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# Yes, A Myth: A Reply to Kirkup and Evans

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We suspected that our article would generate controversy since it challenges much of the “received wisdom” about the West’s attitude toward economic and social rights. We thus specifically focused our attention on a decisive, formative historical moment: the founding of the global human rights regime. We argued that the roots of contemporary economic and social rights norms emerged out of domestic US and British policy and practice. Because what is at stake is a matter of fact—namely the attitudes and actions of Western states—we provided extensive evidence and careful, detailed analysis to support our claims.

In response, Alex Kirkup and Tony Evans complain that we have presented “a distorted and partial view of the post-war inclusion of economic and social rights within the post-war capitalist order.”<sup>1</sup> Our purpose, though, was never to provide *any* sort of account of integrating human rights into the capitalist world order.<sup>2</sup> We argued instead, as the quote at the outset of

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1. Alex Kirkup & Tony Evans, *The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly*, 31 *HUM. RTS. Q.* 222 (2009) [hereinafter K&E]. The passage is repeated almost exactly at 237.
2. We do not, however, ignore the global economy. When it is relevant to *our* purposes, we give it more than passing attention. See, e.g., Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 *HUM. RTS. Q.* 908, 912, 926–27, 937–40 (2007) [hereinafter W&D].

their reply indicates, that contrary to the common perception of Western hostility to economic and social rights, Western states were strong, consistent, and essential supporters of international recognition of economic and social human rights. Western states were also leading practitioners of dramatically expanded domestic implementation of those rights. Although Kirkup and Evans never actually address the particulars of our argument—it is hardly even cited—they do raise a number of interesting methodological and substantive issues that merit discussion. We begin with methodology, which their abstract identifies as their principal concern.

## I. EMPIRICISM AND POSITIVISM

Kirkup and Evans complain that our approach is “empirical and positivist.”<sup>3</sup> We have always thought that it is a good (and certainly not a problematic) thing to support one’s arguments by “a wealth of empirical examples, references to international law, speeches, and regional human rights regimes”<sup>4</sup>—particularly when the issue is what states did and why. If there is a problem here, we cannot figure out what it might be.

As for the charge of positivism, we are perplexed. Kirkup and Evans seem not to mean the epistemological doctrine prevalent in much mainstream social science. “Positivism,” as they present it, appears to involve the view that legal texts are a description of state practice.<sup>5</sup> This is neither our view, nor is it the view of the self-identified international legal positivists we know, who instead typically emphasize the difference between practice and texts, and the priority of practice.

Kirkup and Evans also suggest that “positivism” entails the claim that “the ratification of a human rights treaty and the intention to pursue the principles embodied within a treaty are one and the same thing.”<sup>6</sup> We certainly do not hold this view. Ratification creates obligations. Whether states comply with those obligations is another matter. As for the claim that “Whelan and Donnelly’s positivism supports a natural rights philosophy,”<sup>7</sup> we are dumbfounded. We had thought that central to *any* form of legal positivism was an opposition to natural law (and thus, one would imagine, natural rights as well).

Contrary to Kirkup and Evans’ suggestion that we take “UN debates, resolutions, and [the] corpus of international law, at face value,”<sup>8</sup> we looked

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3. K&E at 222.

4. *Id.*

5. This seems to be the import of their illustration, K&E at 223, that is attributed to Louis Henkin in the text and to Oscar Schacter in the note (which lacks a page reference).

6. K&E at 222–23.

7. K&E at 224.

8. K&E at 222.

in some detail at the politics of negotiating the international legal instruments<sup>9</sup> and the domestic politics and practice of the two leading post-war Western states.<sup>10</sup> We took the claims of Western states seriously only because they are backed by a strong and sustained record of practice. Western (and especially US) practice, to be sure, has been not merely imperfect, but in many instances profoundly inadequate. Nonetheless, parallel with and subsequent to the development of global human rights norms, there was a major transformation of Western states into rather robust welfare states that devoted immense resources and attention to implementing internationally recognized economic and social rights.

The assertion that we give scant “reference to politics, interests, and power”<sup>11</sup> is simply untrue. One of our central objectives was to demonstrate the interests of Western states in strengthening their emerging welfare states.<sup>12</sup> We gave special attention to the international political role of the United States and Britain because they were the leading Western powers during the period under consideration. We also noted the importance of (primarily US) civic organizations<sup>13</sup> and included narrowly partisan political interests in our account where they seemed appropriate.<sup>14</sup> And when Kirkup and Evans write that “[our] article frames questions of power and interest within conventionally conceived concepts of the state, sovereignty, and natural rights, in the tradition of international society,”<sup>15</sup> it becomes clear that their real complaint is how we frame questions of power and interest, not that we denigrate or ignore them.

