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# The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight

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## ABSTRACT

This article challenges the widespread belief that Western countries have been antagonistic to economic and social human rights. Examining wartime planning, drafting the Universal Declaration and the Covenants, and the development of functional regimes for money, trade, and workers' rights as well as the European regional human rights regime, we show that Western advocacy of economic and social rights was strong, consistent, and essential to creating the post-war international order, which was intended to consolidate and strengthen Western welfare states. We conclude by considering the sources of the myth of Western opposition and its contemporary implications.

## I. INTRODUCTION

Over the past quarter-century controversies about the proper "balance" between the state and the market in Western democracies and the negative consequences of economic liberalization and structural adjustment in the

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1. Sections 3, 8, 10, 14 draw on material that also appears in Jack Donnelly, *The West and Economic Rights*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES* (Shareen Hertel & Lanse Minkler eds., 2007).

developing world have become entangled with questions about the nature and importance of economic and social human rights. This political context has supported a widespread perception among human rights scholars and activists of Western hostility, or at best indifference, to economic and social rights. "The Western doctrine of human rights excludes economic and social rights."<sup>2</sup> "The dominant Western concept of rights itself. . . emphasizes only civil and political rights."<sup>3</sup>

This story about economic and social rights has increasingly come to take a "three generations, three worlds" form: successive generations of civil and political rights, economic, social, and cultural rights, and solidarity or peoples' rights being championed by the West, the socialist countries, and the Third World respectively.<sup>4</sup> The international norm of the interdependence and indivisibility of all human rights is presented as a compromise forced upon a resistant West, which with the coming of globalization has come

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2. Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUM. RTS. Q. 316, 318 (1996).
  3. Chandra Muzaffar, *From Human Rights to Human Dignity*, in DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA 29 (Peter Van Ness ed., 1999). Compare with Adamantia Pollis & Peter Schwab, *Introduction*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVE xiii (Adamantia Pollis & Peter Schwab eds., 1979); John T. Wright, *Human Rights in the West: Political Liberties and the Rule of Law*, in *id.* at 19; J. Bryan Hehir, *Human Rights from a Theological and Ethical Perspective*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 9 (Kenneth W. Thompson ed., 1980); Charles P. Henry, *Introduction: On Building a Human Rights Culture*, in INTERNATIONAL RIGHTS AND RESPONSIBILITIES FOR THE FUTURE XIX (Kenneth W. Hunter & Timothy C. Mack eds., 1996); WILLIAM FELICE, THE GLOBAL NEW DEAL: ECONOMIC AND SOCIAL HUMAN RIGHTS IN WORLD POLITICS 7 (2003); Pierre de Senarclens, *The Politics of Human Rights*, in THE GLOBALIZATION OF HUMAN RIGHTS 141 (Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner eds., 2003); Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, 18 YALE J. L. & HUM. 273, 282 (2006).
  4. On the three generations theory, see Karel Vasak, *Pour une troisième génération des droits de l'homme*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 837 (Christophe Swinarski ed., 1984); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981); Cees Flinterman, *Three Generations of Human Rights*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 75 (Jan Berting et al. eds., 1990); Karel Vasak, *Les différentes catégories des droits de l'homme*, in LES DIMENSIONS UNIVERSELLES DES DROITS DE L'HOMME (A. Lapeyre, F. de Tinguy, & Karel Vasak eds, 1991); KEBA MBAYE, LES DROITS DE L'HOMME EN AFRIQUE 47–48 (2d ed. 2002) (1992); RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 46–47 (2003); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM, at ch. 3 (2003); MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 10–11, (2004). For an extended critique, see Jack Donnelly, *Third Generation Rights*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 125–31 (Catherine Brölmann, René Lefebvre & Marjoleine Zieck eds., 1993); Hector Gros Espiell, *The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 41 (B. G. Ramcharan ed., 1979); Adamantia Pollis, *Human Rights in Liberal, Socialist, and Third World Perspective*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 146 (Richard P. Claude & Burns H. Weston eds., 1992). These are the classic statements of the three worlds argument. To appreciate the utter lack of historical basis of such claims, consider simply the famous triads of Locke, Jefferson, and the French Revolution: life, liberty, and property; life, liberty, and the pursuit of happiness; and liberty, equality, fraternity.

to pursue an ever more narrowly one-sided emphasis on civil and political rights.<sup>5</sup>

This account, which we call the myth of Western opposition, is patently ludicrous. It is hard to imagine that anyone could look at the welfare states of Western Europe and claim with a straight face that economic and social rights “are largely dismissed in the West.”<sup>6</sup> Nonetheless, this has become a standard reading. Even many who insist on the interdependence and indivisibility of all human rights, and thus the fully equal status of economic and social rights, help to perpetuate the myth by accepting the three generations, three worlds story that has become the hegemonic narrative about “universal, indivisible, and interrelated” human rights in many international human rights circles.

While the myth of Western opposition has many dimensions, here we take on perhaps the most perverse aspect of the myth, namely, the claim that the West resisted or opposed including economic and social rights in the postwar global human rights regime.

The West proposed proclaiming at the world level *only the civil and political rights*. . . . It was only in a second stage, given the hostility of the Socialist countries and under strong pressure from the Latin Americans . . . that the West agreed to incorporate . . . a number of economic and social rights as well.<sup>7</sup>

This, we show in some detail, is revisionist history of the worst kind, not simply false but an almost complete inversion of the truth.

We begin by stressing the centrality of economic and social rights in Allied wartime goals and the central Western role in drafting a Universal Declaration that prominently featured economic and social rights. We then consider domestic Western practice, to show that international support for economic and social rights was largely an extension of, and an attempt to further strengthen, the consolidation of Western welfare states. Turning to the drafting of the International Human Rights Covenants, we show that the West was not in any way opposed to establishing binding obligations with respect to economic and social rights. We then look at the development of postwar functional regimes for money, trade, and workers’ rights and at the European regional human rights regime. Once more, what is striking is not merely the absence of any serious resistance but the depth and breadth of Western support for economic and social rights. Finally, we step back and

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5. Dianne Otto, *Defending Women’s Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality*, in *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 52, 55 (Isfahan Merali & Valerie Oosterveld eds., 2001); FELICE, *supra* note 3, at 7; TONY EVANS, *THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE* 57, 60–61 (2d ed. 2005).
  6. Noam Chomsky, *The United States and the Challenge of Relativity*, in *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* 24, 32 (Tony Evans ed., 1998).
  7. ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* 35 (1990).

try to understand the sources of the myth of Western opposition and its contemporary implications.

## II. FROM FOUR FREEDOMS TO THE UNIVERSAL DECLARATION

The myth of Western opposition attributes inclusion of economic and social rights in the global human rights regime to the influence of the Soviet bloc and Third World (especially Latin American) states. We show instead that not only was the Western contribution central and entirely positive but that Western commitments to economic and social rights were internally generated long before the end of World War II. Other states certainly supported economic and social rights. None, however, did so with more genuine commitment or greater actual impact than the United States and Great Britain, the two leading Western powers. And the other Western states were no less enthusiastic in their embrace of economic and social rights as a central, integral part of any modern system of human rights.

### 1. The Four Freedoms and the Atlantic Charter

In Britain in the fall of 1940, “the English press began to debate the need for an ‘economic bill of rights,’ to defeat Hitlerism in the world forever by establishing minimum standards of housing, food, education, and medical care, along with free speech, free press and free worship.”<sup>8</sup> In November 1940, the Ministry of Information brought in John Maynard Keynes to help develop an alternative to Germany’s statement of postwar economic plans. As Keynes put it in an early draft, “Mr. Bevin said recently that social security must be the first objective of our domestic policy after the war. And social security for the peoples of all the European countries will be our policy abroad not less than at home. Indeed the one is hardly possible without the other.”<sup>9</sup>

In the United States, fear that the United Kingdom might fall prey to German aggression was becoming increasingly central to US foreign policy. Roosevelt’s 1941 State of the Union address, which outlined a US vision of the future based on a sustained, ethically motivated, multilateral foreign policy, famously articulated “four freedoms.”

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8. SAMUEL GRAFTON, *ALL OUT! HOW DEMOCRACY WILL DEFEND AMERICA; BASED ON THE FRENCH FAILURE, THE ENGLISH STAND, AND THE AMERICAN PROGRAM* 60 (1940), *quoted in* ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA’S VISION OF HUMAN RIGHTS* 49 (2005).

9. *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES, VOL. XXV: ACTIVITIES 1940–1944, SHAPING THE POST-WAR WORLD: THE CLEARING UNION* 11 (Donald Moggridge, ed., 1980).

[W]e look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.<sup>10</sup>

Freedom from want was included fully equal to freedom from fear and the repeated reference to “everywhere in the world,” along with the explicit projection of domestic values into the international realm, underscored the essential linkage between national and international objectives in US thinking about the coming postwar world.

Roosevelt reminded the nation that democracy, freedom, and the institutions necessary for protecting them were at stake. Economic and social rights were essential to a “healthy and strong democracy.” Americans expect

equality of opportunity for youth and for others; jobs for those who can work; security for those who need it; the ending of special privilege for the few; the preservation of civil liberties for all; the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living. . . . The inner and abiding strength of our economic and political systems is dependent upon the degree to which they fulfill these expectations.<sup>11</sup>

These separate British and American national understandings received formal joint recognition in the Atlantic Charter, issued at the conclusion of a meeting between Roosevelt and Winston Churchill in August 1941. Of the eight principles outlining the two countries’ war aims, three are particularly relevant to our argument.

Fourth, they will endeavor, with due respect to their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all Nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within

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10. Franklin D. Roosevelt, *The Annual Message to Congress, January 6, 1941*, in *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D ROOSEVELT* 672 (1941).

11. *Id.* at 671.

their own boundaries, and which will afford assurance to all the men in all the lands may live out their lives in freedom from fear and want.<sup>12</sup>

Separately and jointly, and independent of any other states, the United States and Britain placed economic and social rights at the center of their postwar visions of domestic and international order. The Declaration of the United Nations, issued 1 January 1942, reaffirmed the principles of the Atlantic Charter and extended this Anglo-American understanding to the twenty-six nations then in declared war against Nazi Germany.

## 2. American Planning for the Postwar Era

These pronouncements helped to lay the normative foundations for the emerging process of American postwar planning. The US State Department's "Advisory Committee on Problems of Foreign Relations" was reconstituted in late 1941 as the "Advisory Committee on Post-War Foreign Policy." It brought together officials from the State Department and other agencies (including Sumner Welles, who is often credited as being the chief architect of what would later become the United Nations system, as well as Adolf Berle and Benjamin V. Cohen, who were important architects of the New Deal and part of Roosevelt's "Brain Trust"). This group also included prominent figures from outside government (including Norman H. Davis, President of the Council on Foreign Relations and Chairman of the American Red Cross; Hamilton Fish Armstrong, Editor of *Foreign Affairs*; Isaiah Bowman, President of Johns Hopkins University; and Anne O'Hare McCormick, editorial staff writer and foreign affairs columnist for the *New York Times*). An important part of its mission was "to translate into a program of specific policies and measures the broad principles enunciated in the Atlantic Declaration [sic] and in . . . other pronouncements on post-war policy."<sup>13</sup>

Secretary of State Cordell Hull became actively involved in a publicity campaign to emphasize to ordinary Americans their stake in postwar planning.<sup>14</sup> Especially notable was a radio address Hull delivered in July 1942.

Liberty is more than a matter of political rights, indispensable as those rights are. In our own country we have learned from bitter experience that to be truly free, men must have, as well, economic freedom and economic security—the assurance for all alike of an opportunity to work as free men in the company of free men; to obtain through work the material and spiritual means of life;

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12. FRANKLIN D. ROOSEVELT, *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, VOL. 10, at 315 (1950).

