

The Reality of Western Support for Economic and Social Rights: A Reply to Susan L. Kang

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ABSTRACT

Susan Kang's reply to our article on the West and economic and social rights accepts our central claim that the widespread view of Western opposition cannot be supported by the evidence. She subtly and usefully, however, shifts the discussion to a secondary claim in our article, namely, Western support for human rights. Kang argues that Western states have been ambivalent about economic and social rights and that the United States has been fundamentally reluctant to accept them. Our response provides substantial evidence of widespread Western support for economic and social rights and critically examines her alleged evidence of reluctance.

We are pleased that Susan L. Kang has "join[ed] the conversation"¹ about the West and economic and social rights that we began in our 2007 article.² Her response is thoughtful, sophisticated, and wide-ranging. We are grateful for the opportunity to reply to her criticisms and to develop further some of our arguments.

Our principal motivation in writing the original article was frustration at the widespread belief among human rights scholars and activists that the West was hostile to economic and social rights during and after World War

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1. Susan Kang, *The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly*, 31 *HUM. RTS. Q.* 1006 (2009).
2. 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.* 910 (2007).

II. We are gratified that Kang agrees, in light of the evidence presented in our article and in our reply to Alex Kirkup and Tony Evans,³ that this myth of Western opposition is not tenable.⁴

Kang, however, argues that we were too quick to jump in the other direction.⁵ Her focus thus is on our subsidiary argument that economic and social rights have been central to the Western approach to human rights since the end of World War II. We would describe this as the thesis of Western support.⁶ Kang suggests instead that the Western approach has been characterized by reluctance and, especially in the United States, resistance to economic and social rights.

In this reply, we further elaborate and defend the thesis of Western support and examine critically Kang's evidence of reluctance and resistance. Like Kang, we do so in a spirit of "friendly inquiry"⁷—which, like her, we understand to be largely a matter of vigorous intellectual debate.

I. EVIDENCE OF WESTERN SUPPORT

Kang rightly notes⁸ that our article was thin on evidence of Western support. She also complains, with some justice, that we focus too heavily on the interests and actions of state leaders and elites.⁹ We were constrained, however, by space and by the fact that the Western support thesis was, as Kang acknowledges, a "secondary claim."¹⁰ We are grateful to have the opportunity here to present additional supporting evidence.

3. Daniel J. Whelan & Jack Donnelly, *Yes, a Myth: A Reply to Kirkup and Evans*, 31 *HUM. RTS. Q.* 239 (2009).

4. Kang, *supra* note 1, at 1007, 1011, 1028.

5. *Id.* at 1029.

6. We did not, however, argue that the West in general or the US and UK in particular "had a greater 'commitment' than other states" or that "other states were not as committed to economic and social rights." Kang, *supra* note 1, at 1009. Rather, we simply said that although "other states certainly supported economic and social rights" none "did so with more genuine commitment or greater actual impact." Whelan & Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime*, *supra* note 2, at 911. As Kang quotes this second passage immediately before her misrepresentation of our view, we are perplexed. As for the concerns she goes on to express about the relationship between commitment and impact, Kang, *supra* note 1, at 1009, we take the opportunity to state explicitly what seemed to us obviously implicit in our initial presentation. US and British impact depended principally on their political power resources, although the substantive attractions of the views they expressed were also important to their impact and the nature of their commitment motivated the use of their power resources on behalf of these rights.

7. Kang, *supra* note 1, at 1029.

8. *Id.* at 1007, 1009, 1010, 1011.

9. *Id.* at 1010–11.

10. *Id.* at 1007.

One standard measure of support is acceptance of international legal obligations. Let us begin, therefore, with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).¹¹ Defining “the West” to include Australia, Austria, Belgium, Canada, Denmark, Germany, Finland, France, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States, twenty-one of these twenty-two countries are parties to both Covenants (the United States is party only to the ICCPR). Nineteen of those twenty-one states became parties to both on the same day (Australia and Greece became parties to the ICESCR five and twelve years, respectively, before the ICCPR). At the broadest normative level, then, the West has expressed not only unusually strong support for economic and social rights—a 95 percent ratification rate compared to 80 percent rate for other countries—but also equal support for civil and political rights and economic and social rights, which are seen as interdependent and indivisible parts of a larger whole.

Words, however, are (relatively) cheap. Domestic action is what really matters. The best single measure of such action is money; the willingness of governments and societies to put their money where their mouths are.

The best series of social spending data, from the Organization for Economic Cooperation and Development (OECD), goes back only to 1980. Tables 1 and 2 show social expenditure—principally old age, survivors, disability, health, family, labor market, unemployment, and housing benefits—as a percentage of, respectively, GDP and total government expenditure.

On average, social spending as a percentage of GDP increased by more than a fifth between 1980 and 2005, rising from 18 percent to 22 percent (although the 2005 figure of 22.1 percent is slightly below the 1995 figure of 22.8 percent). As a percentage of government expenditures, social spending rose by thirty percent, from 39 percent in 1980 to 51 percent in 2005, with an unbroken upwards trend. In other words, the typical Western government today spends about half of its resources and a fifth of the nation’s domestic economic output on social insurance.

Kang complains that we “do not clarify why welfare states’ provisions should be understood as evidence of universal rights.”¹² It seemed too obvious to us to bother to note that the vast bulk of this social spending is directed at

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11. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).
 12. Kang, *supra* note 1, at 1019.

Table 1
Social Spending (Public and Mandatory Private)
(as percent of GDP)

	<i>Rank (1980, 2005) n=21</i>	<i>1980</i>	<i>1985</i>	<i>1990</i>	<i>1995</i>	<i>2000</i>	<i>2005</i>
Australia	19, 18	10.6	12.5	13.6	18.4	19.7	18.2
Austria	5, 3	23.9	25.0	25.0	27.6	27.3	28.1
Belgium	6, 8	23.6	26.1	24.9	26.3	25.3	26.4
Canada	17, 20	13.7	17.0	18.1	18.9	16.5	16.5
Denmark	3, 6	24.8	23.2	25.6	29.4	25.9	27.1
Finland	10, 9	18.0	22.5	24.2	30.9	24.3	26.1
France	7, 2	20.8	26.0	25.3	28.8	28.1	29.5
Germany	4, 4	24.7	24.7	23.9	28.0	27.5	27.9
Greece	21, 15	10.2	16.0	16.5	17.3	19.2	20.5
Iceland	..., 17	...	...	15.1	16.5	16.7	18.4
Ireland	14, 19	16.7	21.3	14.9	15.7	13.6	16.7
Italy	9, 7	18.8	21.7	23.4	23.6	25.0	26.5
Luxembourg	8, 10	20.6	20.2	19.1	20.8	19.7	23.4
Netherlands	2, 13	25.2	25.7	26.0	24.5	20.6	21.6
New Zealand	12, 16	17.2	17.9	21.8	18.9	19.4	18.5
Norway	12, 11	17.1	18.1	23.4	24.2	22.6	22.9
Portugal	20, ...	10.5	10.7	13.1	17.3	20.0	...
Spain	15, 14	15.5	17.8	19.9	21.4	20.3	21.2
Sweden	1, 1	27.1	29.4	30.2	32.5	29.1	29.8
Switzerland	16, 5	15.4	16.7	17.7	23.8	25.0	27.6
United Kingdom	13, 12	16.9	20.0	17.3	20.8	19.9	22.1
United States	18, 21	13.5	13.5	13.9	15.8	14.9	16.3
Average		18.3	20.3	20.6	22.8	21.8	22.1

Source: OECD, available at <http://stats.oecd.org/WBOS/Index.aspx?DataSetCode=CSP2009>

implementing economic and social rights. The great majority goes towards realizing Article 25(1) of the Universal Declaration:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹³

(These provisions are further elaborated in Articles 9, 11, and 12 of the ICESCR.) Unemployment benefits and labor market programs seek to realize Article 23(1) of the Declaration and Articles 6 and 7 of the Covenant. Also, as this data does not include spending on education (Article 26 of the Declara-

13. Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art. 25, U.N. Doc. A/RES/3/217A (1948).