But even this reformulation is problematic. The footnote to the just-quoted passage reads, in its entirety, “This view is most explicit in R. J. VINCENT, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* (1986).” We were under the impression that Kirkup and Evans were addressing *our* article—which never even cites, let alone relies on, Vincent. We never mention natural rights. And although we do have certain sympathies with the English School conception of international society, our article never uses the terms “international society” or “society of states” and is (intentionally) consistent with a variety of conceptions of the nature of international order.

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9. W&D at 914–17, 927–36.

10. W&D at 919–27.

11. K&E at 222.

12. W&D at 908, 911–14, 922–27, 937–40, 947–49.

13. W&D at 911–24, 919–20, 922–27, 930–32, 938–39.

14. See, e.g., W&D at 929–32.

15. K&E at 223.

## II. "TRUE" HISTORY<sup>16</sup>

Kirkup and Evans make much of the issue of "truth." We used the term twice<sup>17</sup> in a naive, everyday sense: as the *Oxford English Dictionary* puts it, "Conformity with fact; agreement with reality; accuracy, correctness, verity (of statement or thought)." Although we had nothing metatheoretical in mind, we welcome this opportunity to look briefly at the issue—particularly in light of Kirkup and Evans' objection to our empirical approach to understanding the West's views of economic and social rights and their elaboration within international human rights law.

We do agree that when discussing power and interest we focused primarily on state power and state interests. For this, however, we do not apologize. Our topic was the policies and practices of Western states. Therefore, it seemed (and still seems) obvious to us that we should look principally at the interests and practices of those states. Furthermore, in the period during and immediately after World War II, the power and interests of the leading Western states unquestionably need to be at the heart of any plausible international political story.

Nothing in Kirkup and Evans' reply—we consider many of the empirical details below—leads us to reconsider or revise our central argument that "the claim that the West resisted or opposed including economic and social rights in the postwar global human rights regime . . . is revisionist history of the worst kind, not simply false but an almost complete inversion of the truth."<sup>18</sup> Kirkup and Evans do, however, raise an interesting question about "the 'truth' about the West's concern about how to include economic and social rights."<sup>19</sup> Unfortunately, they misrepresent our views and adopt a frequently cavalier attitude toward the facts.

For example, Kirkup and Evans claim that we assumed that "all the most important principles of human rights were settled many years ago."<sup>20</sup> They thus suggest that we took the truth of these principles to be beyond question. In fact, however, we never suggested any such thing—as one might imagine from the fact that in support of their claim they cite not us but Mervyn Frost.<sup>21</sup> Our article recounts *creating* the global human rights regime, which

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16. The term "'true' history" is Kirkup and Evans' provocative creation—a provocation to which this section responds.

17. W&D at 910, 944. Also, at 917 we refer to a claim as not true.

18. W&D at 910.

19. K&E at 222.

20. *Id.* at 224.

21. We would also note that Frost's notion of "settled norms" does not suggest anything about "truth" except in a contingent, constructed sense. The essence of Frost's theory is that norms become settled through a process of constitutive practice, rather than because they are acknowledged to conform to or reveal timeless universal truths. If there is any connection between our article and Frost, it is only in the possible reading that

certainly might have been built in other ways. Had we continued the story beyond 1953, we would have noted the expansion of the regime's norms, most notably the addition of the right to self-determination in the Covenants, as well as extensive elaborations of the rights of women and rights of the child, the addition of the rights of the disabled, new norms on the right to development and the rights of indigenous peoples, and the ongoing struggles for protection against discrimination on the basis of sexual orientation.

We agree that "natural rights did not reveal any universal truths."<sup>22</sup> And one of us has repeatedly argued—in print, for over a quarter of a century—that human rights are a contingent historical construction responding to the standard threats to human dignity posed by modern markets and modern states.<sup>23</sup> It is thus a restatement of our argument, rather than a criticism, when Kirkup and Evans conclude, "Our response to Whelan and Donnelly, then, is that the post-1945 image of human rights reflects changes in the social order and in global politics."<sup>24</sup> Our whole point was that international recognition of economic and social rights was inextricably tied to the consolidation of Western welfare states and reconstruction of the global economy in ways that would support those rights.

Of course, Kirkup and Evans draw attention to different changes in the social order and in global politics—which returns us to the question of "truth" and received wisdom. We readily admit that there are many "truths" about the West and economic and social rights. The vital question, we contend, is the extent to which Kirkup and Evans, Whelan and Donnelly, or any other analysts have identified actual and important truths.

For their part, Kirkup and Evans have not even tried to show any inaccuracies in our extensively documented claims. Therefore, we can only assume that they concede that these claims are true, at least in the limited sense of not being false. This is also suggested by their use of the phrase "distorted and partial,"<sup>25</sup> i.e., incomplete rather than wrong.

