

# INSTITUTIONAL CHALLENGES AND POLITICAL COSTS IN THE US FAILURE TO RATIFY THE ICESCR

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On the international stage, the United States has played an active political role in the drafting process of international human rights treaties that shape both how human rights are framed and enforced. However, the United States has politically struggled to implement these international human rights treaties on a domestic level. Particularly, the United States government has carried structural and political tension preventing its embrace of the ICESCR. The following analysis will draw upon existing literature of the US relationship with the ICESCR and utilize Beth Simmon's theory of treaty implementation as a framework to explain why the US has failed to ratify this central international human rights treaty. The investigation will find, by accounting for institutional hurdle, cultural preferences, and political will, that the politicization of economic rights in the US leads to favoring obstruction and isolationism in terms of treaty implementation, particularly when these deal with positive, economic rights.

## Introduction

The United States faces a dissonance between its commitment to drafting International human rights treaties and its commitment to implementing such international law in domestic practice by refusing to ratify multiple international human rights treaties. One of the starkest indications of this is the United States' struggle to fully embrace the "International Bill of Human Rights" due to the US Senate's failure to ratify the International Convention of Economic Social and Cultural Rights (ICESCR). Though the United States participated in drafting both foundational human rights treaties, and ultimately signed both in 1977 under the Carter administration, the ICESCR has remained in the Foreign Affairs committee with no evidence to suggest the possibility of ratification in the future.<sup>1</sup>

To explore the intricacies of this dissonance in international participation and domestic implementation, this paper aims at addressing the following question: Why has the United States failed to ratify the ICESCR? I will answer this question by considering nuances behind the United States' legal structure, cultural framing,

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<sup>1</sup> Gillian MacNaughton, "Economic and Social Rights in the United States: Implementation Without Ratification," *Northeastern University Law Journal*. Vol. 4, No 2. (2012), 368.

and political cost associated with ratification of the ICESCR. The paper will achieve these considerations through deploying political examples, with a focus on particular testimonies from the Senate Foreign Affairs Committee's hearing of the ICESCR. I will argue that the US lacked the political will necessary to ratify the ICESCR because of the state's structurally complex process of treaty ratification in combination with the nation's politicization of Economic Rights. Such obstructive roadblocks built into both the politics of US governance and international treaty ratification processes gives preference to conservative opponents of enforceable international human rights treaties in the US Senate.

I will begin by discussing the historical relationship between the United States and the ICESCR. Moving forward, I will put this relationship in conversation with existing literature on the incentives and challenges of treaty ratification for the United States to understand how these broader theories apply to the specific context of the ICESCR. As an interlocutor, I will apply Simmon's theoretical framework of state commitment to a treaty as a function of government institutions, preferences, and incentives to examine the United States failure to ratify the ICESCR. Guided by Simmons, I will ground this argument by documenting the United States government's institutional hurdles in the process of treaty ratification, divided cultural preferences towards economic rights, and political relationship toward economic rights to account for the United State's inability to ratify the ICESCR.

### **Explaining the Politics of Treaty Ratification and the ICESCR in the US**

Following World War II, the United States served as a great power with formidable influence in the drafting process surrounding the foundational documents regarded in unison as the International Bill of Human Rights: The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights (ICPPR), and the Covenant of Economic, Social, and Cultural Rights (ICESCR). One central ideology the United States brought to the drafting process of international human rights was a bifurcation of two separate enforceable treaties on human rights, based on a categorical distinction of civil and political human rights and social and economic human rights.<sup>2</sup> Though the separation of the treaties was affirmed on the basis of practicality and enforceability, the separation successfully justified a divided framework in which the United States would come to view the rights in the two treaties as different in nature rather than interdependent; this allowed for a system in which certain rights could be valued over others based on dominant political ideologies.<sup>3</sup>

As drafting continued, the implementation of these treaties became an inherently political process on the domestic level based on concerns over the power it would provide international order. Against growing internationalism following World War II, conservative Senator John Bricker produced a series of legislation calling for a limitation of treaty powers in terms of having any meaningful implementation in the courts.<sup>4</sup> Though the Bricker Amendments failed its formidable influence over US politics was validated by the executive branch when Secretary of State Dulles agreed to essentially relinquish the US from implementing the international human rights treaties domestically—which was upheld from the Eisenhower to the Carter Administration.<sup>5</sup> Amidst tensions between internationalism in the executive branch and isolationism in the legislative branch, international human rights became subjectively political rather than ethically inherent, serving as a polarizing matter between both the US government's international relations and domestic politics.

Moving forward, the United States approach to the International Bill of Rights became a political process in which the executive branch assessed the political incentives of the values attached to economic rights relative to the costs of treaty ratification. Though both covenants were signed by President Carter—a signal of symbolic affirmation to the extent of “soft law”—and sent to the Senate in 1977, the ICESCR has still remained

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2 Natalie Kaufman-Hevener, “Drafting the Human Rights Covenants: An Exploration of the Relationship Between U.S. Participation and Non-Ratification,” *World Affairs*, Vol. 148, No. 4, (1986), 235.

