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2009

Freedom, Want, and Economic and Social Rights: Frame and Law

Katharine G. Young, *Boston College Law School*

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Freedom, Want, and Economic and Social Rights: Frame and Law

KATHARINE G. YOUNG*

INTRODUCTION: HISTORY AND ANNIVERSARY

The Universal Declaration of Human Rights proclaims that all human beings are free and equal in dignity and rights. The proclamation is an artifact, and an accomplishment, of the normatively charged global politics at World War II's end. An anniversary emphasizes the occasion of this moment's "common standard of achievement for all peoples and all nations."¹ It reminds us of the compromises, the settlements, and the opportunities that were a part of this endeavor. If the discourse of emancipation is ours to reinvent, as the fact of the Universal Declaration suggests, we can examine the distance between then and now, them and us, and their aspirations and our own. At the same time, we can take stock of the profound achievement of the Universal Declaration, of the distance between the instrument and what was present before it, and how this feat informs our laws and politics today.

When compared with the Codes, Charters, Declarations, and Bills of Rights that preceded it,² the Universal Declaration's most remark-

* BA, LLB (Hons) (Melb), LLM Program (Harv), SJD Candidate, Harvard Law School, Visiting Assistant Professor, Boston University School of Law. I am grateful to Michael Harper, Frank Michelman, Jeremy Perelman, Hengameh Saberi, Sameer Saran, Henry Steiner, Adam Shinar, Lucie White, and Margaret Young for sharing their thoughts on a previous draft, as well as to the participants of the University of Maryland School of Law Symposium on the 60th Anniversary of the Universal Declaration of Human Rights, and to the editors of the re-emerging Maryland Journal of International Law.

1. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

2. See THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND

able innovation lies in its expansive conception of human freedom. Moving beyond the classical ideal of individual liberty, the freedom expressed in the Universal Declaration is both material and relational. Freedom from want, as well as freedom from fear and the freedoms of speech and belief, belong to the Universal Declaration's highest normative aspirations.³ Articles 22 to 27 protect the rights to work, to social security, to education, and to food, clothing, housing, medical care, and the social services necessary for wellbeing and health.⁴ Everyone is entitled, "as a member of society," to realization of the "economic, social and cultural rights indispensable for his dignity and the free development of his personality."⁵

How should we commemorate this freedom from want, and the related economic and social rights, of the Universal Declaration, in 2008? I begin this reflection by reproducing an iconic image of "Freedom from Want," which appeared on the pages of *The Saturday Evening Post* in the United States on March 6, 1943. Although this picture was published five years prior to the adoption of the Universal Declaration, it provides a telling snapshot of a popular American understanding of economic and social rights that would influence the provisions of the international instrument. The final shape of the economic and social rights was determined, of course, by the efforts of all of the delegates to the United Nations Commission on Human Rights in 1948.⁶ Part one of this reflection

DOCUMENTS FROM ANCIENT TIMES TO THE PRESENT (Micheline R. Ishay ed., 2d ed. 2007), for a collection that locates the history of human rights in both secular and religious traditions while recognizing the contestability of origins.

3. Universal Declaration, *supra* note 1, pmbl.

4. Economic and social rights are often distinguished from labor rights on the one hand and property rights on the other, in order to encompass the rights more directly protective of human welfare and freedom from want. For the purposes of this reflection, I focus primarily on the subsistence and welfare rights to food, health, housing, and education. *See id.* arts. 22, 25, 26. For a distinguishing analysis, see Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 MD. J. INT'L L. 283 (2009).

5. Universal Declaration, *supra* note 1, art. 22.

6. The eighteen-member delegation was drawn from the then-U.N. membership of some fifty-six states. Most of the present 192 U.N. member states had not (re)gained independence and had little opportunity to shape the Universal Declaration's text. Some scholars draw attention to the influential and independent efforts of Peng-chung Chang from China, Hernán Santa Cruz from Chile, Hansa Mehta from India, Charles Malik from Lebanon and Carlos Romulo from the Philippines to counteract the predominance of Western and Communist viewpoints within the Commission. *See, e.g.*, MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 224–25 (2002). Others point to the support of the Universal Declaration by many African and Asian countries after 1948, in order to establish contemporary grounds

emphasizes the allegorical, if not fully causal, parallels between this picture and the Universal Declaration's text.

The interpretation of "Freedom from Want" by popular artist Norman Rockwell provides a sense of completion to the aspiration that guides economic and social rights. In contradistinction to the finality suggested by this image, and in response to its ready critique, I suggest that economic and social rights are better conceived in contestable terms, as incomplete, dynamic, and revisable. In parts two and three of this reflection, I suggest that the challenges posed by the rights to food, health, housing, and education are among the Universal Declaration's greatest. Rather than present an analysis or interpretation of what these rights protect, I propose a series of directions. First, I describe what is meant by the role played by economic and social rights as a frame of discourse within the political contestations of distributive justice. Secondly, I examine the operation of economic and social rights as a set of legal principles, which may or may not be enforceable. In both respects, economic and social rights operate, not as a confirmed depiction of freedom from want, agreed to and recognizable to all, but as a discourse of naming injustices, building institutional responses, and calling on us to decide which claims for material support genuinely belong to the Universal Declaration's expansive and active commitments.

ONE PORTRAIT OF FREEDOM FROM WANT, CIRCA 1943

Norman Rockwell's "Freedom from Want" appeared as part of his series on the "four freedoms," which were proclaimed by Franklin Delano Roosevelt and later adopted in the Preamble of the Universal Declaration.⁷ Drawing from his earlier response, in 1941, to the

to the claim of "a common standard of achievement." In relation to the economic and social rights provisions of the Universal Declaration, the relative input of delegates is still contested. See Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUMAN RIGHTS Q. 908 (2007), for a vigorous assertion of the role of the United States, and other Western countries, against the credit usually given to the Communist countries.

