Economic, Social, and Cultural Rights and the Right to Education in American Jurisprudence: Barriers and Approaches to Implementation

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I. HISTORY OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (hereinafter the Covenant on ESC Rights or the Covenant) states:

The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . . .

The economic, social, and cultural rights (hereinafter ESC rights) listed in the Covenant include a variety of rights, such as: (1) the right to earn a living by work which is freely chosen or accepted; (2) the right to an adequate standard of living, including food, clothing, and housing; (3) the right to the enjoyment of the highest attainable standard of health; and (4) the right to an education.

As of October 11, 2007, 157 countries had ratified the Covenant on ESC Rights, including Canada, Japan, West Germany, and the United Kingdom. Although President

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2. Id. at 7-10.


Carter signed the Covenant on ESC Rights and sent it to Congress for ratification as part of a package of international human rights treaties, it has yet to be ratified and has been pending before Congress since 1978.  

A number of theories attempt to explain the United States' reluctance to ratify the Covenant on ESC Rights. One such theory suggests that ESC rights lacked domestic support because they were viewed as foreign to the American legal system. The fact that "the U.S. Government, [since the early 1980s], has categorically denied that there is any such thing as an economic, a social or a cultural human right" highlights such an argument. Furthermore, the rights articulated in the Covenant have been viewed by the State Department as a "socialist manifesto thinly veiled in the language of rights." Another theory asserts that the United States' reluctance to ratify the covenant is based on a constitutional federalism conflict. This position argues that the issues set forth in the Covenant on ESC Rights should be addressed solely by states, and ratification by the U.S. Senate would impinge on state sovereignty. Although there had been a push in the 1990s to advance an international human rights agenda, the signing of the Covenant on ESC Rights has yet to be realized.

Both of these theories emphasize the differences underlying the Covenant on ESC Rights and the U.S. Constitution. ESC rights, for example, are considered "second generation rights" and emerged from the "socialist philosophy which holds that human rights can only be guaranteed by positive state action." "The drafters of the Covenant on ESC Rights believed that political and civil rights could not be effectively exercised unless the basic needs of survival were met." Conversely, the U.S. Constitution focuses on:

\[ \text{[P]} \text{lacing }	ext{negative constraints}\text{ on the power of government...} \]
\[\text{[and] what the government cannot do . . . . What the Constitution fails to do is recognize that government has certain positive obligations to its citizenry with respect to the social and economic sphere of life.} \]

6. Stark, supra note 4, at 81; see also Alston, supra note 5, at 366.
7. Alston, supra note 5, at 367.
8. Stark, supra note 4, at 81.
9. Id. at 82.
10. Id. at 86-87. For example, in the 1990s the Civil Covenant was ratified by the U.S. Senate, the U.S. participated in the Copenhagen Conference on the Human Dimension, and the U.S. signed the Charter of Paris for a New Europe. Id.
12. Stark, supra note 4, at 81 n.9.
In the United States, ESC rights are considered distinct from those rights that we regard as "political and civil rights."\textsuperscript{14} This fundamental distinction creates an underlying conflict in attempting to argue for legal recognition of ESC rights in a judicial system derived from a form of government established through negative constraints. Consequently, U.S. legal history and the capitalist and libertarian foundations of government tend to fight against the concept of an activist, socially focused government.\textsuperscript{15}

This Note will seek to explore whether these rationales against ratification of ESC rights are actually valid, or whether the U.S. judiciary has created a space within which ESC rights could be implemented. Section II of this Note will identify the types of rights currently recognized in the United States and explore how rights are recognized through the example of education. Subsequently, Section III will discuss and analyze possible proposals in support of U.S. recognition of ESC rights. These proposals include: (1) upholding citations to international law supporting the Covenant; (2) finding ESC rights to be an essential component of political and civil rights, which are explicitly protected under U.S. law; and (3) considering certain ESC rights as fundamental rights under equal protection jurisprudence.

The language of ESC rights divides the obligations under the UN Convention into four main categories: (1) respecting ESC rights; (2) protecting ESC rights; (3) promoting ESC rights; and (4) fulfilling ESC rights.\textsuperscript{16} Due to the structure and emphasis of the U.S. government, as is discussed later in this Note, the goals of promoting and fulfilling ESC rights are beyond the objectives that are likely to be achieved at any point in the near future. However, this Note argues that the federal judiciary has currently accepted the first of these categories — respecting ESC rights — and the current challenge is to move into the second category regarding the protection of ESC rights.


\textsuperscript{14} In fact, the United States government and judiciary have even been reluctant to label these as rights, as indicated in the case law addressed in this section. \textit{See} discussion infra Parts II. B., III.

\textsuperscript{15} Park, \textit{supra} note 13, at 1205.