3 Hope Lewis, “New” Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework”, *Northeastern Public Law and Theory Faculty Working Papers*, (August, 2009), 111.

4 *Ibid.*

5 *Ibid.*, pp. 119.

in the Senate Foreign Affairs Committee without ever moving forward to be considered for a vote.<sup>6</sup> Political opposition towards the prospects of ratification even furthered in the Reagan administration, which domestically advocated for trickle down economics and intentionally devalued economic rights as “so-called” rights—associated with the Eastern Bloc and inconsistent with free market capitalism due to its regulations—and erased them from future state reports.<sup>7</sup> Following this example, the Bush administrations—solidifying a partisan position on the matter—remained ambivalent towards assigning value to the ICESCR on the domestic level. Without advocacy from executive leadership to prioritize or even value the ICESCR on a legislative agenda, the issue of ratifying these treaties fell to the sidelines amidst political priorities.

In contrast, the ICESCR’s companion covenant—the ICCPR—was eventually ratified by George H.W. Bush Administration, due in part to potential political gains from it.<sup>8</sup> Given the context of the Cold War coming to an end, achieving ratification attempted to signal the strength of the US in upholding individual liberties for the international community—though human rights advocates argue the content was substantially “gutted” in order to minimize legal obligations beyond those established by the US Bill of Rights.<sup>9</sup> As the ICCPR already articulated many existing rights in the United States and enshrines similar ideologies of individual freedoms, this example showcases the necessity of political will from the US President and Senate to ratify any given international treaty by strategically overcoming political costs of treaty power.

Though the notion of signing ICESCR by the state’s executive branch still acknowledges legitimacy in this treaty for other international actors, its failure to ratify indicates a concerning reluctance for the United States to fully affirm the Interdependence of human rights. To this day, the United States remains one of the few UN member states that has not yet ratified the foundational ICESCR. Beginning from its signing under substantial reservations, the United States has relied on notions of progressive realization within the treaty to view these rights as future ideals and goals; this reading justifies its need to remain reluctant towards the ICESCR’s domestic enforcement.<sup>10</sup> As a result, Economic Rights became secondary, rather than interconnected, to Civil Rights for the US because they were not considered immediately recognizable or clearly enforceable. Therefore, these ideological reservations validated positions that the ICESCR was inessential to the realization of rights—which had been bifurcated from the civil liberties supposedly championed by the US—so as to shift the calculation of political costs and incentives for the Senate and President to ratify this treaty, especially when considering the challenge of existing institutional hurdles.

### **Existing Literature on US Treaty Ratification and the ICESCR.**

A trend identified by legal scholars suggests there is a perceived ideological tension between the United States and the ICESCR which alters the state’s preference to commit to the treaty. The United States apprehension towards such a convention stems from its long-standing preference—beginning in the Bill of Rights—for recognizing attainable individual freedoms from government as rights.<sup>11</sup> In comparison, the US struggles to equate such individual freedoms to positive rights as the government takes on an active role in the individual’s well being.<sup>12</sup> However, this perceived ideological tension does not suggest the United States holds a disdain for the values in the treaty; many of the rights enshrined in the treaty—such as public education—are already provided in the United States. Recent actions of Presidential Administrations have also identified significance in Economic Rights, such as President Ford’s signing of the Helsinki agreements which committed the US to further implementation of economic rights.<sup>13</sup> This indicates a perceived ideological tension does not stem from

6 Winston Nagan, “The Politics of Ratification: The Potential for United States Adoption and Enforcement of The Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.” Human Rights Roundtable, (1990), 323.

7 Philip Alston, “Putting Economic, Social, and Cultural Rights On the Agenda of the United States,” NYU School of Law Center for Human Rights and Global Justice, (May 2009), 9.

8 Lewis, pp. 124.

9 Nagan, pp. 312.

10 Alston, pp. 369.

11 Lewis, pp. 105.

12 Alston, pp. 4.

13 Ibid, pp. 7.

a disdain between, but an apprehension to fully commit to them even when suggesting a willingness to do so. In this regard, the apprehension does not translate to incompatibility with implementing economic and social rights, but it does divide political consensus when considering making an international treaty enforceable when it appears to supposedly challenge long-standing notions of state and individual sovereignty.

However, the relationship between the ICESCR and the US does not exist in an ideological vacuum as it also has historical implications and groundings. In the drafting process, Economic Rights were more openly embraced by the Soviet Union while Civil Rights were embraced by the United States.<sup>14</sup> As a result, components of human rights were politicized on the international scale. The ideological and political divisions between these nations carried on from the drafting process and into the implementation process. In terms of political will, the United State's adversarial relationship with "the Eastern Bloc" created a disdain for positive rights as conceding its principles of economic freedom to the Soviet Union—even though the treaty is broad enough to not require a particular economic system.<sup>15</sup> In this regard, the US disputed an acceptance of social rights as human rights from both ideological and political grounds.