7. "Freedom from want" continues to guide subsequent human rights instruments. See International Covenant on Economic, Social and Cultural Rights pmb., Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights pmb., Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

2009] FREEDOM, WANT, AND ECONOMIC AND SOCIAL RIGHTS 185

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“Freedom from Want”
Norman Rockwell, *The Saturday Evening Post*

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challenges of the Great Depression,⁸ Roosevelt announced that “necessitous men are not free men” in his 1944 State of the Union Address.⁹ Domestically, “freedom from want” became the central justification for his proposed “second bill of rights,” which would recognize the right to a job, to trade, to a family home, to “adequate medical care and the opportunity to achieve and enjoy good health,” to a good education, and to “adequate protection from the economic fears of old age, sickness, accident, and unemployment.”¹⁰ Internationally, the language of “freedom from want” guided the influential Atlantic Charter of 1941, where a post-war peace would be grounded on the “assurance that all the men in all the lands may live out their lives in freedom from fear and want.”¹¹

In both cases, freedom from want—and in the case of the second bill, the accompanying rights—were introduced as belonging to a set of public commitments rather than to a legal document for judges to enforce.¹² Ironically, while support for Roosevelt’s second bill of rights stumbled in the post-war environment of the United States, the emphasis on economic and social rights would have a pronounced influence on the Universal Declaration, due in part to the leadership of the United States delegate and Chair of the United Nations Commission on Human Rights, and Roosevelt’s widow, Eleanor Roosevelt. This same leadership would emphasize an intention to secure the Universal Declaration’s symbolic, rather than binding,

8. See DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 469–70 (1999) (describing Roosevelt’s message to Congress on Jan. 6, 1941 announcing the Lend-Lease Bill, shrewdly numbered H.R. 1776).

9. Franklin D. Roosevelt, President of the U.S., Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 40–42 (Samuel I. Rosenman ed., 1950).

10. *Id.*

11. The Atlantic Charter, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, 55 Stat. 1603 (Aug. 14, 1941) [hereinafter Atlantic Charter], reprinted in Elizabeth Borgwardt, “When You State a Moral Principle, You Are Stuck with It”: The 1941 Atlantic Charter as a Human Rights Instrument, 46 VA. J. INT’L L. 501, 561 (2006). See also Borgwardt, *id.*, at 526–28 (noting the influence of this principle, and in particular its emphasis on individuals, rather than peoples, countries, or nations).

12. See CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 83 (2004), for a description of this feature of the second bill of rights, contrasting this conception with the enforceable bill of rights of the U.S. Constitution. For the limits of an enforcement model for the Atlantic Charter, see Borgwardt, *supra* note 11, at 556 (“To say that the Atlantic Charter did not meet Austinian standards of enforceability does not really tell us anything about its influence on wartime political culture, both in the United States and internationally.”).

character.¹³

Rockwell's depiction of "Freedom from Want" is a celebration of abundance and national tradition. The artist chose to portray this dimension of freedom in a scene of family conviviality at an American Thanksgiving. (The painting is otherwise known as "The Thanksgiving Dinner.") An attentive, capable, and apron-clad woman serves an oversized turkey to a crowded table. Behind her stands the kindly figure of the household head, his right hand ready to carve up the communal meal. Several guests, spanning different generations, smile and converse with relaxed patience. The nourishment is emotional as well as material, and the table placement is open, seemingly including the viewer in the happy setting.

Of course, "Freedom from Want" cannot deliver the inclusion that it promises. In fact, the painting seems to presage the cultural, gender, and national struggles to come. In celebrating the material comforts brought about by this freedom, it takes for granted a now caricatured celebration of patriarchy, consumerism, and cultural uniformity. The man's role is unquestionably that of provider, the woman's is that of server, and the seated guests do nothing to contest the hierarchy within the family unit. The freedom is secured privately, and enjoyed within the four walls of the family home.¹⁴ The figurative "wants" to be satisfied, suggested by the order and decorum of the table setting, are recognizably middle class.¹⁵ The result is a snapshot of American aspirations that are not only anachronistic, but are also at odds with the sensitivity towards social subordination associated with the women's rights and civil rights movements, which were themselves supported by the aspirations of the Universal Declaration.¹⁶

13. See ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008) (describing the influence of the American delegation in the decision to jettison an enforcement mechanism for the Universal Declaration).

14. See LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 56 (2003) (noting the choice of subject of freedom from want, "not as a worker with a job, nor as government beneficence protecting the hungry and homeless, but rather as a celebration of the plenitude [sic] that American families reaped through their participation in a mass consumer economy").

15. See AMY BENTLEY, EATING FOR VICTORY: FOOD RATIONING AND THE POLITICS OF DOMESTICITY 64-65, 84 (1998) (suggesting that the image conceals the American underclass and that as America campaigned for freedom from want to the world, many were "literally and figuratively barred from sitting at the table and partaking of the meal").

16. Universal Declaration, *supra* note 1, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,

The image's appeal for Americans—it was apparently the artist's most successful attempt within the four freedoms series and remains one of his most recognizable illustrations—was not shared elsewhere. As the artist himself noted, “[t]he Europeans sort of resented it because it wasn't freedom from want, it was overabundance.”¹⁷ Of course, Rockwell was illustrating for an American audience: his later depiction of “The Golden Rule,” presented to the United Nations, is differently composed,¹⁸ reflecting a diversity of peoples that was unlikely to have been accepted by the editors of *The Saturday Evening Post*.¹⁹ Nevertheless, “Freedom from Want” seems to remind, too starkly, that American prosperity has been secured within a global economic order in which many are marginalized. The scene's fresh gentility stands apart from the “ongoing, grimy, disabling want of genuine indigence.”²⁰ The painting's tendency to evoke a freedom to prosper, rather than a genuine freedom from want, sours its appeal in a world in which material resources are so uneven and so scarce for many. The end of want, not the celebration of abundance, would be a more fitting approximation of “dignity and rights” when a full third of the global population is too poor to protect itself against chronic undernourishment, illiteracy, child labor, and an inability to access safe water, basic sanitation, life-saving medicines, and adequate shelter.²¹

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

17. NORMAN ROCKWELL, MY ADVENTURES AS AN ILLUSTRATOR 315 (1988). Rockwell relates how he prevailed over the “darned high-blown” imagery of the four freedoms with “the best idea [he]’d ever had:” to use his Vermont neighbors as models. *Id.* at 312–13.

18. See United Nations Photo, Norman Rockwell Mosaic “The Golden Rule,” <http://www.unmultimedia.org/photo/detail/313/0031379.html> (last visited Apr. 1, 2009), for a depiction of Rockwell's mosaic, inscribed with the words “DO UNTO OTHERS AS YOU WOULD HAVE THEM DO UNTO YOU,” installed on the third floor of the United Nations Conference Building in New York.

19. Apparently Rockwell had wanted to depict African Americans in his illustrations, but was prevented from doing so by the editors of *The Saturday Evening Post*. RICHARD HALPERN, NORMAN ROCKWELL: THE UNDERSIDE OF INNOCENCE 3 (2006).