II. THE CURRENT STATUS OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE UNITED STATES

A. THE DEVELOPMENT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE UNITED STATES

Although rhetoric surrounding human rights in the United States traditionally emphasized the U.S. structure of government as recognizing only civil and political rights, this assertion is not entirely accurate. Rather, a more detailed inspection of U.S. history reveals a movement toward recognizing more social and economic rights. One such example is President Franklin D. Roosevelt's speech on "freedom from want," in which he recommended a new Bill of Rights that would include: (1) the right to earn enough to provide adequate food, clothing, and recreation; (2) the right of every family to a decent home; (3) the right to adequate medical care and the opportunity to achieve and enjoy good health; (4) the right to adequate protection from the economic consequences of old age, sickness, accident, and unemployment; and (5) the right to a good education. In addition, the New Deal began a period during which the federal government undertook social welfare as a matter of law, and established programs such as Social Security. The United States also participated in the Copenhagen Conference on the Human Dimension in 1990 and signed the Charter of Paris for a New Europe, "expressly affirming in an international instrument that 'everyone . . . has the right . . . to enjoy his economic, social and cultural rights.'" While the federal judiciary has been more reluctant to recognize the importance of a number of ESC rights, it has created an equal protection framework that could easily be used to integrate protection of ESC rights into U.S. jurisprudence. Legally recognized rights in the United States are usually protected through a class-based assessment, in which they determine the appropriate level of scrutiny available. This class-based assessment would interact with a claim for ESC rights, for example, on the basis that the failure to legally recognize certain ESC rights disproportionately impacts a specific group. Traditionally, when dealing with social issues and equal protection, courts have used a deferential rational basis test for state regulations. But this approach has also

19. Stark, supra note 4, at 87.
allowed states to utilize any possible rationale for depriving people of ESC rights without a meaningful challenge from the U.S. Supreme Court.

While the primary focus of this Note is the U.S. legal system, the experiences of other countries are informative in presenting possible solutions to the challenge of recognizing and implementing ESC rights. For example, in South Africa, a “comprehensive set of social, economic and cultural rights” has been integrated into their Bill of Rights.\textsuperscript{22} The South African Bill of Rights has been held to impose a combination of positive and negative obligations on the state, and these rights are enforceable by the courts.\textsuperscript{23} In enforcing such rights, the South African judicial system developed a model of “reasonableness review,” which asks “whether the means chosen are reasonably capable of facilitating the realization of the socio-economic rights in question.”\textsuperscript{24} Such language closely resembles the rational basis review that the U.S. judiciary undertakes for equal protection analysis. This similarity suggests that the South African model could be used to integrate ESC rights into the United States’ current legal framework, and could support analyzing ESC rights in a class-based assessment style.

However, a class-based approach may be more effective for those categories analyzed with heightened scrutiny, such as race, national origin, and gender. Although ESC rights are often aimed at addressing economic status disparities, there is an arguable correlation between income level, race, and access to resources including housing, food, and health care.\textsuperscript{25} In one study, Joe Soss, Sanford Schram, Thomas Vartanian, and Erin O’Brien found that:

[S]tates with relatively high minority (African-American or Latino) welfare populations are more likely to create institutional obstacles — such as strict time limits for eligibility to receive welfare assistance and caps on benefits to children conceived by recipients — blocking the receipt of welfare assistance.\textsuperscript{26}

Furthermore, a study by Lee Harris found a negative relationship “between the proportion of African-American welfare families and the amount of cash assistance.”\textsuperscript{27}

\begin{thebibliography}{99}
\bibitem{23} \textit{Id.} at 73.
\bibitem{24} \textit{Id.} at 78-79.
\bibitem{27} \textit{Id.} at 19.
\end{thebibliography}
race, poverty, and access to resources is illustrated by studies showing that "private hospitals [are] leaving minority communities, and those with the least resources, in order to relocate to more affluent, predominantly white communities." By arguing under a heightened scrutiny analysis that lack of access to items such as monetary support, food (i.e., food stamps), and health care violate the equal protection doctrine, the existing U.S. civil rights framework and Title VII may help the United States take that first step towards judicial recognition of ESC rights.

In addition to these studies, academic analyses on possible methods to advance the recognition of ESC rights have focused on two alternative arguments: (1) establishing strict scrutiny for laws which deny the basic needs of individuals; or (2) establishing an intermediate standard of review. Despite the possible argument that strict scrutiny should be imposed due to the disparate impact on minority groups' access to resources, such recognition would be a fairly dramatic reversal of the Supreme Court's current approach. While the second approach — establishing an intermediate standard of review — is more flexible, the Supreme Court has limited intermediate scrutiny to cases involving gender and children born out of wedlock. The Supreme Court emphasized that "[i]ntermediate review is triggered when classification involves 'either a significant interference with liberty or a denial of a benefit vital to the individual.'" While access to food and healthcare could be seen as "vital to the individual," the Court has not indicated a willingness to expand the categories included in intermediate scrutiny.