To offer a particular analytic framework of treaty implementation, Beth Simmons's work explicates a theory of the process of ratification as being driven by political will to overcome institutional hurdles. According to Simmons, The United States serves as a "false negative" in that it might be committed to the values expressed in the treaties in principle—as indicated by President Carter's signing of the treaty—but the support for its values does not overcome political costs and challenges of implementation at the domestic level.<sup>16</sup> Given that treaties have seismic consequences in considering the realization of new rights for citizens, ratifying comes with both political costs and benefits based on what the treaty entails the state will enforce and guarantee. In this regard, Simmons suggests that a government is more likely to ratify a treaty when the treaty content matches its cultural preferences and aligns with political beliefs at the time as it incentivizes political mobilization to organize around overcoming the political cost of the ratification process.

A substantial amount of research exists on the United States' ideological tension between social and economic human rights in the drafting process that developed the ICESCR and on the institutional hurdles provided by the United States treaty ratification process. Building off of this research, the following analysis will work to bridge these elements within the particular relationship between the United States and the prospects of implementing the ICESCR to reveal a susceptibility of international human rights treaties to the political contexts and incentives of a state in which the rights discussed have become politicized.

### **Institutional Challenges: Separation of Powers, the Legislature, and the Courts**

The complex process of treaty ratification operates under the separation of powers between the branches of government enshrined in the United States Constitution. The US Constitution specifically designates the executive's role as the negotiator and signer of an international treaty, but it requires a supermajority (2/3rds) vote of approval by the US Senate in order to be ratified.<sup>17</sup> In this system of national law and custom, a separation of central control over the process—requiring two different forms of government—instills a multi-faceted and collaborative process between multiple branches of the federal government for a treaty to be ratified. Specifically, determining the ratification of a treaty is one of the Senate's particularly designated constitutional duties and cannot be overrun by executive forces. This provides a system which checks executive control of the head of state and subjects political actions to the legislative branch. As a result, this decentralization of authority makes ratification conditional on a consensus from two forms of government—bringing in an array of deliberative political actors. To reach a consensus, the state must undergo a drawn out process of persuasion which raises the political costs and efforts necessary to ratify a treaty.<sup>18</sup>

<sup>14</sup> Nagan, 313.

<sup>15</sup> Barbara Stark, "At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement," *Transnational & Contemporary Problems*, Vol. 107, No. 1, (Spring 2011), 107-142.

<sup>16</sup> Beth Simmons "Theories of Commitment." in *Mobilizing for Human Rights in* (Cambridge: Cambridge University Press, 2009), 64.

<sup>17</sup> Simmons, pp. 70.

<sup>18</sup> Simmons, pp. 69.

Overcoming the institutional hurdles of the separation of powers requires reconciling distinct strategic motives in ratifying a treaty for two branches of government. Representing different roles and goals, the legislative and executive branch may have competing views of the desirability to ratify the ICESCR as it pertains to domestic law. For example, initial considerations of the Clinton Administration considered pushing for ratification of the ICESCR, yet instead chose to focus its efforts on ratifying the CEDAW instead.<sup>19</sup> This could be due to the challenges the ICESCR faces because the two forms of government are divided on the extent of its implementation and the political consequences acting to implement the treaty would achieve. Whereas the executive branch considers global standing of their state and sets the national policy agenda in relation to signing the treaty, the legislative branch focuses on the compatibility of such a treaty in internal enforcement. In this regard, ratifying a treaty requires the investment and approval of two branches of government with structurally distinct roles and interests, subjecting it to both domestic and international political costs. Therefore, mediating both the international value and domestic enforceability of the ICESCR—carried out by separate systems with differing interests—requires a coalition of varying political motives.

The duty of the Senate to ratify treaties not only subjects the ICESCR to reach the consensus of a legislative branch, it also subjects the treaty to reach the consensus of the federalist structure of the United States. The United States Senate is a legislature organized into equal representation from each state; its representative structure is designed to have state domestic interests compose this federalist branch of government.<sup>20</sup> As a result, the Senate reviews treaties as a trustee of national interests collectively, but also suggests that each Senator review treaties in terms of its subnational impact on their individual state. Consequently, treaty ratification in the United States exposes international law to the political tensions between national and subnational interests in implementation. The role of legislative representatives primarily acting under subnational interests impacts the political costs associated with the ICESCR. That is to say, it brings in deliberation over concerns as to whether the local law is left unwilling or unable to match external economic obligations of social programs and policy being enforced as a result of ratifying the treaty. As the structure of this legislative branch brings in the political motives of subnational interests in treaty ratification, and the ICESCR calls on government programs, the political costs required to impose international obligations towards economic rights must also include those of local interests, complicating the political calculation over ratifying the ICESCR. Due to local government's existing policies and programs for their citizens independent from national law, there is a tension over imposing obligations from higher levels of government. Simmons indicates that governments in a federal system are overall much less likely to ratify the ICESCR because of the imposition it puts upon subnational obligations.<sup>21</sup> For one thing, the ICESCR overrides subnational sovereignty by imposing international norms and values in terms of prescribing obligations on certain social and cultural programs without proper support to meet those obligations. As a result, the incompatibility of the treaty with subnational rights imposes an additional political cost to ratification as it works against the pressure and influence of local governments by violating a sense of independence from overarching obligations from government.