20. *Id.* at 73. Halpern draws on Freud to explain Rockwell's appeal to Americans. Such an analysis could itself apply to the aspiration for freedom “from want” as the very human drive that is impossible to satisfy. See Lucie White, *‘If You Don't Pay, You Die’: Death and Desire in the Postcolony*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 57 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007), for a subtle observation of the different social priorities given to wants and needs.

21. For a moral inquiry into the role of American (and other Western industrial nations') wealth in contributing to global poverty, see THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2d ed. 2008). Using World Bank data from 2004, Pogge notes that 39.7% of the

Should the same criticism apply to the Universal Declaration? Like the image, the language of the Universal Declaration reveals both its strident political aspirations and embedded economic, social, and cultural assumptions. Of course, the aspirations and assumptions of Rockwell's "Freedom from Want" and the Universal Declaration are not identical. With the input of representatives from Latin America and other states,²² the economic and social rights that were enshrined within the Universal Declaration are different from those of Roosevelt's New Deal: more cognizant of human dignity and (relatively) more accepting of the limits of rights, their co-relation with other rights and with duties and responsibilities.²³ Rockwell was channeling Roosevelt's freedom from want, not the Universal Declaration's, and not without distortion: the public aims of the New Deal are notably invisible.²⁴ Moreover, the combination of nostalgic idealism and technical realism inimitable to Rockwell masked the connections between poverty and conflict that had been a leading motivation—both American and international—for the entrenchment of economic and social rights. The importance of freedom from want was signaled before, during, and after World War II as a means to confront the Great Depression, the rise of Hitler in Europe, and the links between the two.²⁵ Just as was achieved by Rockwell's "Freedom from Want,"²⁶ this connection has been papered over in the

world's population lives in severe poverty. *Id.* at 2.

22. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 191–93 (1999); see also Whelan & Donnelly, *supra* note 6.

23. See, e.g., Universal Declaration, *supra* note 1, art. 29. For a contrast between Anglo-American freedom and the values of the Universal Declaration, see GLENDON, *supra* note 6, 227–232. For an example of recent work in value-based comparison and its effect on law, see EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002); Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. ON HUM. RTS. 1 (2005).

24. Elizabeth Borgwardt, *FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights*, in *BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 31, 33–34 (Cynthia Soohoo et al. eds., 2008).

25. KENNEDY, *supra* note 8, at 469–70; see also Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 *FORDHAM L. REV.* 555 (2008).

26. See also William Graebner, *Norman Rockwell and American Mass Culture: The Crisis of Representation in the Great Depression*, 22 *PROSPECTS* 323, 340 (1997) (pointing to Rockwell's difficulty in comprehending poverty). Rockwell's illustration of the stock market crash of 1929 depicted a tradesman, a dog, a woman, and a well-dressed gentleman peering at an ominous newspaper headline. Graebner suggests that the picture omitted Rockwell's trademark concentration on facial expressions because of the artist's "inability to understand the emotions that a falling market could generate." *Id.*

intervening period.²⁷

The Universal Declaration's own anachronism is highlighted in the gendered language of its provisions and in the paths of protection that were assumed by its framers to secure many of the objects of each right. In 1948, the national basis of welfare states was largely taken for granted. The claims of labor had been the central paradigm for economic and social rights contestation. Redistribution occurred through owner to (primarily male) worker, as well as from rich to poor. Mass production, employment, and national industry were the accepted formulas for wealth generation and security. The stable hierarchy of the traditional family unit was central to the aspiration for the right of everyone

to a standard of living adequate for the health and well-being of himself and 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 circumstance beyond his control.²⁸

These protections, along with the rights to social security, employment, and education, were the Universal Declaration's basic social architecture.²⁹

In the provisions of the Universal Declaration, just as in the Rockwell painting, the aspiration towards material security was encased in a series of assumptions about the accepted paths and forms of social justice. The anniversary of the Universal Declaration invites us to reflect critically on the institutionalized patterns of economic, social, and cultural value, and the status harms that were an ineluctable part of this aspiration. This is what makes the popular portrait of "Freedom from Want" so suggestive. But it is a mistake to end the examination at the harms to gender, sexuality, or cultural

27. See GLENDON, *supra* note 6, at 238 (noting that the drafters of the Declaration had recognized the root causes of atrocities in poverty, and that this connection was forgotten in the intervening period).

28. Universal Declaration, *supra* note 1, art. 25.

29. This architecture shares much with the New Deal's emphasis on "social citizenship." Compare William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821 (2001) (analyzing the emphasis on decent work, livelihood, and material security in the New Deal), with Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U. PA. L. REV.* 962 (1973) (presenting an analysis of justice as fairness and a social minimum).

pluralism that were a part of the understanding of this aspiration when it was committed to an international text. We should also reflect on the achievements of the vigorous forms of recognition politics that have rendered status harms so palpable, but which have left to one side the material harms that the original aspirations were aiming to correct.³⁰

Such a reflection is part commemorative and part critical. It suggests that the redistributive implications of freedom from want have been sidelined in our concern with the completed shape of this freedom and the acceptance of civil and political rights as its vehicle. It therefore seeks to reintroduce economic and social rights as a central piece of the achievement of the Universal Declaration, and to demonstrate how such rights are best understood, as both frame and law.

ECONOMIC AND SOCIAL RIGHTS AS FRAME

The rights contained in the Universal Declaration are often debated in terms of law or morality. In these terms, the Universal Declaration has fueled both positivist and philosophical analyses, which seek to establish the content of international law or of settled political morality. The presentation of economic and social rights as “frame” is different from these projects. Although the frame of rights is made more forceful by its potential overlap with both law and morality,³¹ it is not necessarily restricted to the questions raised by each. Instead, the frame of economic and social rights engenders political, moral, and sometimes legal contestation that strives for both universalism in expression and the location of institutional responsibility in response. For example, a claim of a right to food, clothing, housing, medical care, or education creates the terms under which hunger, indigence, medical neglect, or barriers to schooling can be communicated and understood as injustices, rather than as misfortunes.³² Such a claim also seeks to identify the terms of an appropriate response, in

30. Here I borrow from Nancy Fraser’s depiction of the challenges of the politics of redistribution in an age of identity politics. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 49 (2003). Fraser’s recent introduction of the question of representation, alongside recognition and redistribution, informs my discussion of framing. NANCY FRASER, SCALES OF JUSTICE (2009).