Table 2
Social Spending (Public and Mandatory Private)
(as percent of total government expenditure)

	<i>Rank (1980, 2005) n=18</i>	<i>1980</i>	<i>1985</i>	<i>1990</i>	<i>1995</i>	<i>2000</i>	<i>2005</i>
Australia	14, 10	31.4	31.7	37.2	49.1	54.5	52.3
Austria	1, 4	48.0	46.9	48.6	49.3	53.1	56.5
Belgium	8, 13	42.2	44.7	47.6	50.5	51.4	50.7
Canada	13, 3	32.7	35.3	36.5	39.4	39.9	56.8
Denmark	2, 12	46.2	41.7	45.8	49.7	48.3	51.5
Finland	6, 11	45.0	48.5	50.4	50.2	50.3	51.7
France	5, 6	45.4	50.2	51.2	52.9	54.5	55.0
Germany	17, 2	24.7	24.7	23.9	51.2	60.9	59.6
Greece	12, 17	35.0	38.9	36.7	37.9	41.0	47.6
Iceland	...	...	...	36.5	38.6	39.8	43.4
Ireland	15, 15	30.7	39.6	34.9	38.2	43.1	49.4
Italy	3, 7	46.0	43.6	44.2	45.0	54.1	54.9
Luxembourg	...	...	...	50.7	52.3	52.5	56.0
Netherlands	18, 16	5.7	44.9	47.4	43.4	46.5	47.8
New Zealand	...	...	...	40.7	45.6	49.5	46.4
Norway	10, 8	37.1	41.6	44.0	47.5	53.4	54.4
Portugal	16, 14	30.5	27.1	32.4	39.9	46.4	50.5*
Spain	4, 5	45.9	41.7	46.6	48.2	51.9	55.2
Sweden	7, 9	42.7	45.8	49.8	49.9	52.3	54.0
Switzerland	...	...	...	58.3	67.9	71.1	78.1
United Kingdom	11, 1	36.4	43.2	41.1	47.1	49.7	66.7
United States	9, 18	40.1	36.8	37.7	42.6	43.5	44.5
Average		39.2	40.4	42.8	47.1	50.4	51.5

* = 2004 data

Source: OECD, available at <http://stats.oecd.org/WBOS/Index.aspx?DataSetCode=CSP2009>

tion and Article 13 of the ICESCR) it substantially underestimates spending on economic and social rights, typically by about 6 percent of GDP.¹⁴

This data admittedly measures effort rather than outcomes. There are often considerable inefficiencies in transforming social spending into effective enjoyment of the targeted rights. Quality and coverage also are not addressed in social spending data. Neither are values such as equality and autonomy. In addition, rising overall costs may force retrenchments in particular areas, a particularly serious issue as the ratio of workers to non-workers declines.

14. For sixteen Western countries (Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, UK, and US), public expenditure on education rises from, on average, 2.1 percent of GDP in 1937 to 3.5 percent in 1960, 5.8 percent in 1980, and 6.1 percent in 1993–1994. VITO TANZI & LUDGER SCHUKNECHT, PUBLIC SPENDING IN THE 20TH CENTURY: A GLOBAL PERSPECTIVE 35 tbl.II.5 (2000).

Nonetheless, social spending is the single best general measure of societal and governmental effort on behalf of economic and social rights. And that evidence shows not, as Kang claims, an “ambiguous and unsettled relationship to economic and social rights,”¹⁵ but strong, consistent, and increasing Western support for economic and social rights—at least over the past three decades.

Data for the decades immediately following World War II are less consistent and less comparable. The general picture, however, is of steady growth in the range, depth, and coverage of welfare programs during the period that is often referred to, with good reason, as the “golden age” of the Western welfare state. Although variations in definitions and data do not permit comparisons across the following sets of figures, they paint a clear and consistent picture of strong and steadily growing Western support.

For fourteen Western countries,¹⁶ social transfers as a percentage of GDP on average more than doubled from 1950 to 1975, from 7.2 percent to 15.3 percent. During the same period, public expenditures as a percentage of GDP increased by almost sixty percent, from an average of 27.1 percent to 43.1 percent. (Most, although not all, of this increase is due to rising social spending.)

For thirteen Western European countries,¹⁷ social security expenditure as a percent of GDP increased from 10 percent in 1950 to 11 percent in 1960 to 16 percent in 1970. For seventeen Western countries,¹⁸ social welfare spending as a percent of GDP rose, on average, from 11.2 percent in 1960 to 15.4 percent in 1973 to 21.5 percent in 1982.

For sixteen Western countries,¹⁹ public expenditure on health care, on average, rose from 0.4 percent of GDP in 1930 to 2.4 percent in 1960, and 5.8 percent in 1980. Public expenditure on pensions rose from, on

15. Kang, *supra* note 1, at 1029.

16. Computed from Jurgen Kohl, *Trends and Problems in Postwar Public Expenditure Development in Western Europe and North America*, in *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* 306, 310 tbl.9.1, 317 tbl.9.4 (Peter Flora & Arnold J. Heidenheimer eds., 1981). The countries included are Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Sweden, Switzerland, UK, and US.

17. Computed from I PETER FLORA ET AL., *STATE, ECONOMY, AND SOCIETY IN WESTERN EUROPE 1815–1975: A DATA HANDBOOK IN TWO VOLUMES* 456 (1983). The countries included are Austria, Belgium, Germany, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and UK.

18. Computed from Alexander Hicks & Joy Misra, *Political Resources and the Growth of Welfare in Affluent Capitalist Democracies, 1960–1982*, 99 *AM. J. SOC.* 668, 686 tbl.2 (1993). The countries included are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Sweden, Switzerland, UK, and US.

19. Computed from TANZI & SCHUKNECHT, *supra* note 14, at 38 tbl.II.7, 42 tbl.II.9. The countries included are Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, UK, and US.

average, 1.9 percent of GDP in 1937 to 4.5 percent in 1960 to 8.4 percent in 1980.

Coverage is no less important than expenditure. "The period from 1945 to 1960 stands out as the phase of major extension" in the coverage of Western welfare states.²⁰ For example, Table 3 shows that pension coverage in fourteen Western countries rises from 31 percent in 1925–1935 to 75 percent in 1945–1950 to 97 percent in 1975. Health coverage rates increase from 20 percent to 69 percent to 92 percent.