Furthermore, the adjustments needed to integrate the ratified treaty into a common law system provide a structural challenge to the ratification of a treaty because it instills outside ideals into an existing legal framework. The United States' judicial practice is structured primarily on a traditional common law system. As precedent from the interpretations and rulings that decide court cases becomes part of the legal system, the common law system requires adjustment in order to accept new overarching principles in the ICESCR.<sup>22</sup> Simmon's research suggests that the ICESCR's broad international framework of general obligations towards positive rights provides a deductive reasoning, drawing upon principles established from an authoritative and binding text as a framework for economic rights, more attuned to civil law.<sup>23</sup> In contrast, the United States common law legal system is inherently inductive. That is, the particularities of a single case sets overarching ideals of the legal precedent. Therefore, a structural tension in the conceptual approach of law exists between

19 Alston, pp. 4.

20 Simmons, pp. 69.

21 Simmons, pp. 82.

22 Ibid.

23 Simmons, pp. 72.

the principles of the ICESCR and the common law system of the United States. This structural incompatibility makes for a reason why the ICESCR, instilling overarching ideals through one centralized document serving as a framework for guaranteeing economic rights, is 66% less likely to be ratified in states that utilize a common law judicial system.<sup>24</sup> In this regard, the structural incompatibility between very logic of a common law system and civil law system creates an institutional tension with the ICESCR that would impact the legal communities embrace of the treaty when it was considered for ratification.

The United States' government also places structural disadvantages towards implementing the ICESCR because the precedents that the ratified treaty could proliferate in courts are uncertain and irrevocable. Considering that ratifying a treaty provides the domestic legal authority necessary to make rulings on cases under its behalf, it could work to expand the power and predominance of the treaty in domestic affairs with unintended consequences. Considering this, ratifying the treaty and allowing it to play an instrumental role in the legal system and expand its enforcement provides a sense of risk in that it ushers in uncertainty for its implications beyond the production of domestic law on the treaty from the legislative branch. As the judiciary, independent of the legislative branch's interests, can utilize a ratified treaty to interpret a particular case, and the broad language of an international human rights treaty can become a specific legal precedent that could extend beyond the intentions of the legislative branch. It could demand an unanticipated legal obligation outside the extent of national interests towards cooperating with the treaty could leave the nation unprepared for the treaty's implications in becoming integrated into legal precedent.

## US Government Politicization and the ICESCR

Given the complex structural obstacles towards ratification within the domestic institutions detailed above, the analysis will now consider how the United States government's political preferences in framing the debate of the ICESCR—as shown through the testimonials of the US Senate Foreign Affairs committee hearing—remained divided in accepting the treaty domestically. According to Simmons, treaty content being perceived as compatible with the “values and practices” of the government in domestic affairs indicates a willingness for government acceptance and a political will to ratify.<sup>25</sup> For example, Simmons's suggests left-leaning governments are 75% more likely to ratify the ICESCR as the content of the treaty is associated with rights aligned with preferred political ideologies.<sup>26</sup> A treaty reflecting existing and solidified values and practices offers the political will necessary to actualize it, through expanding its political coalition and reducing political costs for its government. What this suggests is that the similarities between the country's existing preferences bolsters or harms the ratification as a treaty depending on whether it is already accepted and saliable for the state prior to its ratification. In contrast, the following case study of excerpts from the transcript of the US Senate Foreign Affairs Committee Hearings on the ICESCR showcase a lack of general preference necessary for the treaty to be considered synced to the ideals of the US government.

Perspectives offered in the Committee Hearing for ICESCR presented a concern that its content would work in opposition to the US cultural values of individual freedoms. Though the United States attempted to include covenants of private property in the drafting of the ICESCR, such rights were ultimately not included in the final draft of the covenant due to disagreements over how to formulate the right to balance ownership with state action.<sup>27</sup> The absence of guaranteeing private property led to impassioned testimony from Phyllis Schlafly, the national chairman for the stop ERA (Equal Rights Amendment), before the Committee. Schlafly's statements argued that the lack of protection and validation for private property could lead to the “violation” of “existing rights” in the United States.<sup>28</sup> In addition, Schlafly tied his apprehension toward private property as a general sentiment shared by multiple administrations, regardless of party or political ideology, up until Carter.

24 Simmons, pp. 88.

25 Simmons, pp. 64.

26 Simmons, pp. 86.

27 Kaufman-Hevener, pp. 237.

28 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Phyllis Schlafly).

Essentially, this testimony suggests that the ICESCR poses a threat to negative rights, such as private property, that are well-established cultural norms in the United States. The notions of this testimony highlight a perceived cultural distinction toward the ICESCR and the US government over fears that the treaty's content could violate cultural values of individual freedom in negative rights. Therefore, the views of this testimony challenge the acceptance of the ICESCR on the basis of the government's conservative preference toward human rights as negative rights as opposed to the ICESCR's content permitting government involvement.

