guaranteed right to a job will surely trigger arguments that such a guarantee will wreak havoc in financial markets. Moreover, such measures would be deemed unnecessary when unemployment is at historical lows. Naysayers notwithstanding, growing inequality of wealth in this society and its attendant economic difficulties must soon intrude upon the nation’s conscience and onto the political agenda. I predict that efforts to address issues of inequality will begin at the grassroots level and branch outward. As discussed, the states provide most of the economic rights legislation currently in place. It is here that an expanded economic rights agenda will find rich soil in which to take root and grow. The extensive history of local and statewide efforts to protect those protected by governmental programs cannot be ignored. Moreover, because the nation’s issues have their own local texture, a state approach will respond to local exigencies, whether in health care, jobs, education, or housing.\textsuperscript{373} Just as the federal government will not take on the entire International Covenant, neither will any individual state, as none can bankroll such a program without a massive tax exodus.


\textsuperscript{370} Among registered voters, shareholders outnumber those not in the market 54\% to 43\%. See Weisberg, \textit{supra} note 367, at 28.

\textsuperscript{371} A survey of 750 fund investors conducted for Montgomery Asset Management found that shareholders anticipated average annual returns of 34\% on their investments over the next decade. This is three times the average annual return from stocks over the last 60 years. See Edward Wyatt, \textit{The High Hopes of Investors in Stock Funds}, \textit{N.Y. Times}, Oct. 10, 1997, at D1; Weisberg, \textit{supra} note 367, at 28-30.


\textsuperscript{373} Cf. Alston, \textit{supra} note 219, at 379 (the “starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policy making”). As this article goes to press, Illinois voters may soon vote on an amendment to the Illinois Constitution known as the Bernardin Amendment, which asks “shall the Illinois General Assembly . . . establish health care as a basic right of every person in our State?” See Linda Luiton, \textit{A Healthy Chance}, \textit{In These Times}, May 2, 1999, at 9; K.P., \textit{Universal Health Care Win}, \textit{In These Times}, May 16, 1999, at 5.
What will be the role of the International Covenant and its source, the Universal Declaration of Human Rights, in this evolutionary process? I surmise that it will be primarily aspirational; serving as yet another tool for those at the forefront of movements for economic rights at the local level. The more experience gained fighting for economic rights in the state and local arenas, the greater the realization that economic rights guarantees require national, if not international solutions. This ought to urge the United States towards the many international agreements which provide economic rights guarantees.

VIII. CONCLUSION

I began this article asserting that the political and civil rights guaranteed by the United States Constitution exist only as a result of tremendous political struggles. This is not enough. Still to be achieved is a system to protect the population from both the periodic and the structural realities of economic life in a capitalist market economy. This is so even in what may appear to be the best of times. We need an international approach that borrows from the outstanding work of the last half-century. We must heed those who articulate international minimum economic guarantees as well as other structures that allow nation-states to incorporate such rights into their respective systems. Most importantly, we must look locally and build upon the edifice of the American state constitutional structure, which is already firmly and promisingly in place.