31. The Universal Declaration provides a good example of how this overlap is generated.

32. For a classic expression, see JUDITH N. SHKLAR, THE FACES OF INJUSTICE (1990) (describing the changing understanding of the causes of the potato famine in Ireland).

policies, laws, or broader institutions.

The concept of framing was devised in the field of sociology to portray how social actors interpret, understand, and communicate their interests.³³ A frame creates an interpretive lens, a way of understanding a problem that unites other actors and discredits opponents. Applying the frame of rights to a challenge such as hunger may foreground the more structural causes of the problem (or, in normative terms, an injustice), and different objects of recourse or remedy.³⁴ Economic and social rights allow social actors who are agitating for the protection of their material interests to demonstrate why their condition or treatment is injurious to their dignity and other values, why this is important, and which actors bear or share responsibility.³⁵

The success of the economic and social rights frame articulated in the Universal Declaration is threefold. First, it establishes a universalized language that differs from a particularist assertion of the satisfaction of human needs specific to one or another individual or group. We might say that this universalism is post-national, because it signals the importance of common interests across different country arrangements and across the varied experiences of particular groups within them. Hence, the shared minimum of resources established by the implementation of economic and social rights extends to everyone. In this way, the frame of rights, rather than of religion, race, national origin, or class, can unify the claims of a diverse group which may be grappling with a systemic problem from different perspectives.³⁶ Of course, during the recruitment of a movement around economic and social rights, there may be a degree of separation associated with the experience of socio-economic marginalization and urgent economic need. Yet the language of claim-making invited by economic and social rights is open to all.

33. David A. Snow, *Framing Processes, Ideology, and Discursive Fields*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 380 (David A. Snow et al. eds., 2004).

34. For a prominent analysis, see HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* 23 (2d ed. 1996). See also POGGE, *supra* note 21.

35. For a complementary philosophical analysis, having regard to the social “influenceability” that is necessary to the recognition of human rights and renders intelligible economic and social rights, see Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315, 327 (2004).

36. E.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 162–66 (2005) (suggesting the ways in which rights worked to unite and motivate a Latino immigrant group more effectively than faith traditions or class solidarity).

This universalism confronts an age-old problem of distributive politics: that political power usually corresponds with economic power, and that political disadvantage usually corresponds to economic disadvantage. This fact applies to both well-established democratic settings, where serious material deprivations may be confined to a minority, and to low-income democracies, where it may be experienced by the majority as against an increasingly unresponsive state.³⁷ By invoking universal programs which only implicitly target particular groups, redistributive claims have had greater prospects for success in the United States.³⁸ Directly distributive contestations attract stigma towards claimant groups—creating apathy at best, and backlash at worst, in those required to transfer resources. If all are perceived to be worthy or entitled to resource minimums, political support is more likely to be maintained. Universalism within redistributive politics is an innovation of the Universal Declaration, shared with other emancipatory agendas, but settled within the powerful discourse of rights.

Secondly, the frame of economic and social rights establishes an agent–duty-holder relationship that is different from the frames provided by other distributive contestations, such as those calling for the satisfaction of “basic needs” or the urgent attainment of certain “development goals.”³⁹ Asserting a right to food, housing, education, or medical care is to acknowledge a duty or responsibility by others—whether individuals or institutions—to work to secure it. Such an inquiry is absent in the vocabulary of needs, which offers a more passive and supplicant plea to meet certain material requirements without the (admittedly more difficult) prescription of how such needs must be addressed and by whom.⁴⁰

Unlike needs claims, rights claims direct active attention to both

37. E.g., Peter P. Houtzager, *Introduction: From Polycentrism to the Polity*, in *CHANGING PATHS: INTERNATIONAL DEVELOPMENT AND THE NEW POLITICS OF INCLUSION 1* (Peter P. Houtzager & Mick Moore eds., 2003).

38. For an early example, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 44* (1992) (describing the dependence, before the New Deal, of “cross-class distributions rather than . . . class-oriented categorical measures”). Skocpol concedes the difference in the path to European social democracy and the United States. *Id.* at 48.

39. See U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000); see also U.N. Millennium Development Goals, <http://www.un.org/millenniumgoals> (last visited Mar. 31, 2009).

40. Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in *LEGAL RIGHTS 87* (Austin Sarat & Thomas R. Kearns eds., 1996).

agent and duty-holder. Within the Universal Declaration, “everyone, as a member of society,”⁴¹ is an agent and everyone bears responsibility, whether towards one another through work, family, or community relations,⁴² through the “organs of society,”⁴³ or through the greater “social and international order.”⁴⁴ The state is not enumerated as a duty-holder. Its importance is nowhere expressed but everywhere assumed, given that it was governments who were the final arbiters of the text. Nonetheless, even within the state-centric paradigm of 1948, Article 22 of the Universal Declaration proclaims that both “national effort and international cooperation” would lead to the realization of the economic and social rights of all persons.⁴⁵

In the last sixty years, this multiplicity of duty-holders has become ever more relevant. The international influence of corporate globalization, as well as policies of structural adjustment that were initiated by the Bretton Woods institutions for developing countries, have diminished the responsiveness of states in matters of distribution, thus reducing in turn the attractiveness of a normative paradigm so clearly dependent on the state. In such a context, some commentators have suggested that the Universal Declaration’s “organs of society” can extend to business groups;⁴⁶ others have suggested that the “social and international order” refers to the obligations of international institutions.⁴⁷

Nonetheless, it is clear that the state still bears relevance, sandwiched between different global, supranational, and local orders.⁴⁸ The frame of economic and social rights continues to recognize the primary responsibility of the state to deliver resources or revise the structures of entitlement to ensure the basic material protection of

41. Universal Declaration, *supra* note 1, art 22.

42. *Id.* art. 29.

43. *Id.* pmb1.

44. *Id.* art. 28.

45. *Id.* art. 22; *see also id.* art. 28.

46. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶¶ 52–53, delivered to the Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); *see also* Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, Annex art. 18, U.N. Doc. A/RES/53/144/Annex (Mar. 8, 1999).