We are also interested in the impact of social welfare programs. The earnings of workers is one very rough-but-ready indicator in industrial societies. Table 4 shows employee compensation as a percentage of national income for eleven countries from 1950 to 1970. It shows that in every country, labor's share increased—by 18 percent on average.

Increasing equality, and in particular reducing degrading inequalities, is an important aim of most social welfare systems. Theoretical, data, and measurement issues abound. However, Goodin et al. provide some useful measures for Germany, the Netherlands, and the United States, which represent the three principal types of Western welfare regimes.²¹ Although covering only the period from 1985 to 1994, the data in Table 5 is extremely suggestive.²²

This data suggests—as Goodin et al. argue in some detail—that the Netherlands is modestly more egalitarian than Germany and that continental European welfare regimes are substantially more egalitarian than their English-speaking cousins. In all three cases, though, state intervention significantly decreases inequality—by more than a third in the European cases and by a sixth in the United States—as measured by comparing the

20. 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 16, at 57.

21. ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* (1999). A three-fold division has been standard in the welfare-state literature since GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990). See also EVELYNE HUBER & JOHN D. STEPHENS, *DEVELOPMENT AND CRISIS OF THE WELFARE STATE: PARTIES AND POLICIES IN GLOBAL MARKETS* (2001), who add a fourth category for Australia and New Zealand.

22. Pre- and post-government Gini data for Germany from 1973 to 1993 (Richard Hauser & Irene Becker, *Changes in the Distribution of Pre-Government and Post-Government Income in Germany, 1973–1993*, in *THE PERSONAL DISTRIBUTION OF INCOME IN AN INTERNATIONAL PERSPECTIVE* 72, 79 tbl.2 (Richard Hauser & Irene Becker eds., 2000)) and from 1985 to 2005 (Patrick Sachweh, *The "Moral Economy" of Social Inequality: A Study of Popular Views about Poverty and Wealth* 22 fig.1a (Paper presented at the RC 28 conference, Work, Poverty and Inequality in the 21st Century, 6–9 Aug. 2008)) paint a similar picture. The same is true for the United States across the 1980s and 1990s. Nathan J. Kelly, *Does Politics Really Matter?: Policy and Government's Equalizing Influence in the United States*, 32 AM. POL. RES. 264, 274 fig.2 (2004); THOMAS L. HUNGERFORD, *INCOME INEQUALITY, INCOME MOBILITY, AND ECONOMIC POLICY: U.S. TRENDS IN THE 1980S AND 1990S*, at 4 fig.1 (2008), available at http://assets.opencrs.com/rpts/RL34434_20080404.pdf.

Table 3
Social Insurance Coverage
 (covered workers as a percentage of the labor force)

	<i>Pensions</i>			<i>Health Care</i>		
	1925 [1935]	1945 [1950]	1975	1925 [1935]	1945 [1950]	1975
Austria	[36]		81	[49]		88
Australia	5	[51]	81	47	[56]	88
Belgium	29	44	100		46	96
Denmark		100	100		100	100
Finland		100	100		100	100
France	14	52	98		52	94
Germany	66	[70]	98	57	[57]	72
Ireland	[44]		85	[38]		71
Italy	38	39	94	[22]	44	91
Netherlands	53	66	100		42	74
Norway		100		54	90	100
Sweden	100	100	100			100
Switzerland			100	[69]		100
UK	[79]	98	100	[82]	98	100
Average	31	75	95	20	69	91

Source: MAURIZIO FERRERA, *THE BOUNDARIES OF WELFARE: EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION* (2005); VITO TANZI & LUDGER SCHUKNECHT, *PUBLIC SPENDING IN THE 20TH CENTURY: A GLOBAL PERSPECTIVE* 35 tbl. II.5 (2000).

Table 4
Employee Compensation
 (as a percentage of national income)

	1950	1955	1960	1965	1970
Austria	55	59	59	63	64
Belgium		53	57	61	62
Denmark	53	58	58	63	67
Finland	58	56	57	62	64
Germany	58	59	60	65	67
Italy	49	51	52	57	59
Netherlands	55	54	57	64	69
Norway	56	58	63	63	67
Sweden	51	66	66	72	76
Switzerland	61	60	61	64	63
UK	73	73	73	76	80
Average	56.9	58.8	60.3	64.5	67.1

Source: Franz Kraus, *The Historical Development of Income Inequality in Western Europe and the United States*, in *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* 87, 206 tbl. 6.3 (Peter Flora & Arnold J. Heidenheimer eds., 1981).

Table 5
Measures of Welfare Equality

	<i>Germany</i>	<i>Netherlands</i>	<i>US</i>
Pre-government Gini			
1985–1989	0.390	0.349	0.396
1990–1994	0.395	0.360	0.415
Post-government Gini [†]			
1985–1989	0.235	0.204	0.328
1990–1994	0.250	0.231	0.354
Post-government 90/10 ratio*			
1985–1989	2.9	2.4	4.8
1990–1994	3.1	2.7	5.2
% receiving transfer payments			
1985–1989	77.6	95.0	47.7
1990–1994	74.2	92.9	43.4
Pension coverage (% of 65+ heads of household)			
1985–1994	96.9	100.0	95.2

[†] Income plus transfers minus taxes

* Income of top decile divided by income of bottom decile

Source: ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* 292 tbl.A3 (1999).

Gini coefficient of market incomes (“pre-government”) with net incomes after transfer payments and taxes.²³

Contrary to Kang’s suggestions that elite statements of support were not translated into practice,²⁴ the vast body of data of which the above examples are representative indicates strong active Western support for economic and social rights. As measured in government budget outlays, the *primary* business of Western states is promoting economic and social rights. It simply is absurd to suggest, as Kang does, that economic and social rights are “marginalized” in Western practice.²⁵

We admit that this evidence does not show “domestic normative internalization” of international legal norms.²⁶ But it was never our purpose to

23. For purposes of comparison, the US pre-government coefficient of over 0.4 is not only at the top of the West but higher than some (generally poor) non-Western countries, such as Bangladesh, Egypt, and Moldova. It is lower, however, than most Latin American countries (including Costa Rica) and than several Asian and African countries, including China, Malaysia, Nepal, Mozambique, Swaziland, and Zambia. See List of Countries by Income, available at http://en.wikipedia.org/wiki/List_of_countries_by_income_equality.

24. Kang, *supra* note 1, at 1010–11.

25. *Id.* at 1008.

26. *Id.* at 1002. *Cf. id.* at 1009. Kang contends that “the process by which international norms are spread and institutionalized is more complicated than the authors’ portrayal.” *Id.* at 1010. In fact, though, we offered no account at all of the spread and institutionalization of international norms, ending our story with their formulation. The ensuing discussion of norm diffusion thus is, at best, beside the point.

suggest that Western practice was driven by international norms.²⁷ Not only was this logically impossible in the period discussed in our article—that is, while these norms were being developed—but we explicitly argued that causation ran principally in the opposite direction, from Western values and practices to international norms. Western governments and publics, we argued, supported including economic and social rights in the emerging global human rights regime as an international extension of and support for the domestic political work they had undertaken, were undertaking, and planned to undertake to expand and deepen their welfare states.²⁸ About this, there really can be no doubt.