Past rhetoric and the current legal framework indicate the potential success and importance of integrating ESC rights. However, the federal judicial system has been reluctant to take such a step. As a result, no ESC rights are officially recognized — at least not under the heading of "ESC rights."

B. RECOGNITION OF THE RIGHT TO EDUCATION IN THE UNITED STATES: A CASE STUDY

Although the U.S. Supreme Court has recognized the importance of education in order to prepare citizens to participate in self-government and function as well-adjusted members of society, the Court in *San Antonio*
Independent School District v. Rodriguez held that education is not a fundamental right in the United States. In doing so, the Court noted that it "has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet [the Supreme Court has] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the more informed electoral choice." Rodriguez sets forth the traditional approach to the right to education, which was subsequently followed in Martinez v. Bynum. In Martinez, the Supreme Court held that a residency requirement for attending free public schools does not violate the Fourteenth Amendment. Because Morales moved to Texas for the sole purpose of attending school, the Court held that he could be excluded from public education because he lacked the requisite intent to remain in the state.

Rodriguez was decided in 1973 during a time in which there could have been alternative incentives for the Supreme Court to reach the decision that it ultimately made. During this time period, states (and as a result courts) were struggling with actually implementing remedial schemes consistent with Brown v. Board of Education. Because the desegregation process frequently involved bussing, democratic promotion of such methods left congressional representatives alienated from a section of their constituents — the white working class — and resulted in a swing in political power. The newfound Republican power attempted to control some of the massive remedies being undertaken, and:

[A]s part of their agenda to stop the liberals from interpreting the Constitution to protect the poor, the conservatives decided, in San Antonio [Independent School District] v. Rodriguez, that the states could continue to have school districts that spent significantly different amounts depending upon their tax base.

The political pressure to limit the Brown remedies arguably had an influence on the Rodriguez majority, affecting its decision to significantly limit the framing of the issues involved in the case. In that case, the Supreme Court asked whether there was a "guarantee to the citizenry the

34. Id. at 36.
36. Id. at 328.
37. Id. at 330-31.
40. Id.
most effective speech or the most informed electoral choice.”

However, the actual issue facing the Court was whether the level of education provided met the minimum necessary to sufficiently engage in those political activities that are explicitly protected under the Constitution.

Apart from arguing that there was no guarantee of the most effective speech, the majority opinion also claimed that education was an area primarily left to the states. While this is true to a degree, the federal government has a duty to ensure state compliance with the principles of the Constitution and has exercised this obligation through a range of other statutory provisions such as mandatory school attendance and the legal regulation of school curricula, both of which are part of our current education system. Consequently, the rationale relied upon in support of the Rodriguez holding is unfounded.

The right to education has been recognized in a number of international covenants. Apart from the Covenant on ESC Rights, the right to education is also emphasized in Article XII of the American Declaration of the Rights and Duties of Man of 1948, which proclaimed that, “the right to education ‘should be based on the principles of liberty, morality and human solidarity’ and should prepare every person ‘to attain a decent life, to raise his standard of living, and to be a useful member of society.’”

Unlike the international community, the United States has refrained from signing a number of international treaties on the issue of education. As mentioned at the beginning of this Note, the United States is one of the few countries that has not ratified the Covenant on ESC Rights. In addition, as of January 2008, the United States had yet to ratify the UN Convention on the Rights of the Child (hereinafter CRC), which also addresses the right to education. The CRC has been ratified by 191 states — all independent states of the world except for Somalia and the United States. However, failure to formally adopt international treaties on the issue of education has not prohibited the United States from emphasizing the importance of education, as illustrated above.

The right to education is unique among the ESC rights because it is one of the only rights that contains aspects of three generations: “the first generation of civil and political rights; the second generation of economic, social and cultural rights, and the third generation of solidarity or group

42. This issue will be further explored in Section III. B. of this Note.
44. Nowak, supra note 11, at 248.
45. Id. at 249-50.
46. Stark, supra note 4, at 80.
47. Nowak, supra note 11, at 251 n.17.
Consequently, recognition of the right to education could be an important tool to bridge the gap between first- and second-generation rights and build support within U.S. jurisprudence for other ESC rights, such as the right to employment or the right to food.

III. ENFORCEMENT OF ESC RIGHTS

How can ESC rights become a part of American jurisprudence despite the failure of the Senate to ratify the Covenant on ESC Rights? As Section II set forth, despite past support from the executive branch and the potential to apply the equal protection framework to ESC rights, the U.S. Supreme Court has been reluctant to protect these rights and has even rejected outright education as a fundamental right. This Section focuses on addressing the bases that can be used to transition legal conduct toward ESC rights from respect to protection.

A. RECOGNITION OF INTERNATIONAL STANDARDS IN FEDERAL COURTS

Legal protection of ESC rights could be successfully advanced through a constitutional comparative approach in which international legal precedents are accepted as valid precedents in addressing domestic legal issues. If an international human right is considered to be customary international law by U.S. courts, then it is also a part of U.S. law and must be administered by courts in this country as part of federal statutory law.