47. POGGE, *supra* note 21.

48. *See generally* DAVID HELD, *MODELS OF DEMOCRACY* (3d ed. 2006).

everyone is met, while giving scope to a more global and institutionally variegated distributive contestation. From the Universal Declaration's emphasis on "national and international efforts"⁴⁹ has developed more explicit duties of international assistance and cooperation.⁵⁰

Thirdly, the frame of normativity provided by the rights to food, health, housing, or education is not extra-legal or legal-skeptic. Just as the claims of economic and social rights are addressed to the state, while maintaining a focus on other institutions, they also address law. This relationship is often overlooked, as commentators of economic marginalization have sought to prove their radicalism by advocating disengagement with law. This critique claims to identify an alternative emancipatory possibility outside of current legal arrangements in order to create a politics immune from cooptation or domination.⁵¹ Often, this criticism conflates the sometimes demobilizing effect of litigation with the effect of law itself.⁵² The recommendation to maintain localized projects towards material security within civil society, and outside of the state, is a prime example.⁵³

In the current environment, such skepticism misfires. The widespread influence of neoliberal ideology and the accompanying projects of privatization and deregulation have in many places diminished access to economic and social protections, and the responsiveness of the state.⁵⁴ While the chastening of this agenda may have cooled the enthusiasm for these projects, it has not led to greater protections.⁵⁵ Under these conditions, the anti-state, anti-law

49. Universal Declaration, *supra* note 1, pmb1.

50. This is more explicitly expressed in the Universal Declaration's successor treaty dealing with economic and social rights, the ICESCR, *supra* note 7, art. 2(1) (establishing obligations on state parties, which include obligations of technical assistance and cooperation).

51. For a response to the critique, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (refuting the co-optation critique as specifically cogent to legal strategies).

52. For a diagnosis of this tendency which remains pertinent, see Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & Soc'y 309 (1990).

53. Lobel, *supra* note 51, at 962-66 (citing examples from "glocalization" and civil society revivalism).

54. See Special Rapporteur on the Realization of Economic, Social and Cultural Rights, Danilo Türk, *The Realization of Economic, Social and Cultural Rights, delivered to the U.N. Econ. & Soc. Council*, U.N. Doc. E/CN.4/Sub.2/1992/16 (July 3, 1992).

55. For a recent attempt to grapple with this new context, see THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (Narcis Serra & Joseph E. Stiglitz eds., 2008).

agenda recommended by some advocates provides no resources with which to counteract the further evisceration of the state. Indeed, the relegation of the aspiration to material security to an extra-legal space may be unable to halt the diminishing access to certain goods and services or to certain public functions and may even accelerate it.

Instead, the frame of economic and social rights continues to hold the state responsible for its delivery of entitlement or, conversely for the way in which it confers rights, privileges and immunities on private actors. In administrative, educational, or even disruptive terms, the politics of economic and social rights continue to involve law. This politics may even involve litigation. With this insight in hand, economic and social rights are used by actors to contest politics and law in pragmatic, critical, and innovative ways.⁵⁶

ECONOMIC AND SOCIAL RIGHTS AS LAW

If the operation of economic and social rights as frame enhances our understanding of the moral and political stakes of distributive politics, its operation as law is equally dynamic. Economic and social rights can work to exert legal pressure on decision-makers in an institutionally diverse set of scenarios. At the constitutional level, this goes beyond what judges are capable of enforcing, to conducting lawmakers and decision-makers in their ordinary legislative and administrative settings.⁵⁷ At the international level, this requires attention beyond instances of dispute resolution, to the way in which the rights expressed in international agreements and customary international law generally affect the behavior of states.⁵⁸

Economic and social rights figure as law in many countries and are guaranteed in a significant number of constitutions. A legally protected right to food, health care, housing, or education has myriad potential operations. At the constitutional level, economic and social

56. For a collection of notable examples, see *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* (Jeremy Perelman & Lucie White eds., forthcoming 2009).

57. See Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 667 (2008).

58. This general question has given rise to a burgeoning literature. For prominent expression, see LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (suggesting that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (presenting one causal explanation for Henkin's empirical insight).

rights may translate to a justiciable complaint, giving rise to a judicial response.⁵⁹ Or they may figure as subjective entitlements requiring certain procedural protections.⁶⁰ Or they may resemble a directive principle of state policy, exerting pressures on political actors that may be described as legal, even if unenforceable.⁶¹ The operation of such rights as law presents new questions about how the structure of private law might impinge on economic and social rights, how courts are capable of enforcing rights, and how states are obliged to protect them within the global economic order.

Turning first to the international level, there is a conspicuous, if not coincidental, parallel between the general legal status of the Universal Declaration and the specific legal operation of the economic and social rights protected within it. The “legal” status of the Universal Declaration was left deliberately ambiguous at the time of its proclamation by the United Nations General Assembly. “[T]eaching and education” would promote respect for rights, and “progressive measures, national and international,” would secure their recognition and observance.⁶² Explicit state duties would have to wait until codification in the subsequent human rights treaties, especially the ICCPR and the ICESCR. The legal significance of the Universal Declaration would rest on the apparent paradox, identified

59. See *infra* text accompanying notes 85–95 (regarding the South African experience); see also Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT’L L. REV. 35 (2006) (referencing different constitutional texts); COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella et al. eds., 2006) (describing developments in various jurisdictions, and especially in Latin America, including Brazil, Bolivia, and Colombia).

60. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process requires a hearing before the removal of welfare benefits). For an examination of the relations between U.S. courts, legislatures, and agencies that conceives of a right to disentrench public agencies that have been immune from review, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (describing education, housing, and mental health litigation).

61. See, e.g., Bunreacht na hÉireann [Ir. CONST., 1937] art. 45; Const. of the Republic of Ghana, arts. 34–41; INDIA CONST. arts. 38, 39, 41–48A. For the narrowing of the gap between directive principles and enforceable rights in India, see, e.g., Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 171 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

62. Universal Declaration, *supra* note 1, pmbl. The General Assembly called upon member countries to publicize the text and “cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions.” G.A. Res. 217D (III), ¶ 1, U.N. Doc. A/810 (Dec. 10, 1948). For the similar view of Roosevelt’s economic declaration, see SUNSTEIN, *supra* note 12 and accompanying text.

in 1950, that it did not constitute “a legal instrument expressive of legally binding obligations . . . [yet could nevertheless] prove, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law.”⁶³

Despite this ambiguity of enforcement, the rights expressed in the Universal Declaration influence law and policy in significant ways. The Universal Declaration influenced the development of later conventions on human rights, such as the ICCPR and ICESCR. Moreover, it continues to be invoked as a primary source of human rights in international agreements,⁶⁴ despite the presence of these later, expressly binding, human rights instruments.