II. EVIDENCE OF WESTERN RELUCTANCE OR RESISTANCE

Kang is likely to respond that this extensive Western effort was fundamentally reluctant and achieved only in the face of considerable resistance. In liberal democracies, however, massive, sustained, and increasing expenditures over several decades can only represent a rather broad and deep national consensus.

There has been, and continues to be, controversy about the details of measures to implement economic and social rights. Economic and social rights do “remain controversial” in some Western countries.²⁹ But the same is true of any important issue of public concern, including civil and political rights. Consider privacy, torture, habeas corpus, the death penalty, and the treatment of juvenile offenders in the United States.³⁰

If Kang’s point is that efforts to implement economic and social rights have depended centrally on civil society action, often in the face of initial

27. We did “not explain how the existence of the Western postwar welfare state . . . translates into broader support for international economic and social human rights,” Kang, *supra* note 1, at 1019, because we had no intention to do so, beyond arguing that these domestic commitments shaped Western participation in the early development of the global human rights regime.

28. Whelan & Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime*, *supra* note 2, at 919–27.

29. Kang, *supra* note 1, at 1008. *Cf. id.* at 1015, 1021.

30. As is common in much of the literature on international norms, Kang misunderstands the nature of norms having a “‘taken for granted’ quality,” Kang, *supra* note 1, at 28. That something is taken for granted does not mean that it is uncontested; if that were the standard, no norms would be taken for granted. It does not even mean that those who take it for granted never question it. It simply means that on a day to day basis it is given little thought; is accepted *prima facie*. But crisis and criticism from a mobilized minority are among the standard triggers for examination of taken for granted beliefs—which still remain taken for granted at a broad societal level. The distinction between personal and societal internalization, and thus the difference between individual beliefs and the societal status of a norm, is usefully developed by Ryder McKeown, *Norm Regress: US Revisionism and the Slow Death of the Torture Norm*, 23 INT’L REL. 5, 9 (2009).

elite and government reluctance and resistance, that is of course true. But this is equally true of civil and political rights. Our argument was that Western states—the governments that rule them and the publics that select those governments—have strongly and consistently supported economic and social rights, although imperfectly and with varying degrees of enthusiasm. Kang's evidence does not suggest otherwise.

She complains, with some justice, that in our article we did “not provide a clear framework for understanding and evaluating a state's support for economic and social rights.”³¹ In the preceding section we have tried to indicate the type of evidence that is relevant and to begin to marshal it. Kang, though, does not even hint at what such a framework would look like.³² In fact, she presents no evidence at all about the general *pattern* of either Western or Anglo-American³³ practice. Instead she offers isolated examples that neither individually nor in their cumulative impact show substantial reluctance or resistance by Western states or societies to economic and social rights. She also completely ignores the vast body of rights-protective Western practice.

Most of Kang's evidence is at best peripheral. Opposition to particular rights, especially narrowly formulated rights, does not show opposition to economic and social rights unless the aggregate of particulars adds up to a general pattern of opposition across a wide range of economic and social rights. Interpretations of rights that are narrower than other actual or possible interpretations are not evidence of reluctance, so long as those interpretations represent plausible conceptions of that right.³⁴ The choice of mechanisms of implementation that are less robust or efficient than other actual or possible mechanisms is not evidence of resistance, so long as those mechanisms represent a reasonable level of effort that can be seen as plausibly directed toward progressive implementation.

For example, Kang notes that “[t]he US government refuses to ratify many of the basic international labor conventions,” particularly ILO Convention

31. Kang, *supra* note 1, at 1009.

32. Likewise, although she criticizes us for failing to provide “information about domestic public opinion or support for economic and social rights,” Kang, *supra* note 1, at 1010, she presents no data on public opinion at all and, at best, extremely limited, arbitrarily selected information on arbitrarily selected domestic actors.

33. Kang's focus on the US and UK follows our lead, which was based on the fact that they were the leading postwar powers, a central fact in considering the development of the global human rights regime, and that because they have a somewhat less intense commitment to economic and social rights than many other Western states they are the “hard cases” for our argument.

34. This was evident during the drafting of the enumerated articles on economic and social rights in 1951. Their general, broad wording was meant to afford to states wide latitude in interpretation and implementation commensurate with resource availability and differing levels of economic and social development. The highly detailed and lengthy draft articles on proposed by the Soviet Union were consistently rejected by large majorities throughout the drafting period, from 1950 to 1954.

87 (Freedom of Association and Protection of the Right to Organise) and Convention 98 (Right to Organise and Collective Bargaining).³⁵ Of our list of twenty-two Western countries, however, only New Zealand stands with the United States on Convention 87. In the case of Convention 98, only Canada joins the United States as a non-party. So, at best, Kang has picked an example where the United States is an extreme outlier. And even this tells us nothing about US behavior.

Kang discusses only one concrete postwar American or British action on labor rights, passage of the 1947 Taft-Hartley Act. The Act, Kang notes,

limited secondary boycotts, forced cooling off periods during strikes, allowed for “right to work” (or right to not join a union) laws, and also forced leaders to sign anti-Communist affidavits to have access to collective bargaining rights. Taft-Hartley also gave employers “Free Speech” rights, allowing employers to advocate against unionization of employees.³⁶

Secondary boycotts, however, are not mentioned in the Universal Declaration, the ICESCR, Convention 87, or Convention 98. Cooling off periods likewise are secondary, highly specific practices that tell us little if anything about support for or resistance to the underlying rights. Guaranteeing workers the option not to join a trade union is, we agree, bad public policy. It does, however, represent a plausible interpretation of the right of freedom of association. To many Americans, allowing employers to advocate against unionization appears as a necessary, if perhaps unfortunate, matter of consistency with respect to free speech. And anti-communist oaths, which are ordinarily thought of as an infringement of civil and political rights, were applied in a great variety of other contexts as well. In other words, nothing here shows resistance, or even reluctance, with respect to key labor rights.

Consider also Kang’s description of Truman’s goals: “a peacetime commitment to full employment, a national health care service, stronger unemployment provisions, better housing, maintenance of price controls, and higher minimum wages.”³⁷ “Stronger,” “better,” and “higher” indicate that what was at stake was not recognition of rights—they were already recognized and being implemented—but the form, extent, or pace of implementation.

National health insurance was indeed rejected, tragically. But the United States does provide publicly funded health care for the poor and the elderly and subsidizes private provision for others through the tax code. This profoundly ineffective implementation of the right to health represents a (foolhardy, inefficient, and class-biased) over-reliance on the mechanism of market provision, not a rejection of the right or even of ultimate state

35. Kang, *supra* note 1, at 1016.

36. *Id.*

37. *Id.* at 1021.

responsibility. In any case, on health care the United States is the bizarre outlier in the Western world.

As for the commitment to full employment, it was indeed deleted from the Employment Act of 1946. But without arguing that US efforts are adequate, it must be noted that the United States has extensive programs to create employment and to compensate those who cannot find work. Furthermore, the United States arguably does at least as well as most European states in minimizing joblessness.

Kang claims that we “do not cite the wealth of welfare state literature on the United States, which agrees that the United States does not include social and economic provisions within its construction of rights.”³⁸ The attached footnote actually cites only one major work, Evelyne Huber and John Stephens’ *Development and Crisis of the Welfare State*. And the page cited provides no evidence in support of Kang’s claim.