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our article documents the processes by which the norms of the global human rights regime were formulated, an early and important part of the process by which over the succeeding decades they came to be "settled norms" of international society.

22. K&E at 224.

23. See, e.g., Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions*, 79 *AM. POL. SCI. R.* 303, 312–13 (1982); Jack Donnelly, *The Social Construction of International Human Rights*, in *HUMAN RIGHTS IN GLOBAL POLITICS* (Tim Dunne & Nicholas J. Wheeler eds., 1999); Jack Donnelly, *The Relative Universality of Human Rights* 29 *HUM. RTS. Q.* 281, 286–88 (2007). Since 1985 Donnelly has described his account of human rights as "constructivist." See JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* 31–43 (1985); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 16, 45 (2003). As KEN BOOTH, *THEORY OF WORLD SECURITY* 382 (2007) recently put it, "Jack Donnelly [was] a social constructivist before the discipline knew" social constructivism.

24. K&E at 224.

25. K&E at 221, 222, 237.

What about the alternative truths they advance? In the following sections, we show that their arguments often do not meet minimum standards of accuracy and empirical support. That still, though, leaves the question of importance. Are they on to something vital that is not included within the truths we have focused on? Any answer to that question depends in part on judgments about which reasonable people may disagree. We want to suggest, however, that the lack of adequate supporting evidence raises very serious problems. Stephen Colbert coined the term “truthiness,” which Wikipedia defines as “things that a person claims to know intuitively or ‘from the gut’ without regard to evidence, logic, intellectual examination, or facts.” Most of Kirkup and Evans’ arguments, we are afraid, are more “truthy” than true in the mundane, “merely empirical” sense of that term.

### III. CIVIL AND POLITICAL RIGHTS VERSUS ECONOMIC AND SOCIAL RIGHTS

Kirkup and Evans claim that the norm of the interdependence and indivisibility of internationally recognized human rights, to which we made central reference, “does not reflect actual practice in the post-war world, which instead, at its base, was built upon the fundamental primacy of civil and political rights.”<sup>26</sup> This important and provocative claim, however, does not even receive a supporting footnote.<sup>27</sup>

In the next sentence, they (no less provocatively) assert that “‘negative’ civil and political rights, which enable individual freedoms such as the ownership of private property, constitute the legal-political framework for the existence of the market and the pursuit of self-interest.”<sup>28</sup> We, however—naively and merely empirically, it would seem—thought that private property rights—which are *economic* (not civil and political) rights—were at the heart of a capitalist market framework. We cannot understand how, for example, freedom of religion, universal suffrage, or protection against torture can be understood principally as constituting a framework that enables the pursuit of self-interest in the market.

“‘[P]ositive’ economic and social rights place a constraint upon the freedom of market actors,”<sup>29</sup> but so do civil and political rights. For example, market actors are not allowed to assault, maim, or kill their competitors, steal from them, slander them, or bribe judges. These, we would suggest,

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26. K&E at 225.

27. The same is true of their claim that the “real reason” behind US efforts was “to support the future *laissez-faire* global economy dominated by US business and finance.” K&E at 226.

28. K&E at 225.

29. *Id.*

are actually much greater restrictions on the freedom to pursue economic interests in the market than the requirement to pay taxes to support social welfare programs.

Most economic and social rights indeed “must come at another’s expense.”<sup>30</sup> The same, however, is true of most civil and political rights. Courts, police, and polling places, voting machines, and election officials, for example, do not grow on trees. Even effective protection against torture (rather than just a paper right) requires considerable, often expensive, efforts. Again, the alleged distinction between civil and political, and economic and social rights does not bear scrutiny.

“Civil and political rights alone have emerged as universal and inalienable rights across the post-war capitalist order. Economic and social rights, in contrast, have existed as no more than ‘entitlement’ won either in the marketplace or by political struggle over the welfare state.”<sup>31</sup> In fact, however, economic and social rights are no less deeply embedded than civil and political rights, even in the United States. In the post 9–11 US political climate, we have witnessed how advocating torture, denial of due process, restrictions on free speech, or invasions of privacy are not only sanctioned by the electorate but can gain one considerable political advantage. Conversely, suggesting limiting state-based pensions or health care for the elderly is political suicide. Once again, the categorical distinction disappears on examination. And both sets of rights “have developed in an uneven pattern.”<sup>32</sup>

There is, of course, a “discrepancy between legal rules and actual practice”<sup>33</sup>—for both civil and political, and economic and social rights. And, as our article demonstrated in detail, Western states have devoted immense effort to establishing and entrenching effective systems for implementing internationally recognized economic and social rights. Even Thatcher and Reagan could not cut back on social spending,<sup>34</sup> as economic and social rights have become deeply embedded in even the most market-oriented of the leading Western states. “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.”<sup>35</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. K&E at 223.