Moreover, many have asserted that the Universal Declaration represents customary international law.⁶⁵ Arguments about the Universal Declaration’s status as custom usually track the following logic. First, customary status is bootstrapped to the United Nations Charter, as the Universal Declaration is argued to constitute the authoritative interpretation of the human rights obligations of the United Nations Charter, itself understood to be customary international law.⁶⁶ Secondly, it arises from the repeated invocation of the Universal Declaration in state practice, its reflection in countless treaties, constitutions and legislation, and in the decisions of both national and international courts.⁶⁷

Why does the status of the Universal Declaration as custom make a difference? If the International Court of Justice, for example, held that the economic and social rights recognized in the Universal

63. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 417 (1950).

64. See the role of the Universal Declaration in, for example, the United Nations Millennium Declaration, *supra* note 39, ¶ 25 (resolving to “respect fully and uphold the Universal Declaration of Human Rights”); see also U.N. Millennium Development Goals, *supra* note 39; World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

65. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters’ note 2 (1987) (suggesting that “[p]ractice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights, even if only in principle”).

66. See, e.g., Louis B. Sohn, *The Human Rights Law of the Charter*, 12 *TEX. INT’L L.J.* 129, 133 (1977). An additional argument points to the status of the Universal Declaration as a general principle of law: Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

67. See John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 21, 29–37 (Bertram G. Ramcharan ed., 1979).

Declaration belonged to the category of custom, such rights would be understood to be generally binding on all states as a matter of international law.⁶⁸ Such a finding would point to the existence of international legal obligations for particular states, like the United States, which have failed to ratify the successor treaty on economic and social rights⁶⁹ (unless such states claimed they had persistently objected to the status of custom, an argument belied by support for the Universal Declaration). International commentators following a monist analysis would also assert that the status of customary law would enable economic and social rights to be invoked before, and applied by, national courts in countries (again, like the United States) in which custom is understood to be part of the law of the land.⁷⁰ In Alien Tort Statute claims in the United States, for example, the Universal Declaration has been used as a source of custom by courts enforcing the “the law of nations” for foreigners in civil actions for conduct committed abroad.⁷¹ While some have interpreted the United States Supreme Court decision in *Sosa v. Alvarez-Machain*⁷² as diminishing the relevance of the Universal Declaration, it continues to be invoked as a coterminous source of custom by certain courts.⁷³

Nonetheless, the commentators who assert that the Universal Declaration has customary status are selective about which provisions

68. Statute of the International Court of Justice, *supra* note 66, art. 38(1)(b). This statement reflects the category of custom as a source of international law, rather than the binding nature of decisions of the International Court of Justice, which is reserved to the parties in the instant case. See U.N. Charter art. 94(1); Statute of the International Court of Justice, *supra*, art. 59. For a statement that decisions of the International Court of Justice are not self-executing in the United States, see *Medellín v. Texas*, 128 S. Ct. 1346, 1358–1359 (2008). *But see id.* at 1384 (Breyer, J., dissenting). I do not here address the question of the authority of international and national courts to declare custom.

69. ICESCR, *supra* note 7.

70. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). A discussion of the ability of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to exert an anti-monist pressure on U.S. courts is beyond the scope of this reflection. Compare Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007), with Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 548 (2004).

71. See Alien Tort Statute, 28 U.S.C. § 1350 (1982); see also *Filártiga v. Peña-Irala*, 630 F.2d 876, 879, 882 (2d Cir. 1980) (noting the approval of the Universal Declaration by the General Assembly and its incorporation in the constitutions of eighteen nations.)

72. 542 U.S. 692, 734 (2004) (“[T]he Declaration does not of its own force impose obligations as a matter of international law.”).

73. See the variety of post-*Sosa* judicial responses collected by Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT’L L.J. 251, 279–80 (2008).

constitute custom, and often neglect economic and social rights from this identification.⁷⁴ There is a weird logic to this disavowal. For example, those who assert a deductive approach to ascertaining the customary law of human rights suggest that the rights that appear in the Universal Declaration, but that are later omitted from the ICCPR, are unlikely to constitute custom. Nonetheless, they neglect a similar exercise with respect to the ICESCR, in which the economic and social rights of the Universal Declaration are substantially replicated.⁷⁵ This is despite the fact that the quantitative support for each convention is similar: the ICCPR presently enjoys 160 states parties compared to the ICESCR's 164.⁷⁶ In qualitative terms, the difference in ratifications between the two covenants is more noteworthy, at least for American commentators, with the United States being a prominent non-party to the latter treaty. In addition, the differences in the content of the obligations,⁷⁷ and the mechanisms of implementation,⁷⁸ between the ICCPR and the ICESCR, are a possible reason to reject the relevance of the latter to the question of custom. Yet with the recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

74. Humphrey, *supra* note 67, at 29 (limiting the analysis of custom to "the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one"). For a critique, see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 95 (1992) (commenting on the Restatement's restriction to prohibitions on slavery and torture). In the context of the Alien Tort Statute, see especially *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 244 (2d Cir. 2003) (rejecting Article 25 of the Universal Declaration and other instruments protective of the rights to life and health as "insufficiently definite to constitute rules of customary international law").

75. *E.g.*, CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 38, 40 (2d ed. 2008) (pointing to the Universal Declaration's rights to asylum, nationality and the right of ownership that did not appear in the ICCPR; and elsewhere noting that the ICESCR takes up the economic and social rights of the UDHR, but adds additional content, such as the right to health).

76. For status of ratifications, see United Nations Treaty Collection, *available at* <http://treaties.un.org> (follow "databases" hyperlink; then follow "Status of Treaties" hyperlink).

77. Compare ICCPR, *supra* note 7, art. 2(1), (requiring States Parties to "respect and to ensure to all individuals . . . the rights recognized"), and *id.* art. 2(3) (requiring provision of remedy for violations), with ICESCR, *supra* note 7, art. 2(1) (requiring States Parties to take steps to the maximum of available resources, with "a view to achieving progressively the full realization of the rights").

78. ICCPR, *supra* note 7, art. 28 (establishing the Human Rights Committee); see also Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (establishing the individual complaint mechanism).

which establishes the authority of the Committee on Economic, Social and Cultural Rights to receive and consider communications, such a distinction loses force.⁷⁹ Moreover, enforceability should not be equated with legality, which belies the focus on state practice and *opinio juris* for the formation of customary international law.