Huber and Stephens do (accurately) describe the liberal welfare state, of which the United States is a leading exemplar, as a “residual, partial, needs-based, service-poor welfare state.”³⁹ But this clearly concerns *how* rights are interpreted and implemented, not *whether* they are recognized or implemented. Furthermore, of the seventeen Western welfare states in their study, only four fall into this category. This is the same number that fall into the category of “universalistic, comprehensive, citizenship-based, income security, gender-egalitarian, labor-mobilizing welfare state[s].”⁴⁰ If we are actually interested in assessing Western (not just US) practice, we cannot focus solely on the bottom end of the distribution. In any case, as we saw above, even these service-poor welfare states devote massive resources and governmental effort to implementing economic and social rights.

Kang’s strongest evidence is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which famously, in President Clinton’s words, aimed to “end welfare as we know it.” We agree that the Act has had significant negative consequences, both intended and unintended, for welfare rights in the United States. But welfare rights simply were not eliminated. Rather, they are now implemented with much greater reliance on market mechanisms and a much more limited governmental “safety net”—and thus substantially less effectively.

Kang’s own comment on these reforms is revealing: they “altered the social contract of the New Deal welfare state.”⁴¹ Finally, in passing, she acknowledges that there has indeed long been an economic and social rights-protective social contract in the United States—although characteristi-

38. *Id.*

39. HUBER & STEPHENS, *supra* note 21, at 87.

40. *Id.*

41. Kang, *supra* note 1, at 1022.

cally, she ignores its expansion (e.g. Medicare) in favor of a rare and atypical example of substantial retrenchment. Even then Kang cannot avoid fatal hyperbole. It simply is not true this “ended any existing national social and economic rights for the most vulnerable members of American society.”⁴² Poor Americans continue to enjoy rights to education, health care (Medicare or Medicaid), labor market assistance, and many other economic and social rights as well.

Beyond this one very limited example, Kang fails to provide *any* evidence of “the paucity of welfare rights in the United States.”⁴³ Serious comparison with most other Western states would indeed show the United States to be at or near the bottom on many measures of social welfare effort—this is suggested by Tables 1 and 2—and performance. But such a comparison would only underscore the fact that the non-English-speaking West provides the “gold standard” of economic and social rights performance.

The other typical problem with Kang’s “evidence” of Western reluctance or resistance to economic and social rights is that it can be readily paralleled with comparable evidence of “resistance” to civil and political rights. Consistency thus would force us to conclude that the West is equally resistant to civil and political rights. Although such an argument might be worth exploring in another context, our focus was and remains on those who argue that the West endorses civil and political rights, with considerable enthusiasm, but opposes or resists economic and social rights.

For example, Kang writes that “when economic and social rights were initially articulated in the nineteenth century, Western governments opposed these claims. . . . In fact, when workers made these rights claims, they were actively repressed by economic and political elites.”⁴⁴ This is equally true of civil and political rights. “[B]y the end of World War II, politicians sought to curtail these [economic and social] rights, as fears over the security threat of the Soviet Union . . . began to mount.”⁴⁵ But civil and political rights were hit at least as hard; McCarthyism had almost nothing to do with economic and social rights. And if welfare “reform” shows US resistance to economic and social rights, the Patriot Act shows fundamental US resistance to civil and political rights.

III. DIVIDING THE COVENANTS

In the remainder of this reply, we will briefly address three additional issues to which Kang devotes a full section of her response. We begin here with

42. *Id.*

43. *Id.* at 1019.

44. *Id.* at 1015.

45. *Id.* at 1016.

the decision to divide the Covenants, followed by discussions of the Council of Europe system and Western foreign policy.

The documentary evidence on the division of the International Covenant on Human Rights into the ICCPR and the ICESCR, which we discussed extensively in our original article, tells a complicated and nuanced story. Kang accepts our critique of crude interpretations of Western opposition. Nonetheless, she claims that we dismissed certain important details that support her argument of resistance or reluctance.⁴⁶

Kang suggests that the motives of Western “elites” were not reflective of actual policy positions of their government and may actually have been instrumental means to achieve other “political” ends.⁴⁷ Therefore, the substantial body of evidence of support that we presented should not be taken very seriously. She never suggests, though, how this (on its face implausible) diplomatic independence from their governments and societies was achieved. In contrast, both in our initial article and in our reply to Kirkup and Evans⁴⁸ we showed that Western diplomats received continuous instructions from their home governments. We are aware of no evidence—Kang certainly presents none—that these diplomats were free agents or that their views failed to reflect those of their governments (or their societies).

Once again, Kang misreads the significance of political controversy. Eleanor Roosevelt, for example, was keenly aware that racism in US politics and society was taking its toll on the reputation of the United States as a defender of human rights at the UN. But both she and her government were committed to working against racism, nationally and internationally. And, it should be emphasized, racism spawned resistance to civil and political rights no less than economic, social, and cultural rights.⁴⁹ The same is true of concerns over “sovereignty.”

Kang also raises the issue of the failure of the United States to ratify the ICESCR in this context.⁵⁰ Above we showed that no other Western state shares this position. Here we want to put it in the broader context of US “exceptionalism” and “exemptionalism” with respect to international legal instruments—resistance and reluctance that have little to do with economic and social rights in particular.⁵¹

46. *Id.* at 1012.

47. *Id.* at 1010–11.

48. Whelan & Donnelly, *Yes, a Myth*, *supra* note 3, at 250. We also draw attention to Kang’s observation that “[r]atification of a treaty by a state with democratic institutions does not ensure strong protection of the norms in question.” Kang, *supra* note 1, at 1010.

49. See Whelan & Donnelly, *Yes, a Myth*, *supra* note 3, at 252.

50. Kang, *supra* note 1, at 1014.

51. We agree with Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 147, 149–50 (Michael Ignatieff ed., 2005) that beyond the particular character of “the enduring, broadly based ‘rights culture’ of the United States” (which stresses popular sovereignty, local government, constitutional patriotism,

Of the eight human rights conventions with international monitoring regimes,⁵² the US has ratified only three: the Racial Discrimination Convention, the ICCPR, and the Convention Against Torture. But are we really to believe that failure to ratify other key conventions means, for example, that the United States opposes children's rights, the rights of women, or the rights of the disabled? Was the United States opposed to civil and political rights in the 1970s and 1980s, before it ratified the ICCPR? Does the failure to allow individual communications to the Human Rights Committee, or the fact that the United States ratified the ICCPR only on the condition that it have no effect on US law (the "non-self-executing" reservation), show US opposition to civil and political rights?

Turning directly to the question of the division of the Covenant, Kang maintains that we "overlook" the important detail that the West, whatever its general normative support for economic and social rights, objected to their inclusion in a "strongly legalized covenant" (the original Covenant).⁵³ "Strongly legalized," however, is at best an obscure term. Is the ICCPR—which lacks an international judicial mechanism and includes only optional provisions for non-binding individual complaints—really "strongly legalized"? In any case, the idea that international human rights law with respect to economic and social rights is somehow softer than that with respect to civil and political rights is a view that has been rejected by the Committee on Economic, Social and Cultural Rights and most legal scholars and practitioners at least since the late 1980s.⁵⁴

nationalism, and libertarianism). US exceptionalism is also explained by the geo-political power of the US relative to other Western states; the long stability of US democracy, the existence in the US of a concentrated, active conservative minority; and—most important—the fact that US political and legal institutions are decentralized and fragmented, *id.* at 150, 186–92, including "supermajoritarian voting rules and the committee structure of the Senate, federalism, and the salient role of the judiciary in adjudicating questions of human rights," *id.* at 187.