In addition, prominent political authorities also argued that the ICESCR was in opposition to the ideas articulated by the legal foundations of the US Framers, utilizing the notion of individual freedom as a basis of conservative preference against the ICESCR. For example, Republican Senator Jesse Helms's testimony invoked the Bill of Rights and the US Constitution to express disdain for the ICESCR's lack of protections for private property.<sup>29</sup> From there, Helms expressed that the ICESCR's ratification meant "abandoning a right so central to our constitution" and instead embracing "Marxist ideals."<sup>30</sup> Helms' statement suggests that ICESCR is antithetical to the US constitution, and adopting it domestically would signify an abandonment of, rather than an addition to, US legal and cultural traditions and a political surrender to Marxism. In particular, Helms argues that the ICESCR's supposed disregard for property rights poses a threat to long-held customs and the legal groundings of the nation. This testimony indicated the salience of a cultural preference toward rights as individual freedoms, as the United States is grounded in a historic, ideological commitment to a constitution of freedom from government that national politicians believed the ICESCR would be inconsistent with. This reasoning suggested that civil rights were already identified in the US Constitution and the ICESCR would impose government power that would come into tension with negative rights. Expressing these concerns, Helms perceived a threat in ratifying the ICESCR because, from this prominent political disposition, it works against the foundational rights expressed in the Nation's long-lasting legal document, making its implementation problematic towards human rights for conservative politicians.

Although the Committee hearing also included testimony suggesting compatibility of the values of the ICESCR and the United States, the ICESCR's polarization of competing perspectives lent itself to its obstruction following the Committee hearing. Professor Louis Sohn's testimony heard before the Senate suggested that the ICESCR's foundation is "traced" on the American ideals expressed by President Franklin Delano Roosevelt in the "Four Freedoms," including a positive right in the "Freedom from want."<sup>31</sup> Sohn went on to add that many of the rights articulated are already, in a broader capacity, offered in the United States. Although Sohn suggested that adopting such a treaty would bring on new legal obligations to implement social programs beyond past legislation, doing so would not inherently harm the domestic realization of existing rights or impose a new market system. This argument dispels the myth that the ICESCR is incompatible with US government preferences by recognizing there was nothing inherently present in the treaty that threatened the existing social order in the United States. In this regard, the hearings presented a wide array of views—but no political consensus—toward the ICESCR. It is precisely the hearing's inclusion of such ideological disagreements as to whether the cultural and legal practices of the United States hold room for the ICESCR that hindered the ICESCR's acceptance by surrounding it with contestation and controversy continuing up until today.

Furthermore, statements made in the Committee's hearing indicated a concern over the costs of fulfilling new obligations from these rights by suggesting the novel legislative consequences of ratification. To address this concern, Sohn's testimony conceded that not all of the rights articulated in the ICESCR are immediately obligatory for the US to uphold and utilized this as a call for ratification in its domestic and international standing.<sup>32</sup> In doing so, Sohn's testimony indicates that the United States's cultural perceptions and values toward the ICESCR are not detrimental; they are yet to be fully realized domestically. The need

29 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Jesse Helms).

30 Ibid.

31 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Louis Sohn).

32 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Louis Sohn).

for more government funding for new social programs that resulted from the treaty's implementation brought on fears of political and economic unpredictability. Columbia Law School professor JP Anderegg approached the Committee with concerns that novel content could bring on an "expanding, centralized welfare state" and raised concerns that the implementation of the treaty would substantially increase economic costs in order to provide for the program. Without the program receiving proper allocation of funds, it was reasonable to assume that the political cost on politicians supporting this treaty's ratification would also increase significantly.<sup>33</sup> This divergence from the idea that the treaty will bring novelty—either new ideals or changes in government—eradicating any notion that what was needed for domestic implementation, consensus on the ICESCR's favorability within the US legislative government, would be reached. Regardless of size or scope, the hearing voices that this novel implementation of socioeconomic rights worked against government preference to protect existing rights.

As suggested throughout existing literature and further elucidated in testimony from the hearing, the US government carries a preference for limiting the ratification and enforcement of international treaties, as they carry a definitive and distinct legal power. This apprehension towards the legal force of implementing an international treaty in a domestic system was foundational to the debate of the ICESCR's ratification. Historically, the precedent of enforcing treaties gives greater power to national and international order over subnational law. Testimony from professor Louis Henkin acknowledged the legal legitimacy of treaty power because of the case precedent set by Court's ruling in *Missouri v. Holland*. His testimony also acknowledged that there was a dissonance in the treaty's legislative compatibility with the US government by speculating that the framers likely did not envision its expansion to issues that Congress could legislate domestically.<sup>34</sup> The notion of expanding treaty power was founded on the long-lasting precedent of *Missouri v. Holland*, which determined that states are legally subject to the content of international treaties signed by the national government.<sup>35</sup> Granting the ICESCR a superior status to subnational law invites further scrutiny toward its implementation due to its overriding legal reach on federal, state, and local laws. The preference for anti-federalist principles of legal implementation made the treaty power a conservative concern regarding the predominance of state rights over national and international rule. In doing so, the overarching legal power of the ICESCR as a treaty has been a particular source of disdain and skepticism for the adversaries of the ICESCR's ratification.