13. UNITED STATES DEPARTMENT OF STATE, *POSTWAR FOREIGN POLICY PREPARATION: 1939–1945*, at 63 (1949).

14. *Id.* at 93.

to advance through the exercise of ability, initiative, and enterprise; to make provision against the hazards of human existence. We know that this is true of mankind everywhere. We know that in all countries there has been—and there will be increasingly in the future—demand for a forward movement of social justice. Each of us must be resolved that, once the war is won, the demand shall be met as speedily and as fully as possible.<sup>15</sup>

From late August to early December 1942, the Advisory Committee's Special Subcommittee on Legal Problems, developed a brief and forceful statement of fundamental human rights principles, including not only traditional civil and political rights but also social rights and basic principles of social and economic justice.<sup>16</sup> Their "Draft Constitution of International Organization," which served as the basis for US negotiators at the August 1944 Dumbarton Oaks conference, included a proposed bill of human rights "in order to facilitate the universal attainment of the Four Freedoms."<sup>17</sup> It insisted that "Governments exist for the benefit of the people and for the promotion of their common welfare in an interdependent world" and that "All persons who are willing to work, as well as all persons whom 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."<sup>18</sup>

Although the issue of human rights was ultimately deferred at Dumbarton Oaks, this had nothing to do with economic and social rights. *All* human rights questions were put off until San Francisco. And when US attention returned to human rights in the work of the new Commission on Human Rights, the central place of economic and social rights was never questioned.

### 3. The Universal Declaration of Human Rights

Proponents of the myth of Western opposition typically argue that the Universal Declaration of Human Rights, the foundational document of the global human rights regime, undervalues economic, social, and cultural rights. "The UDHR contains primarily civil and political rights (those favored

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15. Cordell Hull, *The War and Human Freedom: Radio Address Delivered on July 23, 1942*, 7 U. S. DEPT. OF STATE BULL. 161 (1942), reprinted in 382 INT'L CONCILIATION 381, 388–89 (1942).
  16. UNITED STATES DEPARTMENT OF STATE, POSTWAR FOREIGN POLICY PREPARATION, *supra* note 13, at 115.
  17. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945, at 327 (1958).
  18. UNITED STATES DEPARTMENT OF STATE, POSTWAR FOREIGN POLICY PREPARATION, *supra* note 13, at 483.

by Western nations) as well as a few economic, social, and cultural rights (those championed by the Third World and the Soviet bloc)."<sup>19</sup>

It is true that twice as many articles are devoted to civil and political rights. This, however, is largely because economic and social rights are specified in more aggregated terms. Counting words—616 versus 526—dispels any suggestion of serious quantitative imbalance.

More importantly, nothing in the Universal Declaration suggests even the slightest denigration of economic and social rights. That civil and political rights are listed first suggests no moral or other priority—any more than the fact that the freedoms of religion, expression, and associations do not appear until Articles 18–20 suggests that they were denigrated in comparison to, say, rights to legal recognition, equal protection, and an effective remedy listed in Articles 6–8.<sup>20</sup> In fact, the only collective reference to economic, social, and cultural rights—there is no collective reference to civil and political rights—is the insistence in Article 22 that “Everyone, as a member of society, has the right to . . . the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Mythic accounts also regularly claim that economic and social rights appear in the Universal Declaration despite the indifference, or even active opposition, of the West. “The insistence on including SE [social and economic] rights as rights of equal status in the UDHR was the result of the demand of the USSR and its bloc of nations.”<sup>21</sup> “It was due to the socialist countries, particularly the USSR, that the Universal Declaration of Human Rights included economic, social, and cultural rights.”<sup>22</sup> “Western states originally resisted including economic and social rights in the Universal Declaration.”<sup>23</sup>

As Bard-Anders Andreassen delicately puts it, “this theory is not verified . . . by the records of the meetings of the Commission. Right from the beginning of the Commission’s work, the drafts included rights to social and

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19. ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 30 (1990). Compare Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVE, *supra* note 3, at 5; Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *supra* note 5, at 39; Bonaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 39, 45 (Berta Esperanza Hernández-Trujol ed., 2002); EVANS, THE POLITICS OF HUMAN RIGHTS, *supra* note 5, at 104.

20. There was almost no debate over the order of the listing of rights in the Universal Declaration. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 232 (1999).

21. Ruth Gavison, *On the Relationship between Civil and Political Rights, and Social and Economic Rights*, in THE GLOBALIZATION OF HUMAN RIGHTS, *supra* note 3, at 54 n.46.

22. MBAYE, *supra* note 4, at 45 [authors’ translation].

23. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 191 (1995).

economic goods and benefits."<sup>24</sup> The passages quoted in the previous paragraph advance not a single supporting source<sup>25</sup>—because the record is clear, unambiguous, and points in exactly the opposite direction. We are aware of no scholar who has seriously studied the record who supports the mythic account. Even Tony Evans, a leading academic critic of the “hegemonic” Western bias of the global human rights regime, allows that “western states did not reject the idea that economic, social and cultural rights had a proper and appropriate place in any twentieth century declaration.”<sup>26</sup>

At the United Nations, “the inclusion of social and economic rights was an uncontroversial decision, tacitly agreed to beforehand. . . . From the very beginning of the drafting process, it was agreed to include these rights in the Declaration.”<sup>27</sup> In opening the first meeting of the Commission on Human Rights—which, we should recall, was created as a subsidiary body of the Economic and Social Council<sup>28</sup>—the Assistant Secretary-General for Social Affairs, Henri Laugier, a Belgian, charged the delegates with “showing . . . that today . . . the declaration of the rights of man must be extended to the economic and social fields.”<sup>29</sup> This understanding was never challenged during the drafting process.

The story of the Universal Declaration has already been well told, most notably by Johannes Morsink and Ashlid Samnøy.<sup>30</sup> Economic and social rights were central in the original Secretariat Outline (prepared by a Canadian). They remained central when that draft was revised by René Cassin, a Frenchman with a long interest in and involvement with economic and social rights.<sup>31</sup> The US delegate and Chair of the Commission, Eleanor Roosevelt, supported economic and social rights throughout the drafting process.

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24. Bard-Anders Andreassen, *Article 22, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 319, 333 (Asbjørn Eide, et al. eds., 1992); compare MORSINK, *supra* note 20, at 222–30.
  25. The same is true of the passage from Antonio Cassese quoted in the introduction. We have not, however, ransacked the literature for obscure passages by lightweight scholars. Henkin and Cassese in particular rank at or near the top of any list of postwar American and Italian international legal scholars.
  26. TONY EVANS, *US HEGEMONY AND THE PROJECT OF UNIVERSAL HUMAN RIGHTS* 77 (1996).
  27. Ashlid Samnøy, *The Origins of the Universal Declaration of Human Rights, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 3, 11 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999). Compare Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 28–29 (Asbjørn Eide, Catarina Krause & Alan Rosas eds., 1995); Asbjørn Eide & Wenche Barth Eide, *Article 25, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT, supra* note 27, at 528.
  28. In the General Assembly, human rights were assigned to the Third (Social, Cultural, and Humanitarian) Committee.
  29. Opening Statements, *Summary Record of Meetings, Commission on Human Rights of the Economic and Social Council*, at 2, U.N. Doc. E/HR/6 (1946).
  30. MORSINK, *supra* note 20; ASHLID SAMNØY, *HUMAN RIGHTS AS INTERNATIONAL CONSENSUS: THE MAKING OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1945–1948* (1993).
  31. MARC AGI, RENÉ CASSIN, *PRIX NOBEL DE LA PAIX (1887–1976): PÈRE DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L’HOMME* 255–62, 358–65 (1998).

It simply is not true that several Western delegates “had some difficulty accepting these new rights as human rights,”<sup>32</sup> let alone that Western states “strongly contested the inclusion of economic, social, and cultural rights.”<sup>33</sup> Not a single Western state pressed for a Declaration without economic and social rights.<sup>34</sup> Quite the contrary, all insisted that economic and social rights were essential to the Declaration, which was drafted precisely at the time of the flowering of the Western welfare state.

#### 4. The ALI *Statement of Essential Human Rights*

Further insight is provided by the document that probably had the greatest impact on the shape and substance of the Universal Declaration, namely, the 1946 *Statement of Essential Human Rights* by the American Law Institute (ALI). John Humphrey, the first Director of the United Nations Division on Human Rights and the author of the initial Secretariat Outline of the Declaration, called the ALI *Statement* “[t]he best of the texts from which I worked.”<sup>35</sup>

In the early 1940s, many US civil society organizations contemplated international human rights guarantees in proposals for institutions to replace the failed League of Nations.<sup>36</sup> The ALI project, begun in 1941, was designed

32. MBAYE, *supra* note 4, at 41 [authors’ translation].

33. Susan Koshy, *From Cold War to Trade War: Neocolonialism and Human Rights*, 58 Soc. TEXT 1, 6 (1999).

34. Again, the passages quoted to the contrary offer no supporting evidence. It is true that “[t]he United States, the United Kingdom, Australia, India, and Lebanon were more or less ambivalent about a detailed enumeration of these rights, and preferred to include them in general terms.” Ashlid Samnoy, *The Origins of the Universal Declaration of Human Rights*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT *supra* note 27, at 12. Compare Andreassen, *supra* note 24, at 335; TOMUSCHAT, *supra* note 4, at 28–29. But this had nothing to do with either principled or practical opposition to economic and social rights. For example, Australia also strongly supported including the general statement of the importance of economic, social, and cultural rights, quoted above, in what became Article 22. Andreassen, *supra* note 24, at 339, citing *Summary Record of the Sixty-Fifth Meeting*, Comm’n on Human Rights, UN Economic and Social Council, 3rd Sess., U.N. Doc. E/CN.4/SR.65 (24 June 1948). More generally, see Andreassen, *supra* note 24, at 321, 337–45, 351–52; MORSINK, *supra* note 20, at 222–30, 334. We return to the underlying issue of “justiciability” in Section 10.

35. JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 32 (1984).

36. See, e.g., WORLD CITIZENS ASSOCIATION, THE WORLD’S DESTINY AND THE UNITED STATES: A CONFERENCE OF EXPERTS IN INTERNATIONAL RELATIONS (1941); Universities Committee on Post-War International Problems, *Summaries of Reports of Cooperating Groups, Problem X—The Protection by International Action of the Freedom of the Individual within the State*, 405 INT’L CONCILIATION 711 (1944); COMMISSION TO STUDY THE ORGANIZATION OF PEACE, BUILDING PEACE: REPORTS OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 1939–1972 (1973); Quincy Wright, *Human Rights and the World Order*, 389 INT’L CONCILIATION 238 (1943). On pre-war precursors, see Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447 (1992).

to encourage implementation of Roosevelt's four freedoms. The participants were of the highest reputation, many having been involved with leading civil society groups, in State Department planning, or at the San Francisco Conference. Their goal was to ascertain "how far the liberal elements of all countries have similar ideas of individual rights" and "how those rights on which all unite can be expressed in a manner acceptable to their different traditions and conditions."<sup>37</sup> The *Statement* thus based itself in national constitutions, international agreements, and emerging policy trends in the United States, Latin America, and Canada, attempting to express what was emerging as a regionally hegemonic vision of the liberal welfare state.

The *Statement* was published in the January 1946 special issue of the *Annals of the American Academy of Political Science*, along with a number of supporting essays. Each enumerated right included a "comment," which both addressed comparative constitutional practice and further elaborated the text. In addition, the accompanying articles addressed both specific groupings of rights and various rights traditions and orientations. Taken together, they provide a penetrating insight into a leading, mainstream Western vision of human rights.