52. The Genocide Convention, to which the US became a party in 1988, does not include a monitoring body. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, G.A. Res. 260 (III), U.N. GAOR, 3d Sess., U.N. Doc. A/RES/3/260 (1948), 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989).
53. Kang, *supra* note 1, at 1012. Kang mistakenly describes us as "rightly not[ing] the reluctance of the US representative to include such rights." The page she cites in our article says no such thing.
54. The claim that the ICESCR creates "soft" obligations was first dismissed by the Limburg Principles in 1987. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, *adopted* 8 Jan. 1987, U.N. ESCOR, Comm'n on Hum. Rts., 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), *reprinted in The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987). Further articulation of the legal obligations of states and grounds for findings of "violations" of the provisions of the Covenant were elaborated under the Maastricht Guidelines. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, *adopted* 22–26 Jan. 1997, *reprinted in The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998).

We do, however, welcome the opportunity to revisit again this “controversy” about the inclusion of economic and social rights in the then-single Covenant. And we will touch briefly on the issue of “soft” legal norms.

As our original article showed in some detail, the “controversy” over economic, social, and cultural rights between the adoption of the Universal Declaration in 1948 and the submission of the two draft Covenants to the General Assembly’s Third Committee in 1954 had three distinct stages. First, General Assembly Resolution 421 (V) of 1950 instructed the Commission to include *an expression of* economic, social, and cultural rights in the draft Covenant. In 1951, the Commission drafted substantive economic and social articles and a procedure for monitoring and implementation (which was different than that contemplated for civil rights). In 1952, the Assembly voted for separate but interrelated Covenants, and the Commission completed its final drafts from 1952 to 1954.⁵⁵

Kang argues that beneath the West’s “juridical or technical objections” to a single treaty lay a “political” preference for a “soft” instrument on economic and social rights.⁵⁶ “Preferences on degree of legalization are related to debates about committing resources and creating constraints on a state’s future behavior.”⁵⁷ We have already addressed the issue of committing resources. Here we want to review, again, what actually happened in the drafting work.

The original draft Covenant contained eighteen very carefully worded articles on civil rights. Article 1 of the draft spelled out general obligations of states parties to the Covenant, including a provision to take legislative and other measures to “give effect to” those rights within a “reasonable time” (but not “immediately”). It also required states parties to provide “effective remedy” for violations.⁵⁸ Part III envisioned a “Human Rights Committee” of independent experts to handle state-to-state complaints. There was no individual complaints mechanism, nor was there a reporting requirement.

In response to Resolution 421’s directive to include an expression of economic and social rights “in a manner that related them to the civil and civic rights” already contained in the Covenant, the Commission added an “umbrella clause” on economic and social rights as Article 19. This clause spelled out the principle of progressive implementation of economic and

55. There were other stages in the development of the ICESCR after 1954: further revisions of the text between 1954 and 1966; the period between the Covenant’s entry into force in 1976 and the establishment by ECOSOC in 1986 of a semi-formal Committee on Economic, Social and Cultural Rights; and the period of substantive international jurisprudence under the aegis of the Committee between 1987 and today.

56. Kang, *supra* note 1, at 1012.

57. *Id.* In fact, though, as we saw above, the commitment of resources by Western states has been both huge and steadily growing.

58. See *Report of the Sixth Session*, U.N. ESCOR, Comm’n on Hum. Rts., 6th Sess., at 15–20, U.N. Doc. E/1681 (1950).

social rights with due regard given to the available resources of any state party to the Covenant. With the exception of the Soviet Union and the Ukraine, every delegation on the Commission agreed that these principles of implementation were entirely appropriate for economic and social rights.

Here we reach the first crucial point. Progressive implementation, which was widely endorsed and definitely not a merely Western preference, implied a categorical difference in the nature of states' legal obligations and associated monitoring activities. This led, almost inexorably, to division into two legal instruments.

France added a clause proposing international technical cooperation and assistance to help states in meeting their obligations for economic and social rights.⁵⁹ Greece and Denmark supported the idea.⁶⁰ India said it was "of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights."⁶¹ The Soviets grumbled about the whole notion of progressivity—but they also rejected any international monitoring procedures or obligations. In response, René Cassin of France argued, "It would be deceiving the peoples of the world to let them think that a legal provision was all that was required to implement certain promises, when in fact an entire social structure had to be transformed by a series of legislative and other measures."⁶²

Making technical assistance and cooperation a reality, however, meant crafting a role for the UN Specialized Agencies, whose independent status as international organizations was still being negotiated with the UN system as a whole, but which at the time were principally responsible for "development" work. Indeed, during this early period in the life of the United Nations, the Commission had to walk deftly, ensuring that the specialized agencies were involved in every step of the process of elaborating economic and social rights while also ensuring that the UN Economic and Social Council did not "abdicate its responsibilities" in the field of economic and social affairs.⁶³ In order to institutionalize this special role that would be played by the specialized agencies, John Humphrey of the Division of Human Rights drafted a periodic reporting procedure for economic and social rights, which Lebanon sponsored in the Commission.

Here is the second crucial point. The problem that led immediately to the division of the Covenant was the fact that the Commission had not been

59. *France: Proposal for a General Clause Concerning Economic, Social and Cultural Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 7th Sess., Agenda Item 3(b), U.N. Doc. E/CN.4/612 (1951).

60. *Summary Record of the Two Hundred and Thirty-First Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 7th Sess., at 19, 28, U.N. Doc E/CN.4/SR.231 (1950).

61. *Id.* at 19.

62. *Summary Record of the Two Hundred and Thirty-Second Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 7th Sess., at 11, U.N. Doc E/CN.4/SR.232 (1950).

63. *See Summary Record of the Two Hundred and Thirty-Seventh Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 7th Sess., at 17, U.N. Doc E/CN.4/SR.237 (1950).

able to settle two key questions before the end of their seventh session in 1951. First, would the civil rights in Part I of the draft Covenant be subject to the reporting procedure? Second, would the economic and social rights in Part III of the Covenant be subject to the state-to-state complaints procedure drafted in Part IV, which originally applied only to civil rights (since those were the only rights in the original Covenant)?

Taking the second question first, *not a single state supported a state-to-state complaints procedure for economic and social rights*. No member of the Commission, not even the Soviet Union, ever proposed such a procedure, not even as an alternative proposal. Furthermore, the Soviets and Ukrainians notwithstanding, there were *no* objections to the idea of progressive, rather than immediate, implementation of economic and social rights. Ensuring the availability of “international cooperation and assistance” was to be the responsibility of the specialized agencies. The reporting system addressed making those agencies aware of the resource constraints and needs of states parties. The US-sponsored Extended Programme of Technical Assistance was to be engaged similarly.⁶⁴

Thus when the Commission voted *seriatim* on the provisions for economic and social rights, all passed easily. Yugoslavia abstained on each vote. The Soviet Union voted against every article.⁶⁵ Otherwise, there was consensus. Division simply was not forced upon a reluctant non-Western world by a powerful, hegemonic West. Rather, it was the entirely uncontroversial consequence of the necessarily progressive implementation of economic and social rights and the needs for an appropriate system of monitoring.