### Political Context: Costs and Incentives

For Simmons, the final component in determining a state's level of commitment to an international human rights treaty is the state's political context at the time. In the United States political context of the time, the government was influenced by a longstanding mindset of isolationism toward international human rights, inequality on the issues of race, and concerns over global influence during the Cold War, which has ultimately increased the perceived political costs of the ICESCR's ratification and implementation upon presidential and congressional reelection without providing much political incentive.

In terms of international relations, the context of an ongoing Cold War between the United States and the Soviet Union augmented the United States' political costs of affirming this treaty. As the Soviet Union prided itself on guaranteeing social and economic rights for its citizens starting from the drafting process, ratifying the treaty caused a major political fear in the United States of conceding to the Soviet vision of human rights.<sup>36</sup> Given that the Soviet Union was considered the United States' historic adversary during the enduring Cold War, strategic incentives existed for the United States to remain politically distant in its association with positive

33 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of JP Anderegg).

34 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Louis Henkin).

35 Curtis Bradley. "Federalism, Treaty Implementation, and Political Process: *Bond v. United States*". The American Journal of International Law. Vol. 108, No. 3. Cambridge University Press, July 2014, pp. 486-496.

36 Lewis, 113.

rights suggested by the treaty. These fears stemmed from the ICESCR's perceived association to communism and socialism. In actuality, Jack Goldklang, a representative of the Department of Justice, suggested nothing existed in the treaty that contradicted existing legal and economic institutions.<sup>37</sup> However, the general consensus of the testimonies remained divided and speculative over the long-term ramifications on the state. In contrast, Phyllis Schlafly's testimony before the Committee stated that the ICESCR "takes large steps towards a socialist state" and "imposes" heavy taxes for "international aid" to achieve a world order.<sup>38</sup> Schlafly insisted against implementing the treaty because of anxiety in submitting the United States to the rights enshrined by its political rival, the Soviet Union. In short, conservative arguments propagated the ICESCR as a concession to communism in the context of Cold War fears. In this regard, the international norm of associating social and economic rights as the central rights of the Eastern Bloc raised the political costs of treaty ratification due to Cold War fears of conceding the position of international dominance to the Soviet Union.

At the domestic level, the departing from the Dulles Compromise on ratification and beginning to consider the ratification of treaties provided a context in which the ICESCR could be considered radical and against the political cost of surrendering legal power from national government to international treaties. The Dulles Compromise was, in part, a reaction to isolationist sentiment in legislation that had gained traction in the Senate, including the Bricker Amendment. The Bricker Amendment refers to attempts made by Senator John William Bricker to introduce legislative initiatives that would prevent international human rights treaties from having any effect on the US legal system by inhibiting them from being self-executing and subjecting them to legislative debate after ratification.<sup>39</sup> The testimony of professor Covey Oliver approached Bricker's threat to the power of treaties as antiquated and defeated at the time of consideration. Oliver referred to these attempts as the "Bricker bicker" (seemingly suggesting that Bricker's arguments and the legislative traction it galvanized resulted in nothing more than deliberation), which failed to produce substantial legislative results.<sup>40</sup> However, Bricker's legacy of antagonizing international human rights instruments lives on, as studies indicate that "contemporary arguments" by senators against ratifying the ICESCR have not deviated "substantially" from the framework of isolationism championed by Bricker up to the 1990s.<sup>41</sup> In fact, Bricker's isolationist approach had gained notable support among interest groups at the time such as the American Bar Association, which is seen as an apolitical defender of the US legal institutions.<sup>42</sup> In this regard, statements from the Committee undermined the necessity of addressing the political context of skepticism toward international order on human rights, which began under Bricker, and thus raised the political cost of supposedly threatening domestic sovereignty.

Bricker's disdain for treaty powers even influenced how the treaty was considered under the Carter administration, which expressed reservations toward implementing the ICESCR due to the treaty's binding self-execution of progressive realization. While seeming to challenge the hold of isolationism on human rights treaties by acknowledging the values of the ICESCR, Carter's reservations on prioritizing the treaty on the administration's agenda.<sup>43</sup> Instead, the Carter administration postponed the treaty's signing and, even after signing, conceded to concerns over fully implementing and enforcing the treaty with regards to the obligations it placed on foreign and domestic affairs. Carter's acceptance of the ICESCR's language in Article 2.1 to "take steps" suggested a political calculation that cautioned its actual enforcement; this language disregarded the accompanying obligatory nature of state implementation over time and instead framed the rights as ideals to be sought after.<sup>44</sup> In this regard, Carter's reservation confined the rights to policy goals to be achieved gradually rather than immediately. This was in stark contrast to pro-ICESCR recommendations posed

37 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Jack Goldklang).