The *Statement* roughly mirrors the Universal Declaration, covering basic civil freedoms (Articles 1–6), criminal and procedural rights (Articles 7–9), economic and social rights (Articles 10–15), political participation (Article 16), and equal protection of the laws (Article 17). As with the Universal Declaration, any "imbalance" in favor of civil and political rights largely disappears when we compare levels of aggregation across articles, which is largely an artifact of the longer jurisprudential history of civil and political rights.

Article 10 recognizes "the right to own property under general law." Article 11 covers the right to education. Article 12 recognizes a right to opportunity for "useful work," a formulation that underscores the widespread distaste, among recipients and providers alike, for "the dole." The right to "reasonable conditions of work" (Article 13) includes provisions on wages, hours, and other conditions. Article 14 addresses rights to food and housing. Article 15 deals with social insurance, including state duties to promote health, prevent sickness and accident, provide medical care, and compensate for "loss of livelihood."<sup>38</sup>

Throughout the ALI *Statement* and the *Annals* special issue, the "traditional" Western focus on "negative" rights is treated as of merely historical interest. As Louis Sohn recalled, there was "general agreement that 'a modern

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37. Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L L. 540, 548 (1995).

38. Committee of Advisors on Essential Human Rights, American Law Institute, *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 25 (1946).

bill of rights should also include rights which involve positive action by public authorities."<sup>39</sup> Each enumerated right, both civil and political and economic and social, contains both negative and positive state obligations.

At the time, William Draper Lewis noted that "private concentrations of economic power, such as corporations and labor unions" necessitated a much broader understanding of both rights and the roles of the state.<sup>40</sup> Wilfred Jenks likewise argued that economic and social rights are needed as a "counterbalance to the peculiar risks of an industrialized society, in which men are removed from direct support by and reliance on nature and the family and are subject to accidents and disasters which it is beyond their power to control or escape."<sup>41</sup> Charles Merriam, a member of both the ALI drafting committee and Franklin Roosevelt's National Resources Planning Board, insisted that "No one of this series of rights is complete without the others. There must be coordination of social and economic rights with the political rights which guarantee and protect them." Economic and social rights are "conditions essential to the full flowering of the personality as truly as civil and political rights."<sup>42</sup> John Ellingston—reflecting the predominant view in all Western states at this time—took the question of whether to include social and economic rights as no question at all. The question "is, rather, what specific rights shall be so guaranteed, how they shall be phrased, and by what international and national economic and political action they shall be made effective."<sup>43</sup>

None of this reflected visionary aspirations of the political left. Quite the contrary, the ALI *Statement* was a mainstream elite exposition of the emerging pattern of American, and broader Western ideals *and practice*—to which we now turn.

### III. DOMESTIC WESTERN PRACTICE

Western international support for economic and social rights was deeply rooted in national efforts to complete and consolidate the "welfare state." Western opposition to economic and social rights is, at the level of domestic practice, a preposterous lie. We demonstrate this for the United States and Great Britain, the two Western countries with the most developed postwar

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39. Sohn, *supra* note 37, at 549.

40. William Draper Lewis, *Human Rights in England and the United States*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 66 (1946).

41. C. Wilfred Jenks, *The Five Economic and Social Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 45 (1946).

42. Charles E. Merriam, *The Content of an International Bill of Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 13–14 (1946).

43. John R. Ellingston, *The Right to Work*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1946).

plans. They are also the “hard cases” for our argument, being the Western countries with the greatest skepticism of economic and social rights, as reflected in the Thatcher and Reagan “revolutions” and accounts today of a distinctive “Anglo-American social model.” Having shown the centrality of economic and social rights to the most market-oriented Western states, for reasons of space we can skip even sketching the parallel evidence for Western countries with a more “social” vision of the state. (Readers who are either already familiar or unconcerned with matters of domestic practice may want to skip to Part IV, where the international story continues with the drafting of the Covenants.)

**5. Social Provision and the Welfare State**

“Welfare systems” can be crudely characterized by the agents of provision and the bases for claims. Very roughly, “social welfare” has historically been provided principally by individuals and their families, “society” (e.g. neighbors, employers, charities, “big men”), and governments or rulers, which have been seen as due to their recipients as a matter of individual achievement or membership in a particular group (e.g. family, village, cult), beneficence or moral duty, or legal right or political entitlement. The resulting space is mapped in Figure 1.

CLAIM AGENT	Membership/ Achievement	Duty/ Charity	Legal Right/ Political Guarantee
Self and Family			
Society			
State			

Figure 1. Types of Welfare Provision

Imagine, though, that the height of the rows and the width of the columns is variable. Self and family provision has always been most important, making the top row typically quite high. The relative contributions of society and state, however, have varied dramatically, from thin slivers to thick slices. There has also been considerable variation in the relative importance of claims based on achievement or membership, duty or beneficence, and entitlement. Combining these two dimensions, we can say that historically most societies have relied principally on mechanisms towards the upper left of Figure 1.

By the middle decades of the twentieth century, however, under the combined pressures of industrialization and democratization, a new state form, the welfare state, developed, primarily (but not exclusively) in the West. The term welfare state “implies a basic transformation of the state itself, of its structure, functions, and legitimacy.”<sup>44</sup> It is centrally focused on, and distinguished from its immediate predecessors in large measure by, the universal provision of economic and social rights to all citizens as a matter of legal right or political guarantee (rather than “particularistically,” based on achievement, contract, locality, or membership in a group less extensive than the whole society).

Thus understood, welfare states “are by and large products of the post-World War II period, though most of the current legislation can trace its origin to the turn of the century.”<sup>45</sup> Clear precursors go back, for example, in Germany to 1884 and in Britain to 1905–1911. Important foundations were laid during the Great Depression.<sup>46</sup> A comprehensive system of largely universal coverage was fully established in most Western countries, however, only in the late 1940s and early 1950s.<sup>47</sup>

Not coincidentally, this was also the era of the development of the norms of the global human rights regime. The strong Western support for economic and social rights in the global human rights regime reflects both an international expression of these domestic political developments and a self-conscious attempt to use international law and multilateral organizations to support and consolidate this new state form.

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44. Peter Flora & Arnold J. Heidenheimer, *The Historical Core and Changing Boundaries of the Welfare State*, in *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* 17, 23 (Peter Flora & Arnold J. Heidenheimer eds., 1981).
  45. Stein Kuhnle, *Welfare and the Quality of Life*, in *NORDIC DEMOCRACY: IDEAS, ISSUES, AND INSTITUTIONS IN POLITICS, ECONOMY, EDUCATION, SOCIAL AND CULTURAL AFFAIRS OF DENMARK, FINLAND, ICELAND, NORWAY, AND SWEDEN* 399, 411 (Eric Allardt, et al. eds., 1981).
  46. Between the turn of century and end of World War II, social expenditures increased from 30 to 62 percent of budget in Germany, 20 to 47 percent in UK, and 30 to 53 percent in Sweden. Peter Flora & Jens Alber, *Modernization, Democratization, and the Development of Welfare States in Western Europe*, in *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA*, *supra* note 44, 49–50.
  47. Even the term dates from the early 1940s, being popularized in English in the 1942 *Beveridge Report*. (It did not enter the *Oxford English Dictionary* until 1955.) The first use of the term in German seems to be in 1932. Flora & Heidenheimer, *The Historical Core and Changing Boundaries of the Welfare State*, *supra* note 44, at 33 n.4.

One final conceptual point. Western welfare states have been, with few exceptions, liberal democratic or social democratic states; that is, they have fused civil and political rights (liberal/social democracy) with economic and social rights (welfare states). The interdependence of all internationally recognized human rights has been, in the West, not empty rhetoric for international consumption but at the heart of domestic social and political order. Although economic and social rights came later than civil and political rights, they have been embraced with immense enthusiasm. As even a cursory look at the budgets and bureaucracies of any Western state indicates, economic and social rights occupy far more of the resources and attention of Western governments than civil and political rights.

## 6. Making the British Welfare State

Britain, the classic home of nineteenth century *laissez faire* liberalism,<sup>48</sup> was in the years between 1905 and 1948 transformed into a comprehensive welfare state, with strong support from all three major parties. "An old system of social provision was finally put aside and a new one . . . took its place." "The social rights of citizens . . . [replaced] the alms and doles of earlier periods."<sup>49</sup>

England's poor laws, which date to the late sixteenth century, were until the nineteenth century "not only outstanding but unique"<sup>50</sup> in accepting ultimate state responsibility for true unfortunates. By the early 1830s, about a fifth of total government expenditure went to poor relief.<sup>51</sup> But the desire to keep down poor rates, in the context of massive class bias in the distribution of political rights and a growing moral contempt for the poor, led to chronically inadequate funding that fatally undermined any good intentions. Even the reforms following the 1834 report of the Royal Poor Law Commission left the system harshly punitive and intentionally so unappealing that only the desperately destitute would accept assistance.

The Health and Morals of Apprentices Act of 1802, although restricted to pauper apprentices in cotton mills, can be seen with hindsight as hinting at a new orientation. The Factory Acts of 1833 and 1844 provided some protections to children and women. A Ten Hours Act, originally introduced in 1831, was finally passed in 1847 (although its impact was severely limited

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48. One should not, however, overstate "classical" liberal opposition to state intervention to support the market and deal with social externalities and inequities. See, e.g., Jacob Viner, *Adam Smith and Laissez Faire*, 35 *J. POL. ECON.* 198 (1927); R. L. Crouch, *Laissez-Faire in Nineteenth-Century Britain: Myth or Reality?*, 35 *MANCHESTER SCHOOL ECON. & SOC. STUD.* 199 (1967).

49. MAURICE BRUCE, *THE COMING OF THE WELFARE STATE* 2, 15 (1961).

50. *Id.* at viii.

51. *Id.* at 76.

by employing children in relays). And throughout the Victorian era, progress was made on a variety of workplace safety, housing, and sanitation issues. But these were piecemeal efforts within the old social model.

The real beginnings of the British welfare state might be dated to 1905–1909, the tenure of the new Poor Laws Commission. The Minority Report, drafted by Beatrice and Sydney Webb, provided the first clear, semi-official conceptualization of welfare as an issue of industrial organization, suggesting that the distinctive threats to human dignity posed by an industrial economy required a new system of social provision. The period 1905–1911 also saw a flurry of social legislation that began to point towards a welfare state. The 1905 Unemployed Workman Act, for all its inadequacies, clearly established the principle of national responsibility. Lloyd George's Peoples' Budget of 1909 transformed the parameters of British political debate. And the 1911 National Insurance Act was the first big step towards the post-World War II welfare state.

Steady incremental progress continued in the interwar period, largely irrespective of the party in power. And World War II facilitated a fundamental change in the British vision of the social compact. In 1940, supplementary pensions were introduced. Just a week after the defeat at Dunkirk, a national milk plan, with the government as the payer of last resort, was introduced. In 1941, the means test was eliminated, marking a decisive move towards universal provision. The Beveridge Report of 1942 set what soon became the almost universally agreed upon framework for the postwar British welfare state, with a focus on full employment, a national health system, and family allowances. In 1944 we saw major White Papers on social insurance and employment policy and the creation of a new Ministry of National Insurance. The end of the war brought the Family Allowance Act (1945), National Insurance Act (1946), National Insurance (Industrial Injuries) Act (1946), National Health Service Act (1946), Children Act (1948), and National Assistance Act (1948).

Including economic and social rights in the Universal Declaration was simply an international expression of the new social compact. Neither domestically nor internationally was there any serious British resistance to incorporating economic and social rights into the dominant system of legal norms and political practices. Quite the contrary, there was immense enthusiasm pretty much across the political spectrum.