34. W&D at 944 n.132.

35. W&D at 947.

#### IV. DRAFTING THE COVENANT(S)

Kirkup and Evans go on to sketch an alternative account of the development of internationally recognized economic and social rights that advances supporting evidence. That evidence, however, is thin, cherry-picked, and crumbles on careful examination.

Kirkup and Evans repeatedly claim that the United States wanted to “exclude” or “reject” economic and social rights from the Covenant on Human Rights.<sup>36</sup> It is true that the United States did not support including economic and social rights in the Covenant *as it was initially drafted*. They did not, however, reject those rights—as we showed in considerable detail in our article.<sup>37</sup>

Three arguments “first developed during the Declaration debate”<sup>38</sup> were, Kirkup and Evans claim, “repeated” by the United States during negotiations on the Covenant: that economic and social rights were “aspirations” and not rights; that underdevelopment made economic and social rights claims “hollow”; and that international law was a “wholly inappropriate tool for economic and social rights.”<sup>39</sup> We cannot interrogate this “evidence” because their citations are inadequate<sup>40</sup> or incorrect.<sup>41</sup> There were certainly objections raised about the inclusion of *specific, enumerated* economic and social rights—like the onerous proposals to which the Commission was repeatedly subjected by the Soviet Union. But these “objections,” as Kirkup and Evans characterize them, were not advanced by the United States.<sup>42</sup>

When this question came up during the Commission’s sixth session in 1950,<sup>43</sup> lack of time and a desire to give the matter its due attention compelled the Commission to resolve to draft additional instruments or protocols for

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36. K&E at 226, 227, 231, 232. They also contend that the United States “objected to,” “was opposed to,” and “resisted” economic and social rights. K&E at 228, 230, 232, 238.

37. W&D at 927–36.

38. Kirkup and Evans provide no citation for the debates on the Universal Declaration. The claim they make here also flies in the face of evidence. The “United States Proposals regarding an International Bill of Rights” (U.N. Doc. E/CN.4/4 (1950)) explicitly states that “social rights such as the right to employment and social security and the right to enjoy minimum standards of economic, social and cultural well-being” should be included in the Declaration.

39. K&E at 226.

40. *Id.* K&E notes 24 and 25 cite the *entire* eleventh session of the Economic and Social Council and the *entire* 6th session of the Commission on Human Rights; there are no references to a particular meeting or document.

41. *Id.* K&E note 26 cites the 288th meeting of the General Assembly’s Third Committee during its fifth session. Economic and social rights were not discussed at that meeting.

42. The United States rarely expressed concerns about the intricacies of international law. Those concerns were most strongly held by the United Kingdom and India. We would hardly call India “Western.”

43. See *Summary Records of the Commission on Human Rights*, U.N. ESCOR, Comm’n on Hum. Rts., 6th Sess., U.N. E/CN.4/SR.181, 184–86 (1950).

economic and social rights (as well as political rights) at its next session.<sup>44</sup> The United States was no more “strident” than any other delegation on this question: the majority of states were anxious to have their work on the Covenant finished so the General Assembly could adopt a legally-binding human rights treaty during its fifth session.<sup>45</sup> And if these positions had been held by the United States, why did it vote in the Third Committee for the draft that became General Assembly Resolution 421 (V), calling on the Commission to include economic and social rights in the draft Covenant?<sup>46</sup>

As further evidence of their interpretation of the United States position on economic and social rights, Kirkup and Evans cite a speech that Roosevelt delivered in the Third Committee on 5 December 1951, when the topic under discussion was about crafting a separate covenant on economic, social, and cultural rights based on the rights<sup>47</sup> and measures of implementation that had *already* been included in the draft Covenant. However, Kirkup and Evans claim Roosevelt argued that “universal implementation was impractical and unachievable,” that “specifying the nature of such rights was impossible,” and that procedures “used for receiving petitions” on civil and political rights were inappropriate for economic and social rights. In support of this description they cite notes preserved in Roosevelt’s private papers.<sup>48</sup> We were not able to examine these papers. There is, however, an official record of that meeting. Based on that record—of what she actually said publicly rather than wrote privately for herself—we can only describe Kirkup and Evans’ account as a serious mischaracterization.

Roosevelt, rather than address the question of “universal implementation,” argued that the progressive achievement of economic, social, and cultural rights required different implementation measures. As she noted, (what was then) Article 19, the “umbrella clause” introducing economic, social, and cultural rights, already recognized the principle of progressive implementation.<sup>49</sup> And nearly every delegation in the Commission had a hand in drafting this clause, the genealogical precursor of the ICESCR’s Preamble and Article

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44. *Id.*, U.N. Doc. E/CN.4/SR.186, at 21 (1950). The Commission’s resolution (in U.N. Doc. E/1681, at 6 (1950)) was adopted 13-2-0 (UK and Yugoslavia voted against it).