38 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Phyllis Schlafly).

39 Alston, pp. 6.

40 United States Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of Covey Oliver).

41 Nagan, pp. 315.

42 Nagan, pp. 318.

43 Lewis, pp. 123.

44 Lewis, pp. 123.

in the testimony to the Committee, which expressed a concern that moving away from the treaty's obligatory nature "sabotages the intent and purpose" of the covenant as an act to affirm the United States' investment in world affairs.<sup>45</sup> Instead, the disorganization over how to approach the ICESCR's obligations further divided any notion of a coalition for its political support while failing to address the substantive concerns of isolationist Senators.

In its reservations towards the treaty, the Carter administration may have been subject to conservative pressure stemming from socioeconomic factors of Cold War political anxieties and isolationist approaches attempting to lessen the political costs of ratifying. For Carter, the political implications of ideologically shifting notions of human rights could be perceived as breaking from foreign pressure amidst Cold War tensions. This could possibly explain some of the political costs behind why the executive branch delayed the treaty ratification and reduced it to symbolic idealism. However, rather than establishing a framework interconnecting civil rights and economic rights as human rights, the weakening of the ICESCR's enforcement submitted the United States to political pressure that called for hardening its attitude toward prioritization of civil rights over economic rights. As the ICESCR remains one of the most strongly dismissed and controversial international human rights treaties for the United States, removing the strength of its domestic enforcement proved ineffective in addressing the political context of the time. In this regard, Carter failed to effectively mobilize a broad political coalition to ratify the treaty on the domestic level. Here, Carter's political calculation affirmed the consideration of the ICESCR as a secondary status inferior to the political priority of civil rights and invited further subjection of the ICESCR's nature to politicization by conservative Senators.

In addition, the United States' political context of the time was concerned with the possible political outcomes of the ICESCR in terms of race relations, specifically given that Article 2 of the treaty affirmed nondiscrimination of social and economic rights. The United States' legacy of government-caused segregation in housing, education, and jobs—all social and economic rights affirmed by the treaty—had been deemed unconstitutional during the drafting of the treaty.<sup>46</sup> Even so, the remnants of this government-caused system of segregation continued to subject racial minorities to inadequate housing, underemployment, lack of access to health care, and unideal work positions—all complicated structural issues that the ICESCR would require addressing immediately.<sup>47</sup> Conservative proponents of segregation who wanted to avoid addressing social and economic rights concerning racial minorities, along with isolationists, formed a legislative coalition against confronting these human rights issues in the future. As a result, the United States struggled to domestically and internationally apply nondiscrimination policies to social and economic conditions of segregation due to a perceived political cost of "exacerbating the 'race problem.'"<sup>48</sup> The hesitancy toward embracing the ICESCR due to its obligation for the United States to confront its own underlying racial inequalities in its economic structure raised the stakes on implementation if the treaty were to be ratified. Therefore, continued domestic inequality resulting from past discrimination framed the ratification of this treaty with the political costs of forcing the government to confront its long-standing traditions of social and economic discrimination, subjecting the treaty to a particularly divisive process.<sup>49</sup>

## Conclusion

In conclusion, my analysis substantiates the claim that the United States has yet to ratify the ICESCR because of its failure to mobilize a broad political coalition around the treaty's content, which would be necessary to overcome the complexities of the treaty process. Considering conditions of treaty commitment under the lens of Simmons, the analysis presents the US government's lack of commitment to ratify the ICESCR by assessing government structures, preferences, and incentives. Although attempts were made to inform senators on the implications of ratifying the ICESCR by scholars and advocates brought in to testify to the Committee, their

45 United States. Senate. International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations. November 11-15th, 1979. 96th Cong. 1st Sess. 35 (statement of James Skelton).

46 Lewis, 109.

47 Ibid.

48 Ibid, 110.

49 Ibid.

divided assessments maintained polarization rather than resolving it and, in turn, made the treaty subject to the Senate's obstructionist approach to legislation. In turn, the domestic politicization of international human rights, which began under the Bricker Amendment, was validated in the ratification process rather than properly resolved. The polarized views caused by the content of the treaty, ranging from concerns about future ideals to violations of existing rights, showcases conflicting government preferences that historically contributed to a lack of strategic incentive for ratifying the treaty. With this lack of political motivation, the notion of ratifying the ICESCR was held in Committee, and the United States appeared to further isolate itself from the global standards of embracing economic rights regardless of the nation's economic system.