The British case thus decisively refutes the common claim that liberals rejected economic and social rights, which were championed instead by socialists.<sup>52</sup> Liberal leadership was central,<sup>53</sup> and after 1911

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52. ISHAY, *supra* note 4, at ch. 3, offers a lively, although ultimately indefensible, version of this argument. For a useful brief summary of the eclectic origins of economic and social rights, see Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 *HUM. RTS. Q.* 255, 260–65 (1985).

53. Economic rights have been central to British liberalism at least since Locke. The nineteenth century struggle for worker's rights was as much a struggle of radical liberals as

all major parties [agreed] on expanding social welfare rights: advances were made in the 1920s and 1930s with pensions, expansion of the scope of national insurance, non-contributory national assistance, slum clearance and planning for housing. Harold MacMillan's influential 1933 plea for a national policy on reconstruction and his *The Middle Way* (1938), arguing the necessity for abolition of poverty, need remembering. The Atlantic Charter reference to social security, the joint work of Churchill, Attlee and Bevin, was relied on by Beveridge in his Report, the main thrust of which was accepted by both parties and which would have been implemented in broadly similar fashion by Churchill, had he won the 1944 election. . . . Churchill's 1906 remark that "we want to draw a line below which we will not allow persons to live and labour" reflects the policy of all United Kingdom parties.<sup>54</sup>

## 7. The American Welfare State: A Second Bill of Rights

The welfare state came to the United States later, more slowly, and with greater reliance on market regulation relative to direct state provision. This certainly had and continues to have (unfortunate) consequences for the nature of the US welfare state.<sup>55</sup> Roosevelt and the other architects of the New Deal, however, insisted that an industrial market economy required reconceptualizing traditional US liberties. And economic and social rights were and are no less central to the functioning and legitimacy of the state in the United States than in Europe.

Responding to the profound loss of personal security and freedom caused by the Depression, Roosevelt, in a 1932 campaign speech, called for "an economic declaration of rights."<sup>56</sup> The 1936 Platform of the Democratic Party proclaimed: "We hold these truths to be self-evident—that government in a modern civilization has certain inescapable obligations to its citizens, among which are: (1) Protection of the family and the home; (2) Establishment of a democracy of opportunity of all the people; (3) Aid to those overtaken by disaster."<sup>57</sup> In his acceptance speech, Roosevelt explicitly tied these "prin-

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of socialists. For example, E. P. Thompson's (1966) magisterial history of the English working class movement begins with a hundred pages on Tom Paine. In the early years of the twentieth century "most working men were Liberals. . . . Socialists were rare and the trade unions [were] mainly concerned with limited practical aims." BRUCE, *supra* note 49, at 139–40. By World War II, the libertarian laissez-faire strand of liberalism was a distinctly minority view, even among self-professed liberals, that had remarkably little actual political impact. See also Section 15 below at note 132.

54. CLAIRE PALLEY, *THE UNITED KINGDOM AND HUMAN RIGHTS* 58 (1991).

55. See generally ROBERT E. GOODIN, BRUCE HEADLEY, RUUD MUFFELS, & HENK-JAN DIRVEN, *THE REAL WORLDS OF WELFARE CAPITALISM* (1999).

56. Quoted in CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 65 (2004).

57. Quoted in *id.* at 75.

ciples of 1936" to those of 1776: "The rush of modern civilization itself has raised for us new difficulties, new problems which must be solved if we are to preserve to the United States the political and economic freedom for which Washington and Jefferson planned and fought."<sup>58</sup>

The most comprehensive statement of this vision came in the 1944 State of the Union Address. Echoing the "four freedoms" speech of three years earlier, Roosevelt suggested that in addition to the rights and freedoms protected by the original bill of rights, the nation had already begun to accept a number of self-evident *economic* truths: "true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made."<sup>59</sup>

Roosevelt suggested that the nation had already accepted the idea of a "second bill of rights," and that it was time for Congress to enact it formally. These rights were:

1. The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;
2. The right to earn enough to provide adequate food and clothing and recreation;
3. The right of farmers to raise and sell their products at a return which will give them and their families a decent living;
4. The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
5. The right of every family to a decent home;
6. The right to adequate medical care and the opportunity to achieve and enjoy good health;
7. The right to adequate protection from the economic fears of old age, and sickness, and accident, and unemployment;
8. The right to a good education.<sup>60</sup>

In a speech at Soldier's Field in Chicago on 28 October 1944, entitled "We Are Not Going to Turn The Clock Back," Roosevelt reiterated that the Economic Bill of Rights was essential to assure that demobilizing servicemen return to the "best place on earth." He also made it clear that the federal government would facilitate the transition to a full-employment, high-consumption peacetime economy.<sup>61</sup>

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58. FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VOL. 5, at 231 (1938).

59. FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VOL. 13, at 41 (1950).

60. *Id.*

61. *Id.* at 372.

Many of these ideas had their roots in the work of the National Resources Planning Board (NRPB).<sup>62</sup> Its 1942 annual report identified one of the central purposes of post-war planning as securing

a greater freedom for the American People. Great changes have come in our century with the industrial revolution, the rapid settlement of the continent, the development of technology, the acceleration of transportation and communication, the growth of modern capitalism, and the rise of the national state with its economic programs. Too few corresponding adjustments have been made in our provisions for human freedom. In spite of all these changes, that great manifesto, the Bill of Rights, has stood unshaken 150 years. And now to the old freedoms we must add new freedoms and restate our objectives in modern terms.<sup>63</sup>

The new rights outlined in the report—to work, fair play, food, clothing, shelter and medical care, security, free enterprise, movement, “equal access to justice in fact,” education, and rest and recreation—are strikingly similar to Roosevelt’s later list. The underlying logic is essentially the same as that of the *ALI Statement*.

The NRPB’s 1943 annual report included among the central objectives for post-war planning

- I. The fullest possible development of the human personality, in relation to the common good, in a framework of freedom and rights, of justice, liberty, equality, and the consent of the governed. . .
- II. The fullest possible development of the productive potential of all our resources, material and human, with full employment, continuity of income, equal access to minimum security and living standards, and a balance between economic stability and social adventure.
- III. An effective jural order of the world outlawing violence and imperialism, old or new fashioned, in international relations; and permitting and energizing the fullest development of resources and rights everywhere.<sup>64</sup>

In transmitting the report to the Congress, Roosevelt wrote: “We can all agree on our objectives and in our common determination that work, fair pay and social security after the war is won must be firmly established for the people of the United States of America.”<sup>65</sup> Whatever the disagreements over the details, this was an accurate statement of the changes that had been wrought in US ideas of rights under the dual pressures of the Depression and the War.

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62. One of many public-works initiatives of Roosevelt’s New Deal, the NRPB was a small executive group headed by the President’s uncle (Frederic A. Delano), and staffed by a small group of academic and government experts. It is best known for its Reports issued in 1942 and 1943. It was abolished by a Republican Congress in 1944.
  63. UNITED STATES NATIONAL RESOURCES PLANNING BOARD, NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1942, at 3 (1942).
  64. UNITED STATES NATIONAL RESOURCES PLANNING BOARD, NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1943: PART I. POST-WAR PLAN AND PROGRAM 2 (1943).
  65. FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VOL. 12, at 122 (1950).

Such plans reflected a fundamental rethinking of the relations between state and market, based on the understanding that *unregulated* capitalism posed a profound threat to individual economic security. In a 1932 speech, Roosevelt framed unemployment as a loss of personal security and called for a new understanding of economic and social guarantees as “rights.” “[P]rivate economic power is, to enlarge an old phrase, a public trust as well.” If private industry did not adequately discharge this trust, “the Government must be swift to enter and protect the public interest.”<sup>66</sup> Likewise, the “right to life” needed to be understood expansively to include “the right to make a comfortable living,” an opportunity to acquire a share of the national plenty “sufficient for his needs, through his own work.”<sup>67</sup> Similar guarantees were required for children, the elderly, the infirm and others unable to work.<sup>68</sup>

As in Britain, progress was facilitated by the pressures of the war. “The second bill emerged from a synthesis of New Deal reform with an appreciation of the need to develop an account of liberal democracy that would respond to the threats from fascism and communism.”<sup>69</sup> The internationalization of these domestic principles in the Universal Declaration was “natural” and “organic,” pointing toward what Borgwardt calls “A New Deal for the World.”<sup>70</sup>

#### IV. THE INTERNATIONAL HUMAN RIGHTS COVENANTS

Let us now return to the international level. After completing the Universal Declaration, attention (re)turned to a “covenant” to give these rights binding force in international law. The decision in 1952 to draft separate covenants on civil and political rights and economic, social, and cultural rights, with different implementation machinery, provides some superficial plausibility to the myth of Western opposition. In fact, though, the division into two Covenants had nothing to do with Western opposition to or disparagement of economic and social rights.

#### 8. Drafting the Covenant(s)

It is regularly argued that the decision to create a separate ICESCR “was the product of conflicting political ideologies,” reflecting in particular the fact that the “Western states viewed economic, social, and cultural rights with suspicion.”<sup>71</sup> “Two covenants . . . were necessary mainly owing to disputes

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66. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES, VOL. 5, *supra* note 58, at 753, 755.

67. *Id.* at 754.

68. *Id.*

69. SUNSTEIN, *supra* note 56, at 66.

70. BORGWARDT, *supra* note 8.

71. Puta-Chekwe & Flood, *supra* note 19, at 39, 41.

between Western and Eastern blocs over the priority to be given to civil and political versus economic, social and cultural rights.<sup>72</sup> “The Soviet States, on the one hand, championed the cause of the economic, social and cultural rights, which they associated with the aims of socialist society. Western States, on the other hand, asserted the priority of civil and political rights.”<sup>73</sup>

Certainly there were major debates between the Western and Soviet blocs in the Commission, ECOSOC, and the Third Committee of the General Assembly. The Covenants do formulate civil and political and economic, social, and cultural rights in somewhat different terms. These differences, however, concern their juridical character, not their normative or policy priority.

In 1950, the Commission forwarded a draft covenant to the Economic and Social Council that included eighteen substantive articles on civil and procedural rights.<sup>74</sup> This draft did not even include political rights—which, contrary to the mythic account, were drafted after the provisions on economic and social rights, largely under Soviet, not US, impetus.<sup>75</sup> The Commission envisioned an incremental approach, beginning with the oldest and least controversial set of rights, and planned to consider “additional instruments and measures” on “economic, social, cultural, political, and other categories of human rights” at its next session.<sup>76</sup>

In the General Assembly in the fall of 1950, however, several (non-Western) delegations stressed the incompleteness of an instrument without economic and social rights.<sup>77</sup> By a vote of 38–7–12, Assembly Resolution 421 instructed the Commission to include articles on economic, social and cultural rights in the draft Covenant.

Although the United States expressed “serious concern about the practicability of including economic and social rights in the first draft covenant,”<sup>78</sup>

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72. SHELLEY WRIGHT, *INTERNATIONAL HUMAN RIGHTS, DECOLONISATION AND GLOBALISATION: BECOMING HUMAN* 21 (2001).

73. MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 9 (1995); compare Otto, *supra* note 5, at 54–55; Helen Stacy, *International Human Rights in a Fragmenting World, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 161, 164 (András Sajó ed., 2004).

74. *Report to the Economic and Social Council on the Work of the Sixth Session of the Commission, Supplement #5*, Comm’n on Human Rights, ESCOR, 11th Sess., U.N. Doc. E/1681 (1950).