45. During the debates in the Third Committee and the General Assembly over the proposal to instruct the Commission on Human Rights to include economic, social, and cultural rights in the draft Covenant in 1950, most delegations opposing the move did so on practical—not ideological or political—grounds. See especially the statement by Lebanon, *Summary Record of the 317th Meeting of the General Assembly*, UN GAOR, 5<sup>th</sup> Sess., U.N. Doc. A/PV.317, at 560–61 (1950).

46. *Summary Record of the 318th Meeting of the Third Committee of the General Assembly*, U.N. GAOR, 5<sup>th</sup> Sess., U.N. Doc. A/C.3/SR.318, at 287 (1950).

47. Many of which the United States drafted.

48. K&E at 230, n.42, 43.

49. *Summary Report of the 360th Meeting of the Third Committee*, U.N. GAOR, 6<sup>th</sup> Sess., at 78, U.N. Doc. A/C.3/SR.360 (1951).

2.<sup>50</sup> Universal implementation was not impractical, let alone unachievable. It simply required different means.

Roosevelt did not claim that specifying the *nature* of economic, social, and cultural rights was “impossible.” Quite the contrary, because she had a particular conception of their nature, she argued that they posed special challenges for international law. She argued that whereas the civil rights provisions that had already been drafted were worded precisely, and thus were appropriately included in a binding legal instrument, the articles on economic, social, and cultural rights were “couched in more general terms.”<sup>51</sup> This, however, was not the result of some nefarious Western or US plot. Only the Soviet Union had proposed detailed provisions on economic and social rights (often lifted word-for-word from the 1936 Soviet Constitution). In every instance, these draft articles were rejected overwhelmingly as inappropriately detailed or problematic in substance.<sup>52</sup> The fundamental nature of economic and social rights was never questioned by the United States or any other Western delegation—or, for that matter, the substantial majority of non-Western delegations, who also supported this approach.

Furthermore, it was not unreasonable for states seriously contemplating abiding by the provisions of a binding legal instrument—as opposed to those who saw them as merely symbolic—to be concerned about unanticipated costs and unintended consequences of taking on obligations to guarantee vaguely specified rights. This in no way suggests opposition to economic and social rights. The United States clearly and consistently supported enumerating economic and social rights in separate instruments. This reflected the fact that the draft Covenant that the Commission had painstakingly been drafting since 1947 included a circumscribed and limited set of civil rights only—the draft did not even include political rights. At that time, there was wide support for drafting many separate category-specific instruments. For example, the International Labour Organization (ILO) expressed concern that general provisions on work-related rights in a draft Covenant would confuse and complicate more specific ILO conventions and protocols that had been in force for some time.<sup>53</sup>

As for the claim that “procedures used for receiving petitions on civil and political rights were inappropriate for economic and social rights,”<sup>54</sup> in 1951 there was no petition procedure of any kind. The Commission had

50. The negotiations over this article were intense and consumed more time than any other substantive article on economic and social rights. See *Report of the Seventh Session of the Commission on Human Rights, 16 Apr.–19 May 1951*, U.N. ESCOR, Comm’n on Hum. Rts., 7th Sess., *passim* (1951).

51. *Summary Record of the 360th Meeting, supra* note 49, at 78.

52. W&D at 929.

53. 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 126 (A.J. Hobbins ed., 1996).

54. K&E at 230.

proposed creating a “Human Rights Committee” to hear complaints *by one state against another*. The United States advocated that any procedure for individual or group petitions be provided for in an optional instrument—which is what was elaborated later.

We are aware of no evidence that *any* state in 1951 supported an individual petition procedure for economic, social, and cultural rights. In fact, most states even opposed a procedure for state-to-state complaints. Roosevelt *actually* said that “it would be better to help States achieve progress in that respect than to enable complaints to be brought against them. The draft Covenant therefore provided for the submission of reports with regard to economic, social, and cultural rights as the appropriate procedure.”<sup>55</sup>

Kirkup and Evans also fail to note that in this speech Roosevelt proposed simultaneous drafting and opening for signature of two separate covenants to allay many governments’ fear that division of the Covenant might prioritize civil and political rights over economic, social, and cultural rights.<sup>56</sup> Far from opposing economic and social rights, the United States proposed additional drafting work to ensure that those rights would be included in the emerging body of international human rights law on an equal basis.

In support of their assertion that “the historic evidence” shows US hostility to economic and social rights, Kirkup and Evans again resort to misdirection, citing arguments by Mexico and Saudi Arabia.<sup>57</sup> Political posturing by Mexico about “subjugation” is hardly reliable evidence of US views and arguments. And the Saudis in the passage quoted do not even claim that the United States wanted a covenant without economic and social rights. What these or any other countries thought or said about the US position is quite irrelevant. We know what the United States said and did. As we showed in detail in our article, the record shows strong and consistent US support for including economic and social rights in the emerging body of international human rights law.