The ideological polarization of the Cold War has often been cited as a main obstacle to satisfying the test of state practice and *opinio juris*. The global environment is now very different, and some commentators suggest that international aid responses to crises prompted by natural disasters, like the Indian Ocean tsunami in 2004, or to ongoing food, health, or education crises in certain regions, have formed sufficient state practice for the development of custom.⁸⁰ The focus on aid, however, overlooks the ways in which states fail to observe economic and social rights in other interactions, such as trade policy.⁸¹

Putting to one side the question of custom, it is clear that the Universal Declaration has indirectly influenced national law. It has “migrated” to national (and state) constitutions through constitutional drafting and interpretation.⁸² In the case of drafting, constitutional economic and social rights sometimes preceded, more often postdated, and on some occasions coincided with the timing of the

79. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008). Once it enters into force with the completion of ten ratifications, this Protocol will directly counter the Universal Declaration’s exhortatory model by providing a forum for individuals or groups of individuals to claim, before the Committee on Economic, Social and Cultural Rights, that a state party has violated the economic and social rights provisions of the Covenant, or for a state party to claim that another party is not fulfilling an obligation. *Id.* arts. 2, 10.

80. For an argument that the Millennium Development Goals (MDGs) represent custom in the area of economic and social rights, see Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUMAN RIGHTS Q. 755, 773 (2005); see also Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 793 (2006) (noting the response to the tsunami).

81. See, e.g., Andras Sajo, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT’L L. & POL. 221, 250 (2002) (emphasizing the trade regime).

82. See Gerard L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003). For the metaphor of migration, see generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006). See also Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006). For an example of the influence of the Universal Declaration on state constitutions in the United States, see Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004) (describing the Montana Constitution).

Universal Declaration. In the case of interpretation, advocates and judges have been influenced by the provisions of the Universal Declaration.⁸³ For example, when the Supreme Court of the United States was asked to decide on the effect of the Constitution on welfare protection, Justice Marshall referred to the economic and social rights of the Universal Declaration.⁸⁴

The Constitution of South Africa is the most recent and most far-reaching example of the entrenchment of economic and social rights. There, the Bill of Rights recognizes the rights to access housing, health care, food and water, social security, and education, just as it protects civil and political rights.⁸⁵ In 1948, South Africa had

83. This was the drafters' intent. See, e.g., LAUTERPACHT, *supra* note 63, at 356 (identifying the role of national courts and other organs as "the most effective way of giving reality" to international human rights).

84. *Dandridge v. Williams*, 397 U.S. 471, 521 n.14 (1970) (Marshall, J., dissenting) (citing Article 25 of the Universal Declaration, along with several law review commentaries, in support of the application of the Fourteenth Amendment to welfare rights). The homegrown origins of "freedom from want" make Justice Marshall's recourse to the Universal Declaration unremarkable, although he was not necessarily suggesting the "wise parentage" line of justification for the use of foreign law. Compare *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (suggesting that "[w]ise parents do not hesitate to learn from their children"), with *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005) (Justice Breyer suggesting different epistemic grounds to the use of foreign law). For an examination of the indirect influence of the Universal Declaration in the courts of other countries, see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995/1996).

85. S. AFR. CONST. 1996 ss. 26 (housing), 27 (health care, food, water and social security), 29 (education):

26. Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security

1. Everyone has the right to have access to
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

opposed the inclusion of economic and social rights within the Universal Declaration, on the basis that “a condition of existence does not constitute a fundamental human right merely because it is imminently desirable” and because effective implementation could make it “necessary to resort to more or less totalitarian control of the economic life of the country.”⁸⁶ South Africa abstained from the vote to adopt the Universal Declaration. Apartheid became the official policy of the Government of South Africa the same year. That the South African constitutional system now represents a leading example of entrenched economic and social rights is proof that the distance between normative aspirations and social realities can be bridged.

Two aspects are particularly instructive about the present operation of economic and social rights in South Africa. First, economic and social rights offer a rich set of tools to analyze the distributive impact of the background laws—the rights, immunities, and privileges—that undergird market arrangements. For example, economic and social rights, operating as law, reengage the links between the protection of

....

29. Education

1. Everyone has the right
 - a. to a basic education, including adult basic education; and
 - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
 - a. equity;
 - b. practicability; and
 - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
 - a. do not discriminate on the basis of race;
 - b. are registered with the state; and
 - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

86. U.N. Econ. & Soc. Council [ECOSOC], Human Rights Comm'n, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, ¶ 25, U.N. Doc. E/CN.4/82/Add.4 (Apr. 27, 1948).

property rights and democracy. Because the Constitution sets out a requirement on the state to “respect, protect, promote and fulfill the rights in the Bill of Rights,”⁸⁷ and because it binds the judiciary, as well as other organs of the state, to develop the common law in order to protect or limit rights,⁸⁸ the economic and social rights of the Constitution establish a legal basis from which to observe the distributive implications of private law. In other words, the Constitution radiates outwards to include private relations that may impact on economic and social rights.

In the twelve years of South African jurisprudence since the adoption of the post-apartheid Constitution of 1996, this “horizontal” dimension has not been fully developed. Nevertheless, there are important signals of how the Constitution may influence private law in certain key respects. For example, the Constitution’s guarantee of everyone to have access to housing has been respected by South African courts by recognizing the state’s duty to address the needs of potentially homeless people when performing legal evictions from private land—evictions necessary to respect private property.⁸⁹ The right to housing provision has been used to reduce the administrative burdens on the state when engaged in emergency accommodations, and to create additional hurdles for the execution of land in the sale of petty debts.⁹⁰ Additionally, it has been a source of a rule requiring the state to provide alternative accommodations during evictions from unsafe buildings.⁹¹ These legal steps confound the dichotomy of positive and negative rights that for so long has operated as a shorthand categorization—and diminution—of economic and social

87. S. AFR. CONST. 1996 s. 7(2).

88. *Id.* s. 8(1), (3).

89. *President of the Republic of S. Afr. v Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) (S. Afr.) (holding that the constitutional property rights of the landowner and constitutional housing rights of squatters were both impaired by a failure of state to provide alternative accommodation).

90. *See Minister of Pub. Works v Kyalami Ridge Envtl. Ass’n* 2001 (3) SA 1151 (CC) (S. Afr.) (holding government provision of emergency accommodation need not have satisfied all administrative requirements, in light of the constitutional rights of flood victims); *Jafitha v Schoeman* 2005 (2) SA 140 (CC) (S. Afr.) (holding South Africa’s Magistrates’ Court Act unconstitutional where it permitted the sale in execution of people’s homes in order to satisfy petty debts).