75. The original draft Covenant had eighteen articles covering basic civil rights. The Soviet Union consistently put forth drafts covering a whole range of economic, social, and political rights but this “package” was consistently rejected (see note 81 below). The draft of the ICCPR submitted to the Third Committee in 1954 did not include political rights.

76. *Report to the Economic and Social Council on the Work of the Sixth Session of the Commission, Supplement #5*, *supra* note 74, at 6.

77. *Summary Reports of the 297th, 298th, and 299th Meetings of the Third Committee*, U.N. GAOR, 5th Sess., U.N. Doc.s A/C.3/SR.297-299 (30 Oct. 1950).

78. *Summary report of the 318th Meeting of the Third Committee*, U.N. GAOR, 5th Sess., U.N. Doc. A/C.3/SR.318, 287 (17 Nov. 1950).

it voted with the majority. Most other Western states were opposed or ambivalent. New Zealand and the UK expressed concern that the document in hand represented four years' work and should not be further delayed by efforts to add additional articles. France and Greece agreed that something should be included, but were unsure about what or how. The Netherlands and Canada pointed out the differences between the two categories of rights in terms of implementation (justiciability).<sup>79</sup> But none (with the possible partial exception of the UK) objected to including economic, social, and cultural rights in a binding international treaty. The dispute was over how, not whether, to give more precise and binding international legal formulation to economic and social rights.

Once drafting work began in the Commission in early 1951, the Western contribution was, as with the Universal Declaration, strong and entirely positive. The article on the right to work, drafted by France, was adopted 16–0–2. The article on favorable conditions of work (France and the United States) was adopted 13–0–4. Australia's proposal for an article on social security was adopted 9–3–5. The article on special provisions for women and children (France, Guatemala, and Yugoslavia) was adopted 16–0–2. The US draft on the right to housing was adopted 12–0–6. An Australian article on the right to an adequate standard of living was adopted 14–0–4.

By contrast, every amendment offered by the Soviet Union and/or Yugoslavia, however, was rejected. For example, the Soviet Union draft on trade union rights was rejected outright in a paragraph-by-paragraph vote—not because of any opposition to the right, but because the Soviet draft was considered to be unacceptable.<sup>80</sup> In the end, the (quite reasonable and strong) text proposed by the United States was adopted 10–0–8.<sup>81</sup>

The Commission also began preliminary work on implementation procedures, again based largely on a draft by John Humphrey. For civil and political rights, Humphrey envisioned a system of state-to-state complaints and a Committee to review them. For economic and social rights, however, he proposed a self-reporting system, because these rights were to be achieved progressively, keeping in mind the differences in levels of development and the material resources available to various states. "The idea is to help governments to fulfil their obligations rather than to penalize them for viola-

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79. *Summary Reports of the 297th, 298th, and 299th Meetings*, *supra* note 77.

80. After the decision to draft economic and social rights was made, the Soviets continually peddled a "package" of economic, social, and political rights to the Commission and the Third Committee. The Soviet language was often far too specific and narrow for the goal of building consensus on what should be included as a "right." The article on trade unions, for example, contained thirteen sub-paragraphs of such a detailed nature that it was rejected easily.

81. Commission on Human Rights, *Report of the Seventh Session*, 13 U.N. ESCOR, Supp. 9, at 8–11, U.N. Doc. E/1922 (1951).

tions.”<sup>82</sup> That Humphrey was also a leading advocate of including both civil and political and economic, social, and cultural rights in a single covenant should remind us not to confuse the practicalities of implementation with the normative or policy priority attached to particular rights.

At the end of the Commission’s 1951 session, India drafted a resolution asking the General Assembly to Reconsider Resolution 421’s directive for one covenant. Although insisting that both sets of rights were “equally fundamental and therefore important,” India argued that civil and political rights were “justiciable,” whereas economic, social, and cultural rights were not. This required different measures of implementation, which could best be done through separate instruments.<sup>83</sup> (We return to this issues in Section 10 below.)

Although defeated in the Commission, the Indian proposal was revived in both ECOSOC and the General Assembly. By then, the different implementation procedures had created what one Soviet diplomat disparagingly called “a covenant within a covenant.”<sup>84</sup> The desire to resolve this problem more than any other factor led to the division into two covenants. General Assembly Resolution 543—the so-called division resolution—was adopted by a vote of 27–20–3 on 4 February 1952. Division simply had nothing to do with lower normative or policy priority for economic and social rights.

## 9. The American View

Were the views expressed publicly by Western states just polite cover for more deeply skeptical, even hostile, attitudes? Both John Humphrey’s diaries and unclassified State Department documents show that although US policy was deeply intertwined with Cold War ideological rivalry and US relations with the emerging bloc of post-colonial states, and despite genuine substantive concerns over the practicalities of implementation, neither the United States nor any other Western power argued for the normative priority of civil and political rights.

For example, Eleanor Roosevelt recalled that for the new Chair of the Commission, Charles Malik of Lebanon, and many others, “the Economic and Social Articles had become a symbol of the aspirations and needs of these countries. They did not understand or attach the same importance to civil and political rights as does the United States and some of the more

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82. ON THE EDGE OF GREATNESS: THE DIARIES OF JOHN HUMPHREY, FIRST DIRECTOR OF THE UNITED NATIONS DIVISION OF HUMAN RIGHTS, VOL. 2, 1950–1951, at 202 (A.J. Hobbins ed., 1996).

83. *Summary Report of the 248th Meeting*, Comm’n on Human Rights, ESCOR, 7th Sess., U.N. Doc. E/CN.4/SR.248, 6 (10 July 1951).

84. HUMPHREY, *supra* note 35, at 144.

developed countries . . . they look to [economic, social and cultural rights] as a lever which may help to raise them out of their present depressed condition."<sup>85</sup> This politically astute judgment in no way suggests lower priority for economic, social, and cultural rights. The comments concern non-Western disengagement of civil and political rights without in any way suggesting Western undervaluing of economic and social rights.

Roosevelt's concern that the discussion of economic and social rights not be allowed to open opportunities for the "reckless propaganda campaign" of the Soviets was reflected in the official American position.<sup>86</sup> The State Department instructions to the US delegation to the Commission indicated a clear preference for "general language along lines proposing the promotion of economic, social and cultural progress and development" in the covenant and for including economic and social rights in "separate protocols."<sup>87</sup> The State Department instructed the US delegation to propose one of three alternative draft formulations of economic and social rights, the third of which was quite detailed:

Each State party hereto, believing that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, undertakes, with due regard to the organization and resources of the State, . . . to promote:

- (a) The highest attainable standard of health;
- (b) Provisions for adequate education designed to enable all persons to participate effectively in a free society to the extent of their capabilities, to develop fully the human personality, and to strengthen respect for human rights and fundamental freedoms;
- (c) Measures to raise the standard of living, to give special protection to mothers and children, to provide adequate nutrition, housing and facilities for recreation and culture;
- (d) The effective recognition of the right of collective bargaining, the cooperation of management and labor in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (e) Policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, equal pay for equal work, adequate protection for the life and safety of workers in all occupations, and a minimum living wage to all employed and in need of such protection;
- (f) The opportunity for everyone to engage in occupations and businesses in which they can have the satisfaction of giving the fullest measure of their skill and attainments; and

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85. UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: 1951, VOL. II, THE UNITED NATIONS; THE WESTERN HEMISPHERE, 741 (1979).

86. *Id.* at 742.

87. *Id.* at 735, 736.

(g) Measures to provide basic security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond the control of the individual.<sup>88</sup>

This is not a proposal that is in any way hostile to economic and social rights and their international recognition!

In June 1951, the State Department emphasized not “oppos[ing] majority sentiment in ECOSOC.”<sup>89</sup> Believing that efforts to split the covenant would fail and thus “rebound unfavorably,” it recommended “that the United States simply go along with the majority on this question, without pressing for one side or the other in this matter.” The US should simply restate its position on the differences between the two kinds of rights—economic and social “rights” are objectives that make claims on states within the limits of their resources and subject to progressive implementation—which already were “acknowledged in the draft Covenant.”<sup>90</sup>

As the progress of the debate slowly made two covenants seem a realistic goal, new instructions were issued to the US delegation on 28 September 1951. The US should propose two covenants, should there be majority sentiment for that position. If not, the US should ask the General Assembly to defer its decision and request the Commission to prepare three instruments for consideration in 1952: an instrument with all the rights; one with just civil and political rights; and one with just economic, social, and cultural rights.<sup>91</sup> Should both of these alternatives prove impossible, “the United States Delegation should not oppose but should vote for the inclusion of economic, social and cultural rights in a single Covenant.”<sup>92</sup>

In other words, Cold War politics pushed the United States towards rather than away from the Soviet and Third World positions, and in none of this was there any suggestion of normative or policy priority for civil and political rights. The only issue was how best to recognize and implement economic and social rights in the emerging body of international human rights law.

## 10. Justiciability

Most Western governments did see an important qualitative difference between civil and political rights and economic, social, and cultural rights: only the former were immediately “justiciable,” meaning capable of being

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88. *Id.* at 738–39.

89. *Id.* at 745.

90. *Id.* at 747, 748.

91. *Id.* at 753.

92. *Id.*

formulated to impose strict, judicially enforceable obligations in national law. The myth of Western opposition, however, mistakenly presents Western concerns over strategies of implementation as matters of normative or policy priority.

Non-justiciability is often presented as a defect of rights in general and of economic and social rights in particular. For example, Alexandre Berenstein argues that including economic and social rights in the European Convention would give them “a higher value than that attaching to them at present, because they would be raised to the rank of fundamental rights and given special protection identical to that now given to the rights and freedoms set forth in that Convention.”<sup>93</sup> Matthew Craven describes the International Covenant on Economic, Social and Cultural Rights (ICESCR) as “a poor relation to the Covenant on Civil and Political Rights, suffering in particular from a weaker implementation procedure.”<sup>94</sup>

The assumption that justiciability is evidence of higher value, however, is ludicrous. Access to courts is a poor, even perverse, measure of social (recognition of) value. For example, national defense is a paramount obligation of the state but no country permits individuals to take the government to court if it fails to meet these obligations. Although judicial remedies do usually enhance the value of a right to a right-holder, justiciability does not exhaust the essential functions of rights and justiciable rights are not the only kind of rights. Even legal rights may be non-justiciable.

Constitutional rights, which are often analogous to human rights, are in many countries more directive statements of principles than justiciable legal claims. Cass Sunstein distinguishes between “pragmatic” and “expressive” constitutionalism.<sup>95</sup> We prefer the labels “remedial” or “justiciable,” which identifies a particular pragmatic process, and “directive,” which more precisely identifies the positive function of “expressive” provisions.<sup>96</sup> The crucial point, though, is to appreciate these different functions of rights.

The Covenants treat economic and social rights as expressive/directive and civil and political rights as pragmatic/remedial. Article 2 of the ICCPR requires parties “to respect and to ensure” the enumerated rights and to provide “an effective remedy . . . [and] to develop the possibilities of judicial remedy.” Article 2 of the ICESCR, however, requires that each party “undertakes to take steps, individually and through international assistance

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93. Alexandre Berenstein, *Economic and Social Rights: Their Inclusion in the European Convention on Human Rights. Problems of Formulation and Interpretation*, 2 *HUM. RTS. L. J.* 257, 261 (1982).

94. CRAVEN, *supra* note 73, at 352.

95. SUNSTEIN, *supra* note 56, at ch. 8.

96. “Non-justiciable,” however, would be a poor choice. It is a residual, rather than a defined, category, and it draws our attention to an absence (of justiciability) rather than what is positively done by such rights.

and co-operation . . . 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.”