Going back to the first question—whether the reporting procedure for economic and social rights should apply to civil (and later, political rights)—the answer was, ultimately, “yes.” And good that it was. Considering that the state-to-state complaints mechanisms have never been used in the field of human rights, the reporting procedure, born of the “division” debate, has been a very positive legacy and ultimately has had a much greater impact than even the various procedures—most of them “optional”—that allow the submission of individual complaints.

A close reading and analysis—as one of us has done elsewhere⁶⁶—of the nuances of the politics surrounding the division of the Covenants during the period from 1950 to 1952 reveals a number of overlapping, subtle issues surrounding the nature of civil and political in relation to economic

64. See Eleanor Roosevelt's statement, *Summary Record of the Two Hundred and Forty-Eighth Meeting*, Comm'n on Hum. Rts., 7th Sess., at 8–9, U.N. Doc E/CN.4/SR.248 (1951). We make special note of the EPTA, which was sponsored by the United States, since Kang challenged us, Kang, *supra* note 1, at 1014, to provide evidence of “soft norms” supported by the United States aside from the ICESCR itself.

65. *Summary Record of the Two Hundred and Forty-Seventh Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 7th Sess., U.N. Doc E/CN.4/SR.247 (1951).

66. DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* (forthcoming 2010).

and social rights. The Soviets were dismissive of the entire enterprise of a global human rights regime—that much is abundantly clear. The “West,” on the other hand, took this period of intense normative development very seriously. In this they were joined by several non-Western states, including India, Lebanon, and Chile.

We need to keep in mind the novelty of making individual people the subject of international law. This was truly *terra incognita*. Most states, including the Western states, took the process of translating the norms embodied in the Universal Declaration very seriously—so seriously in fact that they were adamant to enumerate real rights carrying real obligations for states, and not simply repeat the articles contained in the Universal Declaration. Their concern was to establish an effective way to incorporate economic and social rights into the emerging global human rights regime. For example, an Indian proposal at the close of the Seventh Session of the Commission on Human Rights in 1951 asking the Economic and Social Council to request that the General Assembly reconsider its decision to include economic and social rights in the Covenant was defeated 5-12-1.⁶⁷ But in the Council just three months later, Australia, China, France, Guatemala, Lebanon, Sweden, and Uruguay changed their votes because they were convinced that separate human rights conventions did not necessarily mean a violation of the principle of “indivisibility”—a term that found its genesis during this period.

The only thing that *really* changed between one draft covenant with both sets of rights and two separate but interrelated covenants was the application of the reporting procedure to the ICCPR. The whole division debate, in other words, provides no evidence of Western resistance, or even reluctance, concerning economic and social rights.

IV. THE COUNCIL OF EUROPE

Kang’s discussion of the Council of Europe focuses on secondary matters of the legal mechanics of implementation while ignoring the substantial and often impressive performance of Western states on economic and social rights.

Although the European Convention deals primarily with civil and political rights, it originally included rights to form and join trade unions (Article 11) and to marry and found a family (Article 12). In addition, Protocol 1, drafted in 1952 (before the Convention even came into force), adds rights to property (Article 1) and education (Article 2). Conversely, some basic civil and political rights are not included in the Convention. The right to free elec-

67. *Summary Record of the Two Hundred and Forty-Eighth Meeting*, U.N. ESCOR, Comm’n on Hum. Rts., 7th Sess., at 26, U.N. Doc E/CN.4/SR.248 (1951)

tions is added in Protocol 1, freedom of movement and residence is added in Protocol 4, adopted in 1963, the death penalty is abolished in Protocols 6 (1983) and 13 (2002), and legal rights to appeal a criminal conviction, compensation for wrongful conviction, protection against double jeopardy, and equality between spouses were added in Protocol 7 (1984).

We mention these details because they reveal the drafting practice of the Council. Only when there is near universal agreement on a legally binding text is it presented for adoption. Given the legal history of most members, this was relatively easy to do in the 1950s for civil and political rights. Because most economic and social rights were undergoing rapid and dramatic expansion, this was not possible, or even desirable. It bears repeating that the Convention also lacked a right to free elections—not because European states generally opposed or resisted this right, but because of difficulties in agreeing to a precise legal formulation.

Detailed specification of most economic and social rights had to wait until adoption of the European Social Charter in 1961. The list of rights recognized in the Social Charter, however, is far more extensive than the ICESCR: rights to work; just conditions of work; safe and healthy working conditions; fair remuneration; organize; bargain collectively; protection of children and young persons; protection of employed women; vocational guidance; vocational training; protection of health; social security; social and medical assistance; benefit from social welfare services; vocational training, rehabilitation and social resettlement for physically or mentally disabled persons; social, legal, and economic protection of the family; social and economic protection of mothers and children; engage in a gainful occupation in the territory of other Contracting Parties; and protection and assistance for migrant workers and their families. The revised Social Charter, adopted in 1996, adds rights to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex; information and consultation; take part in the determination and improvement of the working conditions and working environment; social protection of elderly persons; protection in cases of termination of employment; protection of workers' claims in the event of the insolvency of their employer; dignity at work; equal opportunities, and equal treatment of workers with family responsibilities; protection in the undertakings of workers' representatives and facilities to be accorded to them; information and consultation in collective redundancy procedures; protection against poverty and social exclusion; and housing.

We belabor this list because Kang entirely ignores the substance of the rights recognized in the Social Charter, along with the fact that they typically are specified in greater detail and more demanding terms than the rights of the ICESCR. Most strikingly, Article 12 requires social security standards that meet the European Code of Social Security, which provides page after

page of detailed specifications of minimum benefit levels. All Kang chooses to note is that states may choose to be bound, in the revised version, by as few as sixteen articles and sixty-three numbered paragraphs, and that judicial enforcement of these rights is not provided. Her explanation—advanced without supporting evidence—is that “member states . . . did not value social and economic rights equally to civil and political rights in the Cold War context.”⁶⁸ We disagree.

If the Cold War context were decisive, we should have expected that judicial enforcement of the Social Charter would have been realized, or at least well on the way to adoption, by now. In fact, though, nothing of the sort is being seriously contemplated. The Social Charter is implemented through different mechanisms because the members find that to be a more effective way to realize these rights.

By requiring less than complete adoption, rights can be formulated in much more detailed and demanding terms. Were all provisions to be mandatory, they would have to be watered down, often substantially. Forgoing regional judicial enforcement not only dramatically reduces the costs of implementation but allows for much more detailed specifications of the rights. It simply would be too cumbersome and costly to allow disputes about technical details of benefits to be brought before a regional court. Even at the national level, most such matters are handled administratively, with good reason.

Consider the following simple test. Are the rights to education and to join and form a trade union, which are mandatory and judicially enforced through the Convention, substantially better protected in the Western members of the Council of Europe than, say, the rights to social security and workplace safety, which are protected through the Social Charter? If any differences exist, they are modest at best.