International precedents, constituting customary international law, have been accepted and recognized in the United States by federal courts. One such example is *Boehm v. Superior Court.* In *Boehm,* the California Court of Appeals cited the Universal Declaration of Human Rights in deciding what constitutes the minimum scope of basic needs. Similarly, in *Filartiga v. Pena-Irala,* the Second Circuit Court of Appeal held that "official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." However, the federal judiciary views certain rights

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49. Nowak, supra note 11, at 252. However, the right to education has consistently been accepted as primarily a "second generation right." *Id.*
50. *Id.* at 252. There are also circumstances where U.S. courts look and refer to international authority even when the proposition may not rise to the level of customary international law. These types of cases will be discussed in further detail below. See infra notes 51-80 and accompanying text.
51. See, e.g., Park, supra note 13, at 1242-43.
52. *Boehm v. Superior Ct.*, 223 Cal. Rptr. 716, 721 (1986). *Boehm* was later overruled by a legislative enactment which required counties to "adopt standards of aid and care for the indigent and dependent poor," rather than have the standard of aid to be based upon a specific factual study of actual subsistence costs of living in each county. *Taylor v. Contra Costa County,* 56 Cal. Rptr. 2d 448, 449 (1996).
53. *Boehm,* 223 Cal. Rptr. at 721.
54. *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980).
55. *Id.* at 884 (emphasis added).
as hierarchically more acceptable than other rights. For example, "freedom from torture and arbitrary imprisonment are more readily accepted as fundamental human rights [by the judiciary] than are the rights to subsistence benefits, shelter, healthcare or education." 56 In In re Alien Children Education Litigation, the U.S. District Court for the Southern District of Texas supported the devaluation of certain ESC rights by stating that "the right to education, while it represents an important international goal, has not acquired the status of customary international law." 57

Contrary to the conclusion of the U.S. District Court for the Southern District of Texas, ESC rights have arguably been widely accepted and recognized, and should be considered sufficiently established in the international community to have achieved a status as customary international law. As mentioned earlier, 157 countries have adopted the Covenant on ESC Rights and some of these rights have been recognized in U.S. courts, though not under the title of ESC rights. For example, the Supreme Court has recognized the importance of education to prepare citizens to participate in self-government and function as well-adjusted members of society. 58 The right to education is also emphasized in Article XII of the American Declaration of the Rights and Duties of Man of 1948 which stated that, "the right to education 'should be based on the principles of liberty, morality and human solidarity' and should prepare every person 'to attain a decent life, to raise his standard of living, and to be a useful member of society.'" 59 The CRC, which has been ratified by 191 countries, also addresses the right to education. 60 In addition, a number of other covenants and treaties have supported and recognized ESC rights.

56. Park, supra note 13, at 1242.
59. Nowak, supra note 11, at 249-50.
60. Id. at 251 n.17.
61. While not an exhaustive list, some of these documents include treaties, such as the Convention Against Discrimination in Education; declarations, such as the Universal Declaration of Human Rights and the Universal Declaration on the Eradication of Hunger and Malnutrition; various UN standards, such as the Covenant on Economic, Social, and Cultural Rights (CESCR) General Comment No. 4 (1991) on the Right to Adequate Housing, CESCR General Comment No. 6 (1995) on the Economic, Social and Cultural Rights of Older Persons, CESCR General Comment No. 8 (1997) on the Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, CESCR General Comment No. 10 (1998) on the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights, CESCR General Comment No. 12 (1999) on the Right to Adequate Food, CESCR General Comment No. 13 (1999) on the Right to Education, and CESCR General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health; interpretive texts, such as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and the Bangalore Declaration and Plan of Action Regarding Economic, Cultural and Social Rights and the Role of Lawyers; and regional instruments, such as the European Convention on Human Rights and Fundamental Freedoms – Protocol One, and the Additional Protocol to
Even if certain rights do not rise to the level of customary international law, parties can still assert that international precedents and human rights law can be validly cited to in American jurisprudence. There are currently two lead cases, *Roper v. Simmons* and *Lawrence v. Texas*, which support the use of international precedents to inform constitutional interpretations of domestic legal issues.

In *Roper v. Simmons*, a case also examining the proper role of international authorities, the U.S. Supreme Court held that the U.S. Constitution prohibited imposition of the death penalty for offenders under the age of eighteen. The Court acknowledged that it “has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’” Furthermore, *Roper* noted how Article 37 of the CRC “contains an express prohibition on capital punishment for crimes committed by juveniles under 18.” Similar language can be found in other significant international covenants, such as the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child. *Roper* is of special significance because of the close parallel between the international precedents cited and those applicable to ESC rights. Most notably, neither the CRC nor the Covenant on ESC Rights has been ratified by the United States. However, this lack of ratification did not dissuade the U.S. Supreme Court from citing the CRC as precedent for the legal interpretation of the rights protected by the Eighth Amendment.