There is indeed an important difference between rights that must immediately be respected and ensured, preferably through courts, and those subject to progressive realization. But nothing in the substance of either Covenant—or, as we have seen, in the drafting history—questions the substantive importance of economic, social, and cultural rights.<sup>97</sup> The covenants simply recognized that most states in the 1950s and 1960s had considerable capability to create subjective civil and political rights (Hohfeldian claim rights) in national law for all individuals, whereas most states lacked the combination of will and resources needed to provide comparable legal guarantees for most economic and social rights. As the Indian delegate put it during the drafting of the covenants, “their resources and state of economic development did not permit them to implement the economic and social rights at one stroke of the pen.”<sup>98</sup> Roosevelt echoed this sentiment, at one time pointing out that it had taken half a century to make primary education compulsory in the United States.<sup>99</sup>

In the years following World War II, the implications of making most civil and political rights justiciable were relatively clear. In most legal systems “cruel, inhuman or degrading treatment or punishment,” for example, already had, or could readily be given, a fairly concrete meaning. Given the strong substantive commitment to these rights of not only almost all Western states but also a number of Third World states as well, they were readily formulated as justiciable.

The jurisprudence of most economic and social rights, by contrast, was limited or nonexistent. (The principal exception was workers rights, which, not coincidentally, are formulated in Articles 6–8 of the ICESCR in much more readily justiciable terms.) Furthermore, international human rights norms were being established precisely as welfare states were dramatically expanding. Western states thus were profoundly unsure about the practical implications of justiciability—and thus unwilling to accept potentially opened obligations. The diversity of national practices also made negotiating

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97. It is also worth noting that the Covenants do not appeal to any alleged substantive distinction between positive and negative rights. International Covenant on Civil and Political Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) (ICCPR); International Covenant on Economic, Social and Cultural Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) (ICESCR).

98. *Summary Report of the 248th Meeting*, *supra* note 83.

99. *Summary Report of the 360th Meeting of the Third Committee*, U.N. GAOR, 6th Sess., U.N. Doc. A/C.3/SR.360, 78 (5 Dec. 1951).

detailed justiciable obligations extremely difficult. Add dramatic differences in resource bases, especially across regions, and it was almost impossible to imagine global recognition of anything more than a severely truncated list of seriously justiciable economic and social rights. Directive rights thus made legal and political sense.

In addition, the Soviet bloc and many Third World states were “less concerned with the legal niceties of drafting than with the inclusion of the widest possible range of rights.”<sup>100</sup> Whatever the text said, they intended to treat even civil and political rights as directive rather than justiciable. Therefore, since the differences in Article 2 did not greatly concern them, but were of great significance to most Western (and some Third World) states, the whole issue actually provoked relatively little serious controversy.

This was not the ideal way to approach economic and social rights. For example, it would have made more sense to distinguish among relatively justiciable economic and social rights and those largely subject to progressive realization through non-judicial means.<sup>101</sup> But the path chosen in the covenants was substantively (not un)reasonable and, most importantly, politically possible. A number of Third World states expressed similar understanding and concerns.

In fact, the understanding of economic and social rights as directive rather than justiciable was shared by all states. No state, Western or non-Western, seriously proposed—in the sense of being willing to adopt as a matter of enforceable national law—treating economic, social, and cultural rights as matters of immediate rather than progressive realization.

Consider the actual treatment of economic and social rights in communist states.

Certain social welfare services were indeed provided to a very great number of citizens . . . although they were not provided in terms of rights, *i.e.* the respective claims were not enforceable in an independent court. These services were administered on a more or less reliable and egalitarian basis as in-kind additional compensation to one’s salary. The state had no duties in this respect; it provided its services on a discretionary basis and in exchange for loyalty in everyday life.<sup>102</sup>

The Soviets, for all their talk about economic and social rights, treated them exactly as the covenant does, namely, as important goals of social policy rather than individual rights enforceable in national courts. And they treated

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100. JAMES FREDERICK GREEN, *THE UNITED NATIONS AND HUMAN RIGHTS* 38 (1956).

101. Israel unsuccessfully advanced this view in the Third Committee in 1951. *Summary Report of the 360th Meeting*, *supra* note 99, at 82.

102. András Sajó, *Rights in Post-Communism*, in *WESTERN RIGHTS? POST-COMMUNIST APPLICATION* 141–42 (András Sajó ed., 1996); compare Rein A. Mylerson, *Socialism and Human Rights*, in *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS, ESSAYS IN HONOUR OF TORSEL OPSAHL* 13–16 (Asbjørn Eide & Jan Helgesen eds., 1991).

civil and political rights in much the same way. This was the norm in most of the Third World as well. Ironically (from the perspective of the Western opposition thesis) the West has had by far the best record of making a wide range of economic and social rights justiciable.

### 11. Multilateral Implementation Machinery

One other feature of the covenants might seem to support the Western opposition thesis. The Civil and Political Covenant both created a Human Rights Committee to review periodic state reports on compliance and included an Optional Protocol authorizing the Committee to consider individual communications alleging violations. The Economic and Social Covenant, by contrast, did not create a committee of experts and even today still lacks an individual complaint mechanism.

The absence of a complaint mechanism, however, flows directly from the differences in the obligations in the two covenants. Without nationally justiciable obligations to respect and assure economic, social, and cultural rights for all individuals, there is not much need for a quasi-judicial supranational complaint procedure.<sup>103</sup>

The initial absence of a Committee on Economic, Social, and Cultural Rights, by contrast, was indeed unjustifiable.<sup>104</sup> Reviewing state reports is a valuable monitoring and promotion activity suitable for all internationally recognized human rights—as the Committee has demonstrated in its practice. But it was Third World, and especially African, states, not the West, that resisted creating such a committee.<sup>105</sup> During the final stages of negotiating the details of the covenant, a US proposal for a committee drew little sup-

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103. The Open-Ended Working Group on an Optional Protocol to the ICESCR is still wrangling with many of the same issues as in the original debates in 1950–1952, although concerns about justiciability are now much less widely shared. See, e.g., *Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Open-ended Working Group, Comm'n on Human Rights, ESCOR, 62nd Sess., U.N. Doc. E/CN.4/2006/WG.23/2 (30 Nov. 2005); *Report of the Open-ended Working group to Consider Options Regarding the Elaboration of an Optional Protocol to the ICESCR on its Third Session*, Comm'n on Human Rights, UN Economic and Social Council, 62nd Sess., U.N. Doc. E/CN.4/2006/47 (14 Mar. 2006). Compare Jackbeth K. Mapulanga-Hulston, *Examining the Justiciability of Economic, Social and Cultural Rights*, 6 INT'L J. HUM. RTS. 29 (2002); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AM. J. INT'L L. 462 (2004).
104. Even more problematic is the name “Human Rights Committee” for a body that deals only with civil and political rights. This “affront” to economic, social, and cultural rights, however, cannot be blamed on the West. The name was an artifact of the original, single draft Covenant that was never subject to serious debate.
105. Philip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 339 (1987).

port.<sup>106</sup> This error was corrected when the Committee was created, with the support of all Western states except the United States, in 1985.<sup>107</sup>

## V. FUNCTIONAL AND REGIONAL ORGANIZATIONS

A similar picture is evident when we turn to functional regimes for finance, trade, and workers' rights and the European regional human rights regime. In each case we again find Western states strongly supporting, rather than resisting, economic and social rights.

### 12. Remaking the Global Economy

Full employment was essential to the emerging Western vision of "social citizenship."<sup>108</sup> The welfare states then coming into being "embodied a notion of citizenship centred on labour market participation," with many particular programs and policies shaped by "the fact that the vast majority of the population were directly or indirectly dependent on wages for subsistence."<sup>109</sup> A citizen, in this newly hegemonic vision, is entitled not only to legal security and civic and political participation but also to economic and social security and participation.

Employment had become central to both the identity of the mid-twentieth century citizen and the legitimacy of the mid-twentieth century state. Beyond the economic and material reasons for seeking a revival of economic activity, and thus employment, Western planners and leaders, haunted by the memory of sustained mass unemployment during the 1930s, stressed the sense of dignity, autonomy, and full and equal participation in society that a job provided.<sup>110</sup> This vision was clearly expressed at the Bretton Woods Conference, which in the summer of 1944 concluded two years of Anglo-American negotiations over the architecture of the postwar international economic order.

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106. Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 473, 478, (Philip Alston ed., 1992), citing U.N. Doc. A/C.3/L.1360 (1966).

107. Alston, *Out of the Abyss*, *supra* note 105, at 348–49.

108. T. H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950); T. H. MARSHALL, *THE RIGHT TO WELFARE AND OTHER ESSAYS* (1981).

109. Simon Deakin, *Social Rights in a Globalized Economy*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 25, 35 (Philip Alston ed., 2005).

110. WILLIAM H. BEVERIDGE, *FULL EMPLOYMENT IN A FREE SOCIETY* (1945) offers a powerful expression of this attitude.

Particularly important was agreement on an International Monetary Fund (IMF). The IMF is today widely reviled by supporters of economic and social rights. Structural adjustment and “the Washington consensus” are frequently seen, with considerable justice, to reflect, at best, a shameful lack of concern for economic and social rights. The picture in the 1940s, however, was radically different.

Consider the second paragraph of Article 1 of the Articles of Agreement, which set out the purposes of the IMF: “To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.” As our discussion above suggests, this passage was not merely unsurprising to contemporaries but “natural” and “necessary.” As Dag Hammarskjöld put it while he was still Permanent Secretary to the Ministry of Finance of Sweden, “the aim of economic policy contemplated in the expression ‘full employment’ has been universally accepted.”<sup>111</sup>

This was no last minute addition in New Hampshire to cover up cruder material interests. Similar language appears in the 1944 Joint Statement issued by US and British monetary experts: “To facilitate the expansion and balanced growth of international trade and to contribute in this was to the maintenance of a high level of employment and real income, which must be a primary objective of economic policy.”<sup>112</sup> That language in turn can be traced back to drafts from October and May 1943.<sup>113</sup>

Going back even further and deeper, John Maynard Keynes, in one of his earliest memos on postwar monetary reform, wrote in September 1941: “If we fail, our best hopes of finally abolishing economic want and of providing continuous good employment at a high standard of life will be lost to us. A vast disappointment, social disorders and finally a repudiation of our ill-judged commitments will be the result.”<sup>114</sup> Keynes took “a great interest in the Beveridge Report” and believed that “this model of a national welfare state was readily capable of international extension and application.”<sup>115</sup> And at Bretton Woods he presented the IMF as an essential mechanism for “raising the standard of life and the conditions of labour everywhere, to make the resources of the world more fully available to all mankind.”<sup>116</sup>

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111. DAG HAMMARSKJÖLD, *FROM BRETTON WOODS TO FULL EMPLOYMENT* 19 (1945).

112. *THE INTERNATIONAL MONETARY FUND 1945–1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION, VOLUME III: DOCUMENTS* 131 (J. Keith Horsefield ed., 1969).

113. *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES*, *supra* note 9, at 380; *THE INTERNATIONAL MONETARY FUND 1945–1965*, *supra* note 112, at 85–86.

114. *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES*, *supra* note 9, at 27.

115. H. W. Singer, *An Historical Perspective*, in *THE UN AND THE BRETTON WOODS INSTITUTIONS: NEW CHALLENGES FOR THE TWENTY-FIRST CENTURY* 17 (Mahbub ul Haq, et al. eds., 1995).

116. *Quoted in* SUSAN GEORGE & FABRIZIO SABELLI, *FAITH AND CREDIT: THE WORLD BANK'S SECULAR EMPIRE* 30 (1994).