Courts should not be fetishized. They are frequently useful, and often essential, implementation mechanisms. In some circumstances in some countries, however, some rights are at least as well implemented by non-judicial means. Whether this is the case is an empirical question, not a matter of principle. In Europe, the regional system of implementing economic and social rights not only seems to be working just fine, it evidences not the slightest resistance on the part of Western states.

V. INTERNATIONAL ACTION

Kang also considers inadequacies of Western states in promoting economic and social rights beyond their own borders. We did not address this topic

68. *Id.* at 23.

both because it was not a major issue during the interwar and immediate postwar periods (which were our focus) and because it has no relevance to the central issue of domestic performance. For better or worse, we live in a world of largely national implementation of internationally recognized human rights. States have near exclusive authority and responsibility for implementing and enforcing human rights on their own territory. International action is a relatively minor addendum.

Would it be a good thing if Western, and other, states devoted more attention to promoting economic and social rights in other countries? Of course, but their behavior with respect to international promotion tells us nothing about their attitudes towards the rights in question. And Kang's discussion of this dimension is, unfortunately, strikingly similar to her discussion of Western domestic practice.

She talks only of the United States. And she focuses largely on the peculiar character of the US position. For example, Kang notes that the United States was the only state to reject a right to housing at the 1996 Habitat Conference.⁶⁹ The proper point to be made, if we are actually interested in Western attitudes and behavior, is that every Western state except the United States supported a right to housing. She again draws attention to the US failure to ratify the ICESCR.⁷⁰ If one were truly interested in Western attitudes and behavior, however, the point to be made is that, as we noted above, all but one Western state is a party to the Covenant and that this group ratification rate is substantially higher than the rate of the rest of the world.⁷¹ Even when her own evidence shows that the United States is completely out of step with the practice of virtually all Western states, she somehow insists that the American way is the Western way. And her discussion of the Bush administration begins by noting that the shortcomings of its international human rights policies are not restricted to—we would say do not primarily involve—economic and social rights.⁷²

We certainly agree that the United States often falls far behind the (rest of the) West in implementing economic and social rights. In fact, one of the underlying (admittedly political) reasons we had for accurately describing the nature of the Western approach was to underscore the perverse peculiarity of so much of what the United States does (and does not do).

Pretending that the West is like the United States only serves to obscure the often uncivilized nature of US practices with respect to economic and

69. *Id.* at 24.

70. *Id.* at 25.

71. In addition, Western states were largely enthusiastic supporters of the recent adoption of an Optional Protocol to the ICESCR, which will allow the Committee on Economic, Social and Cultural Rights to receive individual communications.

72. *Summary Record of the Two Hundred and Forty-Eighth Meeting, supra* note 67, at 25.

social rights.⁷³ A few Americans may take pride in not being like “old Europe.” We believe, however, that emphasizing (without exaggerating) US deviance from the Western norm is likely to prove politically progressive. And, as we noted in our original article, pretending that even the United States has always been or even now is fundamentally neo-conservative obscures the vital fact that these ideologues are well outside of not merely the Western mainstream but the mainstream of US practice for the past three quarters of a century.⁷⁴

As for the IMF, all we will say here is that the Fund reinvented itself long after the period we considered. And it is the post-US-devaluation IMF that has had a negative impact on economic and social rights, as we acknowledged.⁷⁵ We raised the IMF, as it was at its creation, only to show the breadth of the Western commitment to economic and social rights.

VI. EXPLAINING THE MYTHS OF OPPOSITION AND RESISTANCE

We thus conclude that Western resistance to economic and social rights is as mythical as Western opposition. How, though, are we to explain the persistence of such misguided readings?

We have already noted two likely explanations. First, the United States is mistaken for the West. Second, reluctance at international promotion is mistaken for general reluctance towards the rights. A third explanation, noted in our original article and implied in our reply above, also is important.

Details of interpretation and implementation are of great immediate and local importance. Human rights advocates justly focus on such matters, where progress or regress largely lies in Western liberal democracies. Shortcomings in these second and third order details, however, all too often become the basis for false generalizations about the overall level of practice. As a result of understandable (but not justifiable) political or advocacy over-enthusiasm, a dying tree comes to be reported as the death of the forest.

73. This does not mean that the United States opposes or resists economic and social rights. As we argued above, it simply means that the United States does a much less effective job than most Western states of implementing many (but not all) economic and social rights.

74. Even in the Thatcher and Reagan eras, social expenditure grew modestly. In Britain, its share of GDP rose from 24.1 percent in 1978 to 27 percent in 1992 (although it was pushed down below 24 percent in the late 1980s) and its share of total government expenditure rose from 54.7 percent to 60.1 percent (and was below 55 percent only in the early 1980s). In the United States the GDP figure rose modestly, from 11.2 percent in 1978 to 13.0 percent in 1992, and the percentage of total outlays saw a similar modest rise, from 52.8 percent to 53.9 percent. See PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 144 tbl.6.2 (1994).

75. Whelan & Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime*, *supra* note 2, at 938.

The highest possible level of achievement is the proper standard for advocates to evaluate existing practices and proposals for change. It is not, however, an appropriate standard by which to judge broad patterns of support or resistance. By the “highest possible” standard, all states come up short in all areas of human rights. (Again, this potentially interesting topic is very different from ours here, namely, a special resistance to economic and social rights.) There is an essential relative dimension when we seek to judge levels of support for economic and social rights—or, for that matter, civil and political rights.

We have argued that the inclusion of economic and social rights alongside civil and political rights was and continues to be central to an ideal of human rights shared by all Western states. This ideal is embodied in the norms of interdependence and interrelatedness between the two “categories” of civil and political rights and economic and social rights. These norms do not demand that the categories be the same, that the specificity of enumerated rights be the same, or even that specificity of obligations be the same. As Charles Malik of Lebanon pointed out in 1952, there is a distinction between “the unity of human rights in principle and their separability in practice. . . . [A]s regards implementation, [civil and political, and economic and social rights] were not inseparable. If the concept of unity in principle was followed to its logical conclusion, the violation of one right would be tantamount to a violation of all, and respect for one would be tantamount to respect for all.”⁷⁶ What this tells us is that ultimately the state does much more than simply “respect” and “protect” rights—it must also promote them. In addition to enforcing the law (in the area of nondiscrimination, for instance) economic and social provision and state regulation are the most appropriate means for achieving these ends.

Nevertheless, the reality of substantial, sustained Western support does not justify complacency. More can be and needs to be done, especially in the United States. And more output can be achieved from existing inputs. Both market and bureaucratic inefficiencies bedevil Western efforts.

Failing to recognize real current achievements, however, is not merely intellectually dishonest but practically self-defeating. If it really were the Western way to resist economic and social rights, advocates would be in a much weaker position. In fact, though, they can and should argue that existing practices in their details fail to live up to important and well-established national and international commitments. The reality of sustained Western support for economic and social rights can and should be mobilized to demand even higher levels of effort and better records of achievement. On the need for better Western practice, we agree entirely with Kang.

76. *Summary Record of the Three Hundred Ninety-Fourth Meeting: Third Committee*, U.N. GAOR, 7th Sess., at 280–81, U.N. Doc. A/C.3/SR.394 (1952).