Reliance on international standards also emerged in the recent case of *Lawrence v. Texas*, which held that states could not criminalize consensual same-sex sodomy. In reaching this conclusion, the majority discussed a wide range of international support for the proposition that consensual sodomy should not be criminalized, including the opinions and laws of other nations and interpretations of international conventions. For example, in the majority opinion, Justice Kennedy noted how the British Parliament recommended and enacted laws against the punishment of homosexual conduct. In addition, the *Lawrence* majority emphasized that
the European Court of Human Rights considered a similar case and found that "laws proscribing [homosexual] conduct were invalid under the European Convention on Human Rights."\(^{67}\) Through an exploration of international norms and values, Justice Kennedy created a basis to reverse the \textit{Bowers v. Hardwick} precedent\(^{68}\) and establish a broader interpretation of the rights protected under the U.S. Constitution.\(^{69}\)

These cases illustrate how constitutional comparativism has been utilized to expand individual liberties.\(^{70}\) However, strong opposition exists as to the validity of citations to international law in deciding constitutional issues. As articulated by Justice Scalia in his \textit{Lawrence v. Texas} dissent, "[c]onstitutional entitlements do not spring into existence...as the Court seems to believe, because foreign nations decriminalize conduct."\(^{71}\) Justice Scalia goes on to state that any such discussion of foreign views is merely dicta; "[d]angerous dicta, however, since this Court...should not impose foreign moods, fads, or fashions on Americans."\(^{72}\) Similarly, opponents of applying international law to domestic constitutional issues question the relevance of a "'modern international treaty...for judges trying to interpret the text of our Constitution which was adopted over 200 years ago?' The criticism reflects a...strong impression that international law is arrogantly overreaching, transgressing its proper role as a bracketed discipline."\(^{73}\) For strict constitutionalists like Justice Scalia, criticism of utilizing international law also centers on the idea that such rights impose positive obligations on the U.S. government, whereas the founding fathers intended it to be limited and constrained.\(^{74}\) However, it is interesting to note that federal courts have often relied on such authority to curtail, rather than expand, such rights.\(^{75}\)

\(^{67}\) \textit{Lawrence}, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981)).
\(^{69}\) \textit{Lawrence}, 539 U.S. at 572-73.
\(^{71}\) \textit{Lawrence}, 539 U.S. at 598.
\(^{72}\) \textit{Id.} (citing Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)). However, Scalia’s critique overlooks the fact that much of U.S. jurisprudence emerged from English law. In \textit{Miranda v. Arizona}, the U.S. Supreme Court noted that:

\begin{quote}
So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.
\end{quote}

\(^{73}\) Alford, \textit{supra} note 70, at 654.
\(^{74}\) Park, \textit{supra} note 13, at 1203.
\(^{75}\) Alford, \textit{supra} note 70, at 675-76 (citing Eldred v. Ashcroft, 537 U.S. 186, 205-06, 208 (2003) (discussing "international experiences to curtail the general freedom to publish"); Burson v. Freeman, 504 U.S. 191, 202-03, 211 (1992) (relying on "international
In response to such criticism, individuals and courts can look to the lengthy historical tradition of citing to foreign precedent, going back to *Dred Scott v. Sandford*, in which a comparative assessment was used to determine whether Scott was a citizen of Missouri.\(^{76}\) “From the beginning... American courts regularly took judicial notice of both international law and foreign law” such that it would be a massive reversal for U.S. constitutional interpretation to “now ignore international law standards and the practices of other countries.”\(^{77}\) Consequently, taking foreign precedent and international human rights law into account would neither be unusual nor improper for other issues of constitutional interpretation with regards to ESC rights. Although some scholars argue that the U.S. Supreme Court has only recently relied upon foreign sources with regard to important constitutional cases in which there has been a historical dearth of precedent on the issues,\(^{78}\) the references to, and citations of, international law have been fairly prevalent over the past fifty years.

Apart from citations to international law in recent Supreme Court cases, there is a history of constitutional comparativism from the founding days of America. Even prior to the New Deal era and the establishment of social welfare policies, Thomas Jefferson, in the Declaration of Independence, made reference to giving “decent respect to the opinions of mankind.”\(^{79}\) While not explicitly granting ESC rights, this phrase in the Declaration of Independence emphasizes the importance of looking beyond our borders and interpreting U.S. laws and the Constitution within a framework of the general advancement and perspectives of mankind. These sources all provide language regarding the respect and value that should be placed on international covenants and the legal progress in other nations.\(^{80}\)

B. ESC RIGHTS AS A COMPONENT OF POLITICAL AND CIVIL RIGHTS

There are two possible approaches to linking ESC rights with political and civil rights, which form the basis of our constitutional rights as currently interpreted by the U.S. Supreme Court. The first approach argues that when ESC rights or sections thereof are adopted, these rights may be