Even in the US, where some on the right remained pathologically opposed to multilateralism and still suspicious of domestic economic “interventionism,” something very much like this understanding was the clear majority view. For example, the Treasury Department, in a June 1944 pamphlet, insisted that

the primary objective of economic policy must be the maintenance of a high level of employment and real income. It is recognized that only through international cooperation will it be possible for nations successfully to apply measures for achieving this end. It is a fundamental purpose of the Fund proposal to provide an agency for monetary cooperation among nations to aid in the securing of economic advancement and rising standards of living for all.<sup>117</sup>

In a very different style, but reflecting the same basic vision, Oskar Piest, in summarizing the benefits of the IMF for “Mr. and Mrs. America,” began with “greater chances of steady employment” and moved on to “the highest standard of living in the world” and “maximum economic (and political) freedom.”<sup>118</sup>

In trade, no less than money, the goal was “a relatively open and multi-lateral system . . . that would reconcile openness and trade expansion with the commitment of national governments to full employment and economic stabilization.”<sup>119</sup> Prior to the October 1946 London International Conference on Trade and Employment there was “a remarkable degree of unanimity . . . on the interdependence of trade and employment policy”; “the separate and equal status of the employment provisions indicated the importance which the subject was accorded in the Anglo-American negotiations.”<sup>120</sup> The US proposals, published in November 1945, claimed that: “The attainment of approximately full employment by the major industrial and trading nations, and its maintenance on a reasonably assured basis, are essential to the expansion of international trade on which the full prosperity of these and other nations depends; to the full realization of all liberal international agreements . . . and, therefore, to the preservation of world peace and security.”<sup>121</sup> Although an International Trade Organization was stillborn, the fatal disagreements were about implementation and means, not the centrality of employment and the welfare state.

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117. THE INTERNATIONAL MONETARY FUND 1945–1965, *supra* note 112, at 138.

118. OSKAR PIEST, TOWARD STABILITY OF WORLD ECONOMY: DEFENSE AND CRITICISM OF THE BRETTON WOODS AGREEMENTS 61 (1945).

119. G. John Ikenberry, *A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement*, 46 INT’L ORG. 289 (1992).

120. RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE 109, 146 (1956).

121. UNITED STATES DEPARTMENT OF STATE, PROPOSALS FOR EXPANSION OF WORLD TRADE AND EMPLOYMENT 9 (1945).

The postwar economic order sought to replace the “classical” liberalism of laissez faire trade and the gold standard with an “embedded liberal” order, to use the phrase coined by John Ruggie, designed around the goal of full employment. Deviations from the “classical” model largely allowed temporary insulation against external shocks and pressures that would impede realizing welfare state policies.<sup>122</sup> A new vision of the role of the state with respect to the market was extended, partially, to the international economy in the 1940s and 1950s, both reflecting and attempting to solidify “the shared legitimacy of a set of social objectives to which the [Western] industrial world had moved, unevenly but ‘as a single entity.’”<sup>123</sup>

One can reasonably debate the relative importance of embedded liberalism to the “golden age” of rapid growth, low unemployment, and stunning progress in realizing economic and social rights. It is clear, however, that embedded liberalism reflected the deeply rooted intentions and extensive hard work of Anglo-American politicians, planners, and negotiators, as well as their Canadian, French, and other Western colleagues. The Soviet role was less than negligible and the non-Western contribution was generally insignificant.

### 13. Workers’ Rights

Conventional accounts of the precursors of the post-war global human rights regime typically focus on slavery (and the slave trade), minorities, and workers’ rights. The review procedures of the International Labour Organization (ILO), founded in 1919, provided the model for the treaty-reporting systems established by most international human rights treaties. Its substantive work, particularly in its first half century, sought to internationalize and facilitate the continuing progress of the emerging (Western) welfare state. In fact, much of the ICESCR, especially Articles 6–8, involves “condensations of much of what was already contained in ILO standards.”<sup>124</sup>

Interwar ILO conventions dealt primarily with terms and conditions of work and workplace safety. But even in its early years, ILO conventions addressed unemployment (Convention No. 2), freedom of association (No. 11), workmen’s compensation (No. 12, 17, 18, 42), equal treatment (No. 19), sickness insurance (No. 24, 25), and minimum wage (No. 26). The actual provisions typically were modest.<sup>125</sup> Where standards of broad ap-

122. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 392–93 (1982).

123. *Id.* at 398.

124. HÉCTOR BARTOLOMEI DE LA CRUZ, GERALDO VON POTOBOSKY & LEE SWEPSTON, *THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* 128 (1996).

125. For example, the unemployment convention (No. 2) dealt only with establishing and maintaining free public employment agencies.

plicability were established, ratifications were few.<sup>126</sup> Nonetheless, a wide range of workers' rights issues, which spilled over into a broader concern with the welfare state and economic and social rights, became a matter of international standard setting and monitoring, predating comparable norms and procedures for civil and political rights by several decades.

Like most of the League system, the ILO moved towards hibernation in the late 1930s. It sprang to life again, though, at the twenty-sixth General Conference in 1944. This historic meeting adopted, with the enthusiastic support of the United States and Britain, the Declaration of Philadelphia, which is suffused with a vision of international cooperation to realize social citizenship. Article 1 insists that "labor is not a commodity" and that "the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort." Article 2 asserts that "all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective," namely, that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." The listing of purposes of the organization in Article 3 begins "(a) full employment and the raising of standards of living; (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being."

This promise of a new beginning was pursued aggressively in the early years of the peace. Conventions 87 (1948) on freedom of association and Convention 98 (1949) on collective bargaining created a relatively strong system of international supervision that applied even to states that had not ratified the conventions.<sup>127</sup> Comparable coverage still has yet to be achieved in any other area of human rights. And over the following two decades the ILO continued to push forward, adopting important new conventions on social security, equal treatment, and social benefits. These initiatives both reflected the emerging Western welfare states and served as a multilateral mechanism to foster their spread and deepening.

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126. For example, Convention No. 17 on workers' compensation for accidents, which was completed in 1925, was ratified by Sweden in 1926, Belgium and the Netherlands in 1927, and Spain in 1929. France did not ratify until 1948, the UK in 1949, Finland in 1950, and Germany in 1955. Denmark, Italy, Canada, and the United States have never ratified.

127. ERNST B. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION: THE CASE OF FREEDOM OF ASSOCIATION* (1970); DE LA CRUZ, POTOBOSKY, & SWEPSTON, *supra* note 124, at ch. 20–23.

None of this was forced on reluctant Western powers. Quite the contrary, they actively supported the formation of the ILO, were the driving force behind its revitalization in the 1940s and 1950s, and have remained (with the exception of the United States) its principal supporters.

The ILO is also of interest because it represents a striking example of the principle of interdependence and indivisibility. The linkage of material well-being and spiritual development noted above in the Declaration of Philadelphia is characteristic of the organization as a whole, and of the Western approach to economic and social rights. The ILO's strongest procedures apply to freedom of association, which is usually classed as a civil and political right. And its highest priority items, as reflected in Article 2 of the 1998 Declaration on Fundamental Principles, have strong linkages with civil and political rights: freedom of association, forced labor, child labor, and discrimination in employment.

#### 14. The European Regional Regime

The European regional human rights regime reveals the states of Western Europe—the historical and numerical core of the West—acting largely independently of the rest of the world. It confirms our earlier argument that including economic and social rights in the global human rights regime reflected internal Western preferences rather than external pressures from socialist, Latin American, or non-aligned countries.

As with the covenants, civil and political and economic and social rights have a different legal status and are subject to different implementation practices. The 1950 European Convention of Fundamental Rights and Freedoms is restricted to civil and political rights, which are treated as justiciable individual rights subject to regional judicial enforcement. Economic and social rights are covered in the 1961 European Social Charter (revised in 1996), which imposes obligations that are not enforced by a regional court.

These differences, however, reflect a particular conception of the appropriate nature of regional legal obligations rather than any reticence towards economic and social rights. "In order to be incorporated in the Convention, any right must be fundamental and enjoy general recognition, and be capable of sufficiently precise definition to lay legal obligations on a State, rather than simply constitute a general rule."<sup>128</sup> Thus the list of civil and political rights in the European Convention is narrower than in the Universal Declaration, lacking rights to recognition as a person before the law, nationality, freedom of movement, asylum, to take part in government, and to periodic

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128. Berenstein, *supra* note 93, at 265, quoting Parliamentary Assembly Recommendation 838 ¶ 12 (1978).

genuine elections. As the Committee of Experts explained in its 1984 report introducing Protocol No. 7, it included “only such rights as could be stated in sufficiently specific terms to be guaranteed within the framework of the system of control instituted by the Convention.”<sup>129</sup>

Consider also Protocol No. 1, adopted in 1952. In addition to the right to political participation, it adds the right to property, an economic right, and the right to education, a social or cultural right. These rights are fundamental, generally recognized, and justiciable. That they are economic, social, and cultural rights not only did not preclude their inclusion but seems not even to have been a significant consideration.<sup>130</sup>

Furthermore, we should disparage neither the substance nor the implementation procedures. Part I of the Social Charter goes well beyond the ICESCR, listing nineteen rights and principles (expanded to thirty-one in the 1996 revised Social Charter) that must be accepted “as a declaration of the aims which it will pursue by all appropriate means.” In addition, states must adopt five of seven core articles in Part II and a total of no less than ten total articles or forty-five of sixty-eight numbered paragraphs (increased to six of nine core articles and at least sixteen articles or sixty-three of ninety-eight numbered paragraphs in the 1996 revision). These rights typically are defined in detailed and demanding terms. For example, Article 9 of the ICESCR reads, in its entirety: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” Article 12 of the Social Charter requires parties to assure that their systems of social security meet, in the 1961 Charter, the requirements of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security; or, in the revised Social Charter, the European Code of Social Security, which includes several pages of detailed standards of benefits for medical care, sickness, unemployment, old age, work accident and disease, family, maternity, disability, and survivors.<sup>131</sup>

Although the Social Charter is not subject to judicial enforcement, the European Committee of Social Rights carefully examines periodic state reports, with explicit, paragraph by paragraph, judgments of conformity or nonconformity. For example, the Committee’s Conclusions for Norway, hardly a laggard on economic and social rights, cover over eighty pages for the two year cycle 2004–2005. Conclusions of non-compliance are further reviewed by the Governmental Committee. In addition, selected regional and national employers and workers organizations and NGOs have since

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129. *Quoted in* P. VAN DIJK & G. J. H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 681 (1998).

130. The European Convention on Human Rights also includes the right to marry and found a family. Although this right appears in the ICCPR, *supra* note 97, it is probably best classified as a social right.

131. *See generally*, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/139.htm>.

1998 been authorized to file complaints and are also involved in the work of the Governmental Committee. This is far more rigorous review than under either Covenant.

Could more be done for economic, social, and cultural rights in the European regional regime? Of course. Does the European regional regime disparage economic and social rights? Not at all. Quite the contrary, the European Social Charter provides a substantively more demanding list of rights and a significantly stronger review process than the ICESCR or any other regional system.

## VI. CONCLUSION

What are we to make of all of this? How could such a profoundly mistaken view become so widespread in the professional literature on human rights? What is the significance of getting the history correct?

### 15. Sources of the Myth

In addition to the Western reluctance to create justiciable claims subject to quasi-judicial international monitoring, three additional kernels of truth lie behind the myth of Western opposition. That myth, however, systematically misrepresents their meaning and significance.

First, in the nineteenth century most Western governments and elites did indeed oppose economic and social rights other than the right to property. In addition, "economic rights" was a language used primarily in the labor movement and those "rights" initially were largely restricted to regulating the terms and conditions of industrial labor (expanding in the later nineteenth century to include broader health, sanitation, and housing issues). By the time of the Universal Declaration, though, *no* Western state had any serious theoretical or practical opposition, domestically or internationally, to economic and social rights.