Kirkup and Evans misleadingly state that a 1951 State Department policy paper warned that the United States should not “reject” economic and social rights “out of hand.”<sup>58</sup> Not only had the United States never suggested doing so, the paper never uses that language. Rather, as we explained in detail in our article,<sup>59</sup> it warned against “[pressing] for the separation of these provisions” from the Covenant. This memo, which was the last in a long series that reflected the flexibility of US diplomacy on this matter, actually recommended three possible courses of action. Most importantly, if there was little or no support for asking the General Assembly to reconsider Resolution

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55. *Summary Record of the 360th meeting, supra* note 49, at 78.

56. *Id.*

57. K&E at 230.

58. K&E at 231.

59. W&D at 932.

421 (V), the paper instructed that “the United States Delegation should not oppose but should vote for the inclusion of economic, social, and cultural provisions in a single Covenant”<sup>60</sup>—as it had done the year before.

Kirkup and Evans claim that the United States was “slow to grasp the political significance of its opposition to economic and social rights,”<sup>61</sup> citing an earlier State Department memorandum in which Deputy Director of the Office of UN Economic and Social Affairs James Green “accused the less developed states of failing to grasp the significance of the Cold War and of expressing themselves in ‘emotional’ terms.”<sup>62</sup> This comment, however, simply reflected Green’s frustration that most of these states’ diplomats were “without instruction” and thus tended to “free-wheel as individual experts and . . . be swayed by the oratory of their colleagues,”<sup>63</sup> undermining carefully crafted diplomatic agreements.

Green did not conclude, as Kirkup and Evans claim he did, that in order to avoid losing its moral authority, the United States, for instrumental reasons, needed to “accept” economic and social rights.<sup>64</sup> He recommended that the United States meet its political objectives by “listening sympathetically to underdeveloped countries and by meeting their requests whenever feasible.”<sup>65</sup> He also recommended that the United States seek accommodation with the United Kingdom and other Western European governments on sometimes significant points of disagreement about the Covenant on Human Rights.<sup>66</sup> Most important, Green counseled the State Department to extend far more flexibility to the US delegation to the United Nations. It should not, for example, try to “peddle” resolutions drafted in Washington but rather work closely and flexibly with other delegations to reach consensus.<sup>67</sup> And writing in his private capacity a few years later, Green made clear that the only problem the United States had with economic and social rights was—as we argued in our article<sup>68</sup>—the need for progressive implementation and their (alleged) lack of justiciability, not their inclusion in the emerging body of international human rights law.<sup>69</sup>

60. U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1951, VOL. II: THE UNITED NATIONS; THE WESTERN HEMISPHERE 753 (1979).

61. K&E at 230.

62. *Id.*

63. U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1950, VOL. II: THE UNITED NATIONS; THE WESTERN HEMISPHERE 578–79 (1976).

64. K&E at 231.

65. U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1950, VOL. II, *supra* note 63, at 580–81.

66. *Id.* at 581. The United States and the United Kingdom disagreed deeply about the precision of the language of the first substantive articles on civil rights. And many European delegations were quite supportive of continuing to include, in some fashion, economic and social rights in the draft Covenant—most notably France.

67. *Id.*

68. W&D at 933–36.

69. JAMES FREDERICK GREEN, THE UNITED STATES AND HUMAN RIGHTS 5–8, 38–40, 45 (1956).

With the exception of the Soviet Union, not a single delegation quarreled with the substance of the articles on economic, social, and cultural rights, nor over the concept of progressive implementation, nor over the proposed reporting procedure (instead of complaints). The fight was over the symbolic “indivisibility” of human rights and the “organic unity” of the Universal Declaration.<sup>70</sup> In other words, the issue was how, not whether, to incorporate economic and social rights in the body of international human rights law. And the reservations of the United States, Britain, and other Western and non-Western states (e.g., India and Lebanon) were about the mechanics of implementation, not the substance or paramount importance of the rights.<sup>71</sup>

Finally, and decisively, Kirkup and Evan simply ignore the central fact, noted clearly in our article,<sup>72</sup> that Western states were largely responsible for drafting the articles on economic and social rights.

## V. THE BRICKER CONTROVERSY

Kirkup and Evans present the “Bricker Amendment” controversy as further evidence that the West rejected international recognition of economic and social rights. Yet in attempting to counter our account with an alternative, Kirkup and Evans muddle the facts and overstate the role that economic and social rights played in this otherwise interesting US political drama.