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76. Scott v. Sanford, 60 U.S. 393, 468, 484-85, 496-500 (1856).
78. Alford, *supra* note 70, at 667.
79. *The Declaration of Independence* para. 1 (U.S. 1776); Alford, *supra* note 70, at 664.
able to be expanded by arguing that the grant of such rights must comply with political and civil rights. For example, Dutch legislation in which "married women were denied certain unemployment benefits that were granted to unmarried women and to all men, regardless of their being married or not," was invalid because the legislation was based on the presumption that married women were not the "breadwinners" of their families. 81 Similar holdings have been made in the United States regarding whether women in the military have to show additional proof that they are the family breadwinner in order to get military benefits for their husbands. 82 However, this approach is dependent on portions of the ESC rights being adopted.

The second approach to arguing that ESC rights should be recognized by the United States is through asserting that these rights are implicitly adopted by the Constitution because they are necessary to fully exercise the political and civil rights provided for in the Constitution and Bill of Rights. ESC rights, such as education, are arguably necessary to successfully utilize the political and civil rights explicitly granted, such as the right to vote. Although this argument has been rejected by the U.S. Supreme Court in San Antonio Independent School District v. Rodriguez, 83 as discussed previously, the majority incorrectly framed the issue. The issue should not have been whether there was a "guarantee to the citizenry [of] the most effective speech or the more informed electoral choice," 84 but whether the education provided met a minimum level necessary to sufficiently engage in those political activities that are explicitly protected under the Constitution.

Contrary to the Rodriguez opinion, education is often viewed as a direct foundation for all other rights, including political and civil rights. 85 Throughout American history, presidents and other political notables have recognized the importance of an educated and informed citizenry. In one of his fireside chats, President Roosevelt emphasized that "the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over its government." 86

81. Martin Scheinin, Economic and Social Rights as Legal Rights, in Economic, Social, and Cultural Rights: A Textbook, supra note 1, at 29, 32.
84. Id.
85. Nowak, supra note 11, at 245.
Furthermore, a number of changes since the *Rodriguez* decision support recognizing the right to education. Recent judicial opinions have underscored the importance of education and its unique role and significance in American society. For example, in *Plyler v. Doe*, the Supreme Court emphasized:

[N]either is [education] merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance . . . . In sum, education has a fundamental role in maintaining the fabric of our society. 87

Other decisions have mimicked this sentiment and noted that “laws affecting education may be distinguished from other social legislation because of education’s ‘importance . . . . in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.’” 88 Finally, federal involvement in education is not unprecedented. A current example is the No Child Left Behind Act of 2001. 89

Additionally, the importance of education in fully exercising rights as citizens can be analogized to women’s suffrage. Allowing women to vote was seen by some politicians as simply providing the husband with a second vote, and, “in the nineteenth and early twentieth century [women] were never seen as fully public, and public realm activities . . . . were sometimes thought to impinge on their private identities and activities as women.” 90 Because a woman’s place was seen as in the home, and they lacked access to information and education available to men, anti-suffragettes felt that women’s votes would simply reflect their husband’s urges and not any independent political will. 91 Although an unpleasant sentiment, it did in fact take “decades for women to be fully incorporated into the electoral system and [they have] not exhibit[ed] an independent voice in electoral politics until quite recently.” 92 Similarly, without a right

91. *Id.* at 511.
92. *Id.* at 480.
to education, disadvantaged groups may be unable to exercise their fundamental voting rights in an independent and informed manner. Thus, the Supreme Court in *Rodriguez* improperly framed the question as whether there is a constitutional right to a more informed vote versus an informed vote, when the actual issue was whether there is a constitutional right to gain access to information and education that will inform at the most minimum level. Based on current precedents, the answer to this second question must be yes.

C. **FUNDAMENTAL RIGHTS AND THE STRUGGLE FOR RECOGNITION OF OTHER ESC RIGHTS IN THE UNITED STATES**

There are a number of challenges for establishing a constitutional obligation to protect ESC rights. As discussed above, the Supreme Court has arguably placed value on the right to education, but has yet to take the final step of protecting the right to education. While education has not been recognized as a fundamental right, arguments exist that other ESC rights should be recognized as such. This line of reasoning — that the government has failed to provide certain rights to citizens as a whole — would likely be based on a fundamental right analysis.  

There are three general issues to consider when identifying fundamental rights: (1) “their embodiment in positive law gives their enforcement a legitimating basis in political consent;” (2) “their normative power does not derive solely from their enactment as positive law;” and (3) “as legal rules they operate in an institutional context.” While the third feature does not necessarily have to be tied to the legitimization of such rights, it “may reflect practical constraints on drafting and interpreting rights that already derive legitimacy from suprapositive or consensual bases (or both).” However, holding an ESC right to be a fundamental right may be especially challenging since case law has required that these rights be “deeply rooted in this Nation’s history and tradition” in order to qualify for heightened scrutiny under the doctrine of substantive due process.  