Second, the aggressive advocacy of markets that began with Thatcher and Reagan provoked exaggerated hopes and fears about the demise of (state provision of) economic and social rights. In practice, however, neither the Thatcher nor the Reagan government seriously threatened economic and social rights or the welfare state.<sup>132</sup> Few other Western countries have shown

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132. For example, between 1970 and 1995, government spending as a percentage of GDP increased in the UK from 38.8 to 42.3 percent and social security transfers increased from 8.3 to 15.4 percent. And from 1980 to 1995, social expenditure increased from 18.3 to 22.5 percent of GDP. Comparable figures for the US are 31.6 to 34.3; 7.6 to 13.2; and 13.4 to 15.8. Brian Burgoon, *Globalization and Welfare Compensation: Disentangling the Ties that Bind*, 55 INT'L ORG. 509, 530, Tbl. 2 (2001).

even this much enthusiasm for cutbacks in state provision of economic and social rights.<sup>133</sup> Throughout the West over the past three decades we have instead seen selective, largely incremental, retrenchments that have usually been undertaken only reluctantly and regrettably. In the context of day to day politics, these retrenchments certainly merit attention. But changes that from a broad historical perspective have involved relatively minor tinkering at the edges of the welfare state have been misrepresented as full scale opposition to economic and social rights.

Third, when human rights were re-introduced into international relations in the 1970s—at Helsinki, by the US Congress and the Carter Administration, and by a growing range of human rights NGOs—primary attention *in the international politics of human rights* was given to civil and political rights, and personal integrity rights in particular. Unfortunately, though, legitimate and important critiques of Western and especially US foreign policies spilled over to support a fundamentally inaccurate picture of the Western attitude towards economic and social rights.

Carter and Reagan also neglected political rights, and even many civil and legal rights. Western international neglect of economic and social rights was, and remains, frequently exaggerated. The United States, especially under Carter, included modest attention to basic human needs and subsistence rights. Some Western states, most notably the Netherlands, Norway, and Canada, have integrated economic and social rights into their human rights and development assistance policies since the early 1980s. Since the end of the Cold War, human rights and development policies in the United States, Britain, and most other donor countries have begun to come into fruitful interaction. Human rights NGOs have also given more attention to economic and social rights.<sup>134</sup> And, of course, none of this says anything about domestic Western practice, which certainly provides better evidence of Western values.

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133. The unweighted averages for the eighteen largest OECD countries for the expenditures in the preceding note are 33.5 to 46.7; 10.7 to 19.0; and 19.5 to 24.0. *Id.* In every one of those countries, total social expenditure rose between 1980 and 1995. Even more striking, spending on retirement benefits, health benefits, and family benefits increased in forty-two of fifty-four instances (three classes of benefits in eighteen separate countries). *Id.* at 531, Tbl. 3. The expansion of the welfare state continued right into the 1990s.

134. For a good recent discussion of NGO activity on economic and social rights, see Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004); Mary Robinson, *Advancing Economic, Social, and Cultural Rights: The Way Forward*, 26 HUM. RTS. Q. 866 (2004); Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth*, 26 HUM. RTS. Q. 845 (2004); Kenneth Roth, *Response to Leonard S. Rubenstein*, 26 HUM. RTS. Q. 873 (2004); Katarina Tomaševski, *Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson*, 27 HUM. RTS. Q. 709 (2005).

The second and third of these reasons refer to practices and debates of the 1970s and 1980s. This may seem odd, given that we have focused here on the 1940s and early 1950s. In fact, though, it is telling. We have been able to find no work on the global human rights regime from the 1950s, or even the 1960s, that adopts the myth. What seems to have occurred is that during the international revival of human rights in the mid- and late 1970s, current debates pitting West against East and North against South, especially in the context of demands for a new international economic order, were unthinkingly projected back into the past.

Part of the explanation certainly lies in partisan Cold War politics. Soviet and Third World regimes and their supporters, faced with growing human rights criticism coming primarily from the West, counter-attacked. In addition to anachronistic claims about an overemphasis on civil and political rights and the right to property, they often argued that in the short and medium run in which politics operates, some sub-set of internationally recognized human rights—usually a combination of self-determination, nondiscrimination, and economic and social rights—had at least functional priority. The claim that Western powers denigrated economic and social rights conveniently (although falsely) suggested that *all* countries picked and chose human rights according to their particular history and ideology.

The myth, however, also reflects a willingness of many in the West to accept uncritically the self-representation of socialist bloc and Third World regimes. The reasons for this were many, including hope and optimism, respect for diversity, and post-colonial guilt. The result, however, was to contrast an absurdly charitable reading of the non-western world to a not merely uncharitable but quite inaccurate caricature of the West.

In addition, a misplaced notion of “inclusiveness” supported an understanding of the universality of human rights that required that every group of states contribute something distinctive to those ideas. Every culture, society, or region was presented as having its own authentic and valuable conception of human rights that fed into the creation of international human rights norms. “Any system of ideas that claims to be universal must contain critical elements in its fabric that are avowedly of African, Latin American or Asian derivation.”<sup>135</sup> The claim that each of the “three worlds” of the Cold War era had its own distinctive human rights contribution seems to have made this story irresistible. As a result, what was in fact a cross-regional convergence on the Universal Declaration was misrepresented as an aggregation of pieces drawn from different regions and traditions.<sup>136</sup>

135. Asmarom Legesse, *Human Rights in African Political Culture*, in *THE MORAL IMPERATIVES OF HUMAN RIGHTS*, *supra* note 3, at 123; compare Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT'L L. J.* 201, 207 (2001).

136. The Rawlsian idea of an overlapping consensus is useful here: different groups coming to agreement on a particular set of political and legal norms from (and despite) profoundly

We are *not* arguing that economic and social rights are specially Western. Rather, economic and social rights, as well as civil and political rights, are, as the international instruments insist, *universal* rights.<sup>137</sup> They are an essential part of any plausible conception of human dignity in the contemporary world, irrespective of region, culture, or worldview. And whatever the (often substantial) shortcomings of Western governments, both at home and especially abroad, the West is the region of the world where the interdependence and indivisibility of all internationally recognized human rights has received its most forceful endorsement and its most consistent and effective implementation.

## 16. Why Does it Matter?

Suppose our argument is correct. So what? Why does it matter what we think about how Western states approached economic and social rights after World War II?

As scholars we must admit to a belief in the intrinsic value of setting the record straight. We do this not out of any naive view of objective historical knowledge. Rather, we believe that failing to challenge representations such as the myth of Western opposition—representations that not only have little connection to any supporting evidence but actually ignore an immense body of evidence pointing in exactly the opposite direction—is damaging not just to scholarship but to the enterprise of rational deliberation, to which we are deeply committed.

We want to focus here, however, on the instrumental contribution that setting the record straight may make to the struggle for economic and social rights today and in the future. Especially if we accept the dictum that theory, and by extension knowledge, “is always *for* someone and *for* some purpose,” understanding the social forces behind historical representations becomes important.<sup>138</sup>

We are inclined to believe that part of the explanation for the pervasiveness of the myth is a one-dimensional, anti-Western (and especially

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different worldviews and comprehensive religious and moral doctrines. See JOHN RAWLS, *POLITICAL LIBERALISM*, at xliii–xlv, 11–15, 133–76, 385–96 (1996); John Rawls, *The Law of Peoples*, *THE POLITICS OF HUMAN RIGHTS* 16, 31–32 (1999). For applications to contemporary understandings of human rights, see Heiner Bielefeldt, “*Western*” versus “*Islamic*” Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion of Human Rights, 28 *POLITICAL THEORY* 90 (2000); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 40–41, 51–53 (2d ed. 2003); Ashwani Kumar Peetush, *Cultural Diversity, Non-Western Communities, and Human Rights*, 34 *PHIL. FORUM* 1 (2003).

137. On the complexities of the idea of universality (and relativity), see Jack Donnelly, *The Relative Universality of Human Rights*, 29 *HUM. RTS. Q.* 281 (2007).

138. ROBERT W. COX, *APPROACHES TO WORLD ORDER* 87 (1996).

anti-American) political agenda that has transformed the deep complexity of economic and social rights into an antagonistic calculus of competing sets of rights. Here we can only advance this as speculation worthy of further scrutiny. We would insist, however, that how we construct or remember history has implications for how we act, now and in the future.

The myth of Western opposition impedes rather than contributes to contemporary struggles to defend the welfare state as we have come to know it or to construct humane alternatives (rather than simply return economic and social provision to markets, families, and societies). Ceding the past to far-right free-marketers, as the myth in effect does, is as politically counter-productive as it is historically inaccurate. The Hayeks, Friedmans, and Thatchers ought to be represented as what they are, namely, critics of the mainstream of twentieth century Western social and political theory and practice. They represent a deviant (although in recent years increasingly influential) strand of theory—a theology of markets—that has in practice been decisively rejected in every Western country for more than half a century.

We need to remind both defenders and critics of global markets that what made “the Western model” the envy of much of the rest of the world was not just civil and political rights but also unprecedented achievements in guaranteeing economic and social rights made possible by the welfare state mix of market and state provision—that is, a profound practical commitment to the interdependence and indivisibility of civil and political and economic, social, and cultural rights.

Turning to foreign policy, if we want Western states to take economic and social rights more seriously, nothing is to be gained by pretending that these rights are not and have not been of special interest and importance to most Westerners. Rather, we need to press the ethically problematic contradiction between domestic policies that give a central place to economic and social rights and international policies that undervalue those rights. Pretending that Western reluctance involves genuine or principled opposition to such rights only deflects attention from the real problem, namely, the unwillingness of Western states, and the United States in particular, to bear the financial burdens of international cooperation to improve the realization of economic and social rights in the rest of the world.<sup>139</sup>

Rather than perpetuate politically regressive myths that concoct a Western “norm” from the worst practices and most extreme ideological statements of the most atypical Western countries, we should return to the

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139. In saying this, we take no position on the linkage between economic and social rights to the goals of economic and social development often expressed in the language of the “right to development.” Whatever one’s view on this issue, we simply insist that economic and social rights—and for that matter civil and political rights as well—have an intrinsic value and a distinctive contribution to national development policies that merits emphasis.

actual ideas and practices of Western governments over the last two thirds of the twentieth century. So doing reminds us that the neo-liberal Washington consensus abandons, rather than embodies, long-established Western ideals and practices.

As capital and markets increasingly escape state regulation, we must return to the central insight of the liberal democratic welfare state, the United Nations Charter, the Universal Declaration of Human Rights, and the original Bretton Woods system: markets are to be valued only for their contribution to human welfare. This requires that markets be tempered by, and embedded, within a deeper commitment to minimal distributional equity, as expressed in internationally recognized economic and social rights.

Franklin Roosevelt, Winston Churchill, Eleanor Roosevelt, John Maynard Keynes, John Humphrey, Rene Cassin, and the other architects of the post-war international order understood the vital importance of economic and social rights to the welfare of their compatriots, the legitimacy of their own states, and prospects for a just and humane world order. Western publics and elites, for their own (both intrinsic and instrumental) reasons, enthusiastically supported the efforts of their leaders and governments on behalf of economic and social rights. Getting *that* record straight—discursively re-situating Western states where they in fact have always been, namely, in fundamental harmony with the basic thrust and demands of the full range of internationally recognized human rights—just may contribute to efforts to protect the liberal democratic welfare state, and the vision of interdependent and indivisible human rights that underlies it, from the host of challenges its faces in the early twenty-first century.