91. *See Occupiers of 51 Olivia Road, Beria Twp. v City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.) (finding that while the City has obligations to eliminate unsafe and unhealthy buildings, its constitutional duty to provide access to adequate housing means that potential homelessness must be considered when a City decides whether to evict people from buildings).

rights as opposed to other rights. The operation of economic and social rights as law directs us instead to the more fruitful question of how seriously both negative and positive obligations are taken by the state.⁹²

Secondly, South Africa's experience with economic and social rights has helped to overcome one of the central obstacles to the legal operation of economic and social rights, which relates to their legal enforcement. The justiciability of economic and social rights authorizes judges to hear complaints with respect to economic and social rights infringements, and to order appropriate remedies. The ongoing concern about the justiciability of economic and social rights has been directed to their suspected tendency to inflate judicial power as against the so-called democratic branches. Although the danger is present with all forms of judicial review,⁹³ it has been treated as particularly pressing for economic and social rights. This difficulty, which centers on the perceived lack of institutional competence or legitimacy on the part of judges, has been met by judicial restraint and innovative remedies on the part of the South African Constitutional Court.

In the very first right to housing case, for example, the Constitutional Court declared that the government's housing policy, which had not provided for the emergency needs of people in the position of the claimants, was unreasonable and therefore inconsistent with the protection offered by the right to access housing.⁹⁴ Likewise, in adjudicating on the right to access health care, the Constitutional Court ordered the government to desist from preventing the roll-out of an anti-retroviral drug to prevent the mother-to-child transmission of HIV, additionally requiring the government to establish testing and counseling programs.⁹⁵

In both cases, the Constitutional Court declined to entrench a "minimum core" of economic and social rights, which is the doctrine employed by the Committee on Economic, Social and Cultural Rights to determine a minimum legal content for economic and social

92. For an examination of the state action doctrine and its relation to economic and social rights, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* ch. 6–7 (2008).

93. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

94. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

95. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

rights.⁹⁶ (South Africa's jurisprudence on economic and social rights is linked to international law but does not merely reproduce it.⁹⁷) The determination by the Constitutional Court to assess the positive obligations of economic and social rights under the rubric of a reasonableness test represents a more flexible option, and one that leaves open a degree of contestation around the meaning of economic and social rights, as well as a response to the competence and legitimacy concerns mentioned above.⁹⁸

South Africa's example is instructive for national enforcement, yet remains confined to the national sphere in which, as we have seen, the Universal Declaration was preoccupied. Conceivably, the model of judicial review employed in South Africa may inform the supranational and international tribunals which adjudicate economic and social rights.⁹⁹ A less sanguine assessment, however, would emphasize the limits of this model for effecting legal change in the global economic order, in which the enjoyment of economic and social rights is often determined. Only an analysis of extraterritoriality can bring attention to the way in which one state's actions interfere with the enjoyment of economic and social rights in another state, and to the way in which it can be held accountable. There are some precursors. In sanctions policy, for example, the Committee has set out legal obligations for States to observe.¹⁰⁰ How this may apply in other international interactions, such as in aid or trade,¹⁰¹ is a

96. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Econ., Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, ¶ 10, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990).

97. S. AFR. CONST. 1996 s. 39 (requiring the Court to consider international law, and allowing the consideration of foreign law, when interpreting the Bill of Rights).

98. For analysis, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

99. This orientation would assist the Committee on Economic, Social and Cultural Rights in its new role. See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *supra* note 79. For an analysis of the justiciability of economic and social rights within present United Nations, European, Inter-American, and African human rights regimes, see David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53 (2006).

100. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Econ., Soc. & Cultural Rights, *General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, ¶ 7, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

101. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Econ., Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art.11)*, ¶¶ 18, 36–37, 39, U.N. Doc. E/C.12/1999/5 (May 12, 1999); *General Comment No. 14: The Right to Highest Attainable Standard of Health*, ¶¶ 38–42, 64, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶¶ 16–17,

challenge for which the South African model has limited answers.

CONCLUSION

The ambition of the Universal Declaration's emphasis on freedom, want, and economic and social rights was great. Rockwell's portrayal of "Freedom from Want" fails to capture this aspiration because it presents freedom from want as a comfortable, hierarchical and private affluence, more redolent of the American prosperity that followed World War II's end, rather than the years of insecurity that preceded it. Yet it is significant that the painting was presented, in its poster form, with the caption "OURS. . . to fight for—FREEDOM FROM WANT." On one view, such words merely conjure up the war effort, and the sacrifice, that was part of the image's popular dissemination.¹⁰² On another view, these words suggest a corrigibility of aspiration, a recognition of the politics that lie behind the attempt to give meaning to the aspiration of freedom from want and the rights that accompany it. Perhaps the anachronisms and assumptions—flaws which, it must be conceded, would accompany every concrete portrayal of the realization of economic and social rights—may be forgiven when accompanied by the hope and choice that such words convey.

This reflection has presented the dual operation of economic and social rights, with a similar attitude of hope and choice, as both "frame" and "law." These categories are porous: the frame of politics addresses, is bolstered by, and is impaired by, law, even as it raises separate questions. The frame of rights provides a way of presenting freedom from want in universalist, justice-based, and potentially legal terms. The law of rights provides a method of exerting legal pressure on decision-makers, including but not only limited to judges, in both public and private law, and in national and international spheres. The oscillation between the two furthers the continuing relevance of economic and social rights, rather than defeats it. In fact, this dual

21, U.N. Doc. E/C.12/2001/10 (May 10, 2001), *General Comment No. 15: The Right to Water*, ¶¶ 18, 33–36, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); ECOSOC, Comm'n on Human Rights, *Report of the Special Rapporteur, Paul Hunt, Mission to the World Trade Organization*, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) (prepared by Paul Hunt).

102. Rockwell's *Four Freedoms* series toured the country to raise money by the sale of war bonds. See Lester C. Olson, *Portraits in Praise of A People: A Rhetorical Analysis of Norman Rockwell's Icons in Franklin D. Roosevelt's "Four Freedoms" Campaign*, 69 Q. J. OF SPEECH 15, 22, 23–24 (1983).

operation is instructive about the operation and durability of the Universal Declaration as a whole. After sixty years, the daily challenges and opportunities of the economic and social rights of the Universal Declaration remain ours.