There are two possible approaches for classifying other ESC rights as fundamental. First, through an analysis similar to that used for education, rights such as those to housing, food, and water are arguably essential to fully exercising more established rights. This first approach is unlikely to succeed. Initially, the Supreme Court in *Shapiro v. Thompson* moved toward such a position by noting that residency requirements for welfare affected “the ability of the families to obtain the very means to subsist —
food, shelter, and other necessities of life." Following this decision, some courts believed that welfare could constitute a "fundamental" interest for purposes of equal protection review. However, this assessment was not supported for any significant period of time. Although rejected by subsequent decisions, the argument set forth in Shapiro is framed more closely to that connected with education — as a necessary component to fully exercising the established fundamental right to vote.

The second method to classify ESC rights as fundamental would be through linking them to the penumbra of rights emerging from the Fourteenth Amendment's explicit protection of life. This second approach differs from the initial thrust toward recognizing rights such as the right to housing and food because it is not connected with an established liberty interest, such as the right to vote.

The argument that the right to food and water is part of a penumbra of rights covered under the "life" reference in the Fourteenth Amendment more closely follows the modern substantive due process analysis. While some rights such as privacy have been well established, new substantive due process rights must meet a two-part test developed in Washington v. Glucksberg. The test requires: (1) a "careful description" of the asserted liberty interest; and (2) consideration of whether the challenged activity is objectively "deeply rooted" in the country's history and tradition.

Under this test, some ESC rights could qualify — the right to water, for example, is supported by a history and tradition in the United States of protecting water and the public's interest in water. As part of this tradition, Section 101 of the Clean Water Act emphasizes the U.S. government's current recognition of the importance of maintaining our water resources, and emerges as part of a tradition of protecting water. Similarly, a key component of the public trust doctrine focuses on resource defense, and emphasizes the government's duty to protect society's interest in public resources.

98. Id.
100. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law....") (emphasis added).
102. Id.
Apart from directly arguing that ESC rights should be recognized as fundamental, a third approach asserts that ESC rights as a whole do not significantly expand upon current U.S. jurisprudence. This argument may have merit because various provisions of the Covenant on ESC Rights are already recognized and protected under the U.S. Constitution. For example, Article 7(a)(i) of the Covenant on ESC Rights emphasizes the idea of equal pay for equal work.\(^{106}\) This concept is also embodied in U.S. statutory law through the Equal Pay Act, which states that no employer shall discriminate between employees on the basis of sex by paying differential wages to men and women.\(^{107}\) Similarly, both the Covenant on ESC Rights and federal law require that employees receive promotions without discrimination.\(^{108}\) There are parallels between the Covenant on ESC Rights and U.S. jurisprudence regarding most of the major sub-topics, including workers’ rights, social security, children’s rights, and healthcare.\(^{109}\) This leaves only a few issues covered by the Covenant on ESC Rights that are not currently considered legal rights in the United States.\(^{110}\)

D. ENFORCEMENT OF ESC RIGHTS AFTER THEIR RECOGNITION

Recognition of some or all of the ESC rights in the United States could be problematic in terms of enforcement and implementation. One issue that may arise is that of resource availability and distribution.\(^{111}\) In

109. In addition to those already discussed, the Covenant on ESC Rights, like U.S. law, addresses the importance of safe and healthy working conditions (Article 7(b)) and the right to unionize and strike (Articles 8(1)(a) and (d)). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Art. 12, U.N. Doc. A/6316 (Dec. 16, 1966), reprinted in LEGAL RESOURCE GUIDE, supra note 16, at 7-8.
110. Covenant on ESC Rights, Art. 9, in LEGAL RESOURCE GUIDE, supra note 16, at 8.
111. Covenant on ESC Rights, Art. 10(c), in LEGAL RESOURCE GUIDE, supra note 16, at 8 (restricting child labor).
112. Covenant on ESC Rights, Art. 12, in LEGAL RESOURCE GUIDE, supra note 16, at 9. Although the U.S. does not have a universal healthcare plan, states and localities have increased calls and taken steps to provide coverage to all uninsured. See Marc Lifsher, Gov.’s Plans Stir Up Business Rift: Proposals on Issues Such as Healthcare Have Executives at Odds, L.A. TIMES, Feb. 20, 2007 (proposal by Governor Schwarzenegger for a twelve billion dollar universal health insurance plan); Ken Dixon, Health Insurance-For-All Backed in Hartford, CONN. POST ONLINE, Mar. 6, 2007; Jeffrey Young, Groups Unite on Healthcare, THE HILL, Jan. 16, 2007.
113. The main point of difference is Article 11(1) of the Covenant on ESC Rights, which addresses rights to food, clothing and housing. These rights have not been recognized in the U.S. and, in some cases, have been rejected. See Lindsey v. Normet, 405 U.S. 56, 74 (1972) (finding no constitutional guarantee to housing).
114. Mathien Craven, Assessment of the Progress on Adjudication of Economic,
addition, the United States may have a number of obligations to meet in order to comply with the Covenant on ESC Rights, such as establishing "appropriate legislative, administrative, budgetary, judicial, and other measures" that would aid in realizing these rights. However, due to the technical requirements of passing federal legislation, this process would undoubtedly be slow and lengthy, and could also include oversight of third parties to ensure compliance.