The amendment, sponsored by Senator John Bricker, would have radically restricted the ability of the president to negotiate treaties and, especially, executive agreements. We glossed over this controversy in our already overly long article because the story has been well told elsewhere.<sup>73</sup> We are happy, however, to revisit it here.

To summarize briefly, Bricker and his allies were concerned with preserving US sovereignty, the primacy of the Constitution in US law, and the rights of the Congress. There was also more than a little not-very-well-hidden racism. In order to appease this politically powerful faction, the Eisenhower administration sent Secretary of State John Foster Dulles before the Senate Judiciary Committee on 6 April 1953. Dulles pledged that the administration would not sign *any* human rights treaty currently under negotiation at the

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70. See Daniel J. Whelan, *Interdependent, Indivisible, and Interrelated Human Rights: A Political and Historical Investigation* 114–26 (2006) (unpublished Ph.D. thesis) (forthcoming University of Pennsylvania Press 2010).

71. *Id.*

72. W&D at 929.

73. Most notably in NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990). See also Glendon Schubert Jr., *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POLITICS 257 (1954).

United Nations (i.e., the Covenants), sign any human rights treaty completed (i.e., the Convention on the Political Rights of Women), or seek ratification of the already-signed Genocide Convention.<sup>74</sup>

In addition to Bricker, Kirkup and Evans also emphasize the views of the American Bar Association (ABA), going back to the San Francisco conference. There was indeed a group<sup>75</sup> within the Association that opposed economic and social rights. In addition, two of the ABA's presidents—William Ransom and Frank Holman—repeatedly editorialized against economic and social rights in the pages of the *ABA Journal*. Kirkup and Evans, however, both overstate the ABA's importance and misrepresent its focus.

Far-right ideologues did claim that a Covenant containing economic and social rights would enhance communist influence in the United States and help to usher in socialism.<sup>76</sup> But at least equally significant was a concern that internationally recognized civil and political human rights could be used to challenge segregation and racial discrimination in the South. For example, Frank Holman wrote in 1949 that Article 16 of the Universal Declaration “means that mixed marriages between the races are allowable without regard to state or national law or policy forbidding such marriages.”<sup>77</sup> Thus the ABA was deeply concerned about the 1948 Genocide Convention, which had nothing to do with economic and social rights, fearing that hate-crimes in the South, such as lynching, might be construed as “genocidal activity,” opening the United States to Nuremberg-like proceedings.

In any case, the ABA was hardly a voice of mainstream America. It was an extremely conservative and racist<sup>78</sup> organization that had vociferously opposed Roosevelt's New Deal policies on just about every front. And, we must repeat, it objected not to economic and social rights in particular but to *any* international human rights obligations for the United States. For example, in a May 1945 editorial about the San Francisco conference, the *ABA Journal*

74. *Dulles Bars Pacts of UN on Rights; Fights Treaty Curb*, N.Y. TIMES, 7 Apr. 1953, at 1, 14. Appease, we believe, is exactly the right term. Prior to becoming Secretary of State, Dulles was on the US delegation to the United Nations when the Universal Declaration and the Covenants were being drafted. The reason he “changed his mind” was tactical/political rather than substantive/ideological.

75. This was the Committee on Peace and Law through United Nations, established in 1944 to handle UN issues that otherwise would have been considered in the Section on International and Comparative Law. See *House of Delegates—Third Session*, A.B.A. J., Apr. 1944, at 203, 237; *New Special Committee on Post-War Organization of the Nations*, A.B.A. J., May 1944, at 274.

76. KAUFMAN, *supra* note 73, at 17.

77. Frank E. Holman, *International Proposals Affecting So-Called Human Rights*, 14 L. & CONTEMP. PROBS. 479, 483 (1949).

78. From January to October 1944, the front matter of the *ABA Journal* featured a small column “There is . . . [a] time to laugh” (with the reference to Ecclesiastes 3:4). Each issue included four or five short jokes. The issues published in January, April, May, June, September, and October included jokes with racist and/or ethnic overtones.

expressed deep alarm at the “radical and collectivist proposals . . . to be grouped in categories of ‘human rights’” that were being “pushed” at the conference.<sup>79</sup> The groups doing the “pushing,” however, were American!<sup>80</sup> Indeed, the ABA represented a small and rather insignificant minority on these matters at San Francisco and in the following years.

As documented by Kirkup and Evans, the reactions of the far-right led the United States to reject all human rights treaties, yet this does not serve their argument. Had the real target been economic and social rights, there was no reason to also reject the conventions on genocide and political rights of women. That these were targeted along with both Covenants clearly indicates that race and sovereignty (and Congressional rights), not economic and social rights, were the central concerns. Thus, the position of the American Bar Association, Senator Bricker, and his supporters ironically echoed the Soviet Union in its paranoid concern over the erosion of national sovereignty—especially, in the case of the United States, with respect to issues of race.