This research adds to the literature of the field by bridging US political will with regard to the ICESCR to the US treaty ratification process. Previous scholarship has suggested that the United States and the ICESCR are fundamentally incompatible on the distinction of positive and negative law. As an alternative, the above analysis provides evidence to suggest that the United States and the ICESCR have yet to be politically compatible in the distinct form of treaty ratification. However, further research is still needed to develop methods of quantifying functions of political will and motivation necessary for agreements between the US executive and legislative branch. In this distinction, the practice may more adequately quantify which function is most influential in formulating the ratification of international human rights treaties based on comparative studies with other treaty ratification processes. To further understand the political implications, it might also prove interesting to continue the research by assessing the extent to which individual politicians' alignment to a major political party in the United States influences the political will to implement the treaty. Another suggestion for additional research is to elaborate on the relationship between marginalized groups of US citizens in relation to social and economic rights in domestic practices to assess the domestic need for the implementation of the ICESCR.

The broader implications of my analysis suggest that the United States' failure to ratify the ICESCR is primarily due to the functions that influence the degree of political motivation of treaty implementation within the context of its time. That is to say, the US government is not particularly incapable of ratifying the ICESCR—after all, no vote has been held yet—but the political conditions of the time must work to minimize the political costs of doing so. Simmons suggests that the conditions of these functions of treaty commitment will fluctuate over time depending on the political context. As such, pressing domestic issues such as recent economic anxieties over housing affordability and livable wages in the United States and the rise of progressive candidates in both the legislative and executive branches, could shift the government toward favoring the ICESCR if this pressure continues.<sup>50</sup>

Moving forward in mobilization around international human rights treaties, this analysis suggests a pathway toward ratification of treaties by identifying and engaging in strategies to ratify the ICESCR in the United States. Identifying and minimizing the political costs associated with the ICESCR and making a condition in which it could be ratified would require electing a unified government with representatives who are in favor of supporting the values of social and economic rights as obligations rather than ideals. Alternatively, this analysis also suggests that achieving “hard law” recognition of social and economic rights in the United States requires a new calculation of political costs and incentives to motivate political leaders through structural hurdles. This new calculation would be impacted by applying strong pressure of international standards formed by allies, reshaping domestic public opinion, pressuring reelection prospects, and bringing attention to grassroots advocates and groups pushing mobilization toward and beyond established international standards. Overall, this analysis suggests the need to acknowledge the substantial amount of political will and participation required in the United States to overcome the political costs of the ICESCR in order for the nation to embrace a holistic and interconnected approach to human rights.

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50 Simmons, pp. 67.

**Contributor's Note**

After taking a junior seminar on international human rights treaties, the contributor decided upon this topic as a capstone research project in the course. In particular, the subject brought together their semester-long interest in economic rights, the enforcement of the ICESCR, the political process of domestic enforcement of international treaties, and the formative role of the US government in adopting International human rights treaties. A recent graduate in political science with an emphasis in US politics, their recently revised version of this capstone project works to implicate and theorize on the political costs behind the US government's approach to craft, consider, and fail to ratify the implementation of a legally binding, internationally accepted guidepost of economic rights.

## Bibliography

- Alston, Phillip. "Putting Economic, Social, and Cultural Rights On the Agenda of the United States." *NYU School of Law Center for Human Rights and Global Justice*, no. 09-35, May 2009.
- Alston, Philip. "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy." *American Journal of International Law*, vol. 84, no. 2, 1990.
- Bradley, Curtis. "The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism." *Chinese Journal of International Law*, 2010, p 321-344.
- Bradley, Curtis. "Federalism, Treaty Implementation, and Political Process: Bond v. United States." *The American Journal of International Law*. Vol. 108, No. 3. Cambridge University Press, July 2014.
- Derian, Patricia M. "On the Need to Ratify Human Rights Treaties." *The American Journal of Economics and Sociology*, vol. 40, no. 1, 1981.
- Kaufman-Hevener, Natalie. "Drafting the Human Rights Covenants: An Exploration of the Relationship Between U.S. Participation and Non-Ratification." *World Affairs*. Vol. 148, No. 4. Sage Publications, 1986.
- Nagan, Winston. "The Politics of Ratification: The Potential for United States Adoption and Enforcement of The Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights." *Human Rights Roundtable*. 1990.
- Lewis, Hope. "'New' Human Rights: US Ambivalence Toward the International Economic and Social Rights Framework." *Northeastern Public Law and Theory Faculty Working Papers*. August 2009.
- McNaughton, Gillian and Mariah McGill. "Economic and Social Rights in the United States: Implementation Without Ratification." *Northeastern University Law Journal*, vol. 4, no. 2, 2011, p. 365.
- Roberg, Jeffrey L. "The Importance of International Treaties: Is Ratification Necessary?" *World Affairs*, vol. 169, no. 4, 2007, pp. 181.
- Simmons, Beth. "Theories of Commitment." *Mobilizing for Human Rights*. Cambridge University Press, 2009, pp. 64.
- Stark, Barbara. "At Last? Ratification of the Economic Covenant as Congressional Executive Agreement." *Transactional & Contemporary Problems*. Vol 107 No. 1. Spring 2011.
- United States Senate. *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*. November 11-15th, 1979. 96th Cong. 1st Sess. 35.
- Whelan, Daniel J., and Jack Donnelly. "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight." *Human Rights Quarterly*, vol. 29,

no. 4, 2007.