For some issues, such as the regulation of third party compliance with the Covenant's articles on employment, administrative structures already exist that could easily handle regulation (and do so in connection with those provisions that are already part of U.S. statutory law). With regards to provisions imposing new and unique requirements, one option would be enforcement through consent decrees, similar to the judicial supervision provided during school desegregation. However, "[c]ourts are plainly unsuited for [ongoing participation in the implementation process]. They were never intended to serve in ongoing supervisory roles, and they generally lack the resources, institutional support, and expertise to do so." Although it may be inconvenient, the threat of judicial power may be a necessary element to coerce states to comply with any new rules or regulations. However, the current administrative regime appears best suited to adopting new regulations and has structures already in place through individual agencies. For example, in 1998, President Clinton signed Executive Order 13107, which created a federal agency to educate and address violations of the Covenant on ESC Rights.

IV. CONCLUSION

Protecting the right to education, employment, housing, and other ESC rights would further equality in the United States, especially with regard to groups that tend to suffer from a higher proportion of poverty and inherent
bias in the legal system. However, the stigma associated with ESC rights must be addressed. ESC rights, such as the right to education and the right to work, have traditionally been viewed as associated with the socialist state.\textsuperscript{118} During the Cold War, the United States viewed the Covenant as a “socialist manifesto thinly veiled in the language of rights.”\textsuperscript{119} Although the United States is no longer in the McCarthy era, the sense of America moving in a socialist direction would challenge the American public’s perception of government. However, the interpretation of the Covenant on ESC Rights as a foreign socialist entity is not supported by either its text or the social climate of the United States. Rather, a number of the subcategories identified articulate rights that exist and have been accepted and established in the United States. For example, as part of the Covenant on ESC Rights’ articulation of the “right to work,” Articles 7 and 8 set forth sub-rights such as equal pay for equal work between men and women, safe and healthy working conditions, equal opportunity to be promoted, and the right to unionize.\textsuperscript{120} Although the trend has been to rely on market forces to address and resolve social welfare issues, “as a matter of international law, the State remains ultimately responsible for guaranteeing the realization of these rights.”\textsuperscript{121}

Finally, the structure of the federal government encourages experimentation at the state level, which could help to develop the most effective means of implementing ESC rights. States have been making additional progress on some rights, such as housing and education, even without formal federal recognition of ESC rights.\textsuperscript{122} In part, this is due to the fact that there are “core structural and substantive similarities between the Covenant and state constitutions,” and “[e]conomic rights have always been at the heart of . . . state jurisprudence.”\textsuperscript{123}

Even though states appear to be moving in a positive direction toward protecting ESC rights, statements by the current administration and new additions to the Supreme Court foreshadow future trends of citing and accepting international law. Former Attorney General Alberto Gonzalez criticized the use of constitutional comparatives as undermining the Court’s

\textsuperscript{118} Nowak, supra note 11, at 248.
\textsuperscript{119} Stark, supra note 4, at 81.
\textsuperscript{120} Eide, supra note 1, at 7-8. The actual phrase “equal pay for equal work” is a standard that has been adopted and integrated into modern U.S. jurisprudence with regards to workplace discrimination against women. Equal Pay Act, 29 U.S.C. § 206(d)(1); see also Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Similar issues arise with the other rights articulated in the Covenant for ESC Rights. Another such example emerges in Article 12, which articulates access to medical care. Eide, supra note 1, at 9. While there is not universal health care in the United States, politicians and interest groups have begun calling for healthcare and taking steps toward providing full coverage. See Lifsher, supra note 112; Dixon, supra note 112; Young, supra note 112.
\textsuperscript{121} Maastricht Guidelines, supra note 115, at 554.
\textsuperscript{122} Park, supra note 13, at 1255-61.
\textsuperscript{123} Stark, supra note 4, at 91-92.
legitimacy, and both Chief Justice Roberts and Justice Alito testified during their confirmation hearings that they have "deep skepticism" about the use of foreign authority in constitutional interpretation.124

As this Note has demonstrated, the distinction between political and civil rights and ESC rights is not clear-cut. Current federal legislation has already taken steps toward protecting ESC rights, such as education and employment, and the equal protection framework in place provides a basis for reviewing any claims that might arise due to violations of ESC rights. The only step remaining is formal recognition that ESC rights need to be protected.