Finally, consider one further bit of alleged evidence. Kirkup and Evans cite a meeting of the US delegation at San Francisco that purportedly reveals “that many of its members were increasingly concerned that the inclusion of economic and social rights in any universally accepted list of human rights would create problems for developing US ambitions to create global markets and would be a potential challenge to the Constitution.”<sup>81</sup> We, however, can find no such concerns expressed in the cited source.<sup>82</sup>

The delegation was discussing a “consultants’ report” prepared by a number of US civic organizations invited to attend the San Francisco conference. Many of these groups were strong advocates of including human rights provisions within the text of or as an annex to the Charter. Although the Dumbarton Oaks draft of the UN Charter omitted nearly all references to human rights, human rights provisions had been included in the original State Department draft.<sup>83</sup> By the San Francisco conference, the United States was again open to including references to human rights in the purposes of the Charter.

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79. *Progress in the San Francisco Conference*, 31 A.B.A. J. 279, 280 (1945).

80. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* 122–24 (2003).

81. K&E at 228.

82. In note 32, Kirkup and Evans cite UNITED STATES DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES 1945, VOL. I, GENERAL: THE UNITED NATIONS* 532 (1967). We can find nothing that fits this description. We then reviewed all fifteen entries indexed under human rights in this Volume but still found no support for their account.

83. As we point out in our article, W&D at 914, the original “Staff Charter” prepared by the US State Department prior to Dumbarton Oaks included a “Bill of Rights” that included economic and social rights to be appended to the Charter.

During this meeting, Senator Arthur Vandenberg commented (without taking a position) that the Soviets were proposing to insert references to the right to work and to education and a general non-discrimination clause into Chapter I.<sup>84</sup> The principal concern was not with these rights in particular but with the enumeration of any particular rights. Rather than oppose enumeration, though, the delegation was willing to consider balancing the Soviet proposal by enumerating various civil and political rights as well.<sup>85</sup> When US Secretary of State Edward Stettinius later met with Soviet Foreign Minister Vyacheslav Molotov, he noted that enumerating specific human rights in the Charter might lead to a “very long list.” Molotov eventually agreed to drop the Soviet proposal<sup>86</sup> and the Preamble and Article 1 of the Charter mention no particular rights at all. Again, what is presented as Western opposition to economic and social rights proves to be no such thing.

## VI. CONCLUSION

Readers will certainly note that we have not addressed any of Kirkup and Evans’ points that take the story beyond 1953, our *terminus ad quem*. To a certain extent, we do not disagree with their claims. We will, however, point out that they have little to do with the development of the global human rights regime as they pertain to human rights *per se*. The fact is that the period of intense debates about human rights that mark the formation of the global human rights regime that we know today went into a long period of latency from 1953 until the mid-1980s. The reasons for this are many, but they are due largely to the changing nature of UN politics and especially the de-prioritization of the Covenants in the Third Committee of the UN General Assembly during the 1950s and 1960s. The Third Committee—whose composition largely favored post-colonial states—increasingly turned its attention to questions such as ending colonialism and apartheid. The draft human rights covenants languished there for twelve years, until 1966. Even after their adoption by the General Assembly, the covenants themselves were barely addressed at the first World Conference on Human Rights at Teheran in 1968.<sup>87</sup> The covenants did not gather the requisite signatures to come into force until 1976. It would be another ten years before the reporting procedures and work of the oversight committees began to bear any significant fruit.

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84. U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1945, *supra* note 82, at 533.

85. *Id.* at 546–47.

86. *Id.* at 552.

87. See Whelan, *supra* 70, at 204–18.

The issues of concern to Kirkup and Evans during this period found their expression in the work of the UN Second Committee—which ultimately attempted to address questions surrounding global economic justice through the initiatives adopted by the sixth and seventh Special Sessions of the General Assembly concerning the establishment of the “New International Economic Order.” The Third Committee only *later* attempted to seize on this movement as a human rights concern, as evidenced by General Assembly Resolution 32/130, adopted in 1977.

Our article was about the foundations of the global human rights regime. Our argument was directed at the many scholars who, like Kirkup and Evans in their reply, anachronistically cast a politically partisan net based on reading of debates from the 1970s and 1980s into the past, and contend that they “know” that the West in general and the United States in particular must have been opposed to economic and social rights during the creation of the global human rights regime. By ignoring the great mass of evidence to the contrary presented in our article, and instead torturing a few scattered passages, they reproduce the received wisdom of the myth of Western opposition. The empirical evidence, however, that forms the basis of historical inquiries such as this one, strongly supports our contention that the West, led by the United States and the United Kingdom, far from opposing economic and social rights, was the driving force behind their incorporation into the global human rights regime.