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Dynamics of Healthcare Reform: Bitter Pills Old and New

Christopher N.J. Roberts

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Dynamics of Healthcare Reform: Bitter Pills Old and New

Christopher N.J. Roberts*

ABSTRACT

The United States is at a crossroads—albeit one it has visited several times before. Although the Supreme Court has ruled upon the constitutionality of the Patient Protection and Affordable Care Act, the polarizing controversy surrounding national healthcare that began several generations ago is likely to continue into the foreseeable future. In this latest round of national debates, the issue of healthcare has been framed exclusively as a domestic issue. But history shows that the question of national healthcare in the United States has also been an extremely important issue for international law and international politics. To shed light on the overlooked nexus between the Act, U.S. constitutional law, and international human rights law, this Article examines the debates surrounding healthcare and human rights that occupied the nation's attention over six decades ago.

In the late 1940s, the controversy over President Harry Truman's national healthcare plan became known as the nation's "Great Debate." But because Truman's plan never

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actually became law, this episode of U.S. history has largely escaped the attention of legal scholars. This mid-century debate over healthcare reform has had a profound impact on contemporary domestic and international legal institutions. This Article reveals how, beginning in 1948, the debate over healthcare set in motion a series of political precedents, social practices, and legal interpretations that have influenced every subsequent battle over U.S. healthcare. But in particular, this early debate over healthcare was an important factor in the historic decision in 1952 to divide the Covenant on Human Rights into the two treaties we have today—the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

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I. INTRODUCTION

The Supreme Court has decided upon the constitutionality of the Patient Protection and Affordable Care Act. The issue of national healthcare is one of the most controversial and often replayed civic debates in U.S. history. This Article explores President Harry Truman's effort to enact his national healthcare plan during the late 1940s and early 1950s. The bitter controversy that emerged U.S. exceptionalism that are taken for granted today: (1) the reluctance to view access to healthcare as a *universal right* and (2) the rejection of

incorporating international human rights into U.S. domestic law.¹ But because Truman's plan never actually became *law*, this episode of U.S. history has largely escaped the attention of legal scholars.

Overlooking this legal history is a mistake for two reasons. First, while Truman's plan never ended up as *law*, this does not mean that the underlying social and political struggles are in any way inconsequential for contemporary law and policy. For example, this particular historical controversy ushered in a new era of politics that transformed the way such battles were fought. In the late 1940s and early 1950s, private-interest groups on this issue raised unprecedented sums of money and developed a practice that is now *de rigueur* in political battles: the negative media blitz. Opponents of healthcare reform saturated the airwaves, packaging fear and vitriol into media-friendly bundles of distorted information. Indeed, these debates over healthcare set in motion a series of political precedents, social practices, and legal interpretations that have influenced every subsequent battle over U.S. healthcare.

Second, the debate over national healthcare actually was a factor in the development of law—international human rights law. But interestingly, this piece of the healthcare story—which relates to how the foundation of the modern international human rights regime was literally split in two—has never before been explored. In recent years, a small but growing number of social and legal historians have begun to shed new light on the complex interactions between international geopolitical concerns and domestic interests during critical moments of rights formation.² While these scholars have focused on issues such as race and civil rights, the connections between domestic healthcare policy and international human rights have never before been examined.

Through extensive archival research and the use of a new interdisciplinary, socio-legal research framework, this Article exposes a previously unknown side of the healthcare debates. This Article shows how during the late 1940s and early 1950s, the nation became

1. On the subject of American exceptionalism and human rights, see generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); for the issue of healthcare, see generally JILL QUADAGNO, ONE NATION, UNINSURED: WHY THE U.S. HAS NO NATIONAL HEALTH INSURANCE (2005) (discussing the United States' reluctance to adopt universal health insurance).

2. See generally CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003) (discussing how the Cold War and U.S. participation in the United Nations stymied the ability of African American leaders to advocate for social and economic rights); ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS (2005) (discussing how New Deal values influenced post-World War II international political and legal institutions); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (discussing the relationship between U.S. civil rights conditions and U.S. foreign relations during the Cold War).

polarized over the issue of national healthcare as powerful interest groups, such as the American Medical Association (AMA), joined forces with influential political factions in the U.S. government. All the while, a parallel, global debate over human rights was taking place at the United Nations. The two controversies—the first over national healthcare in the United States and the second over whether socioeconomic rights were actually human “rights”—soon became inextricably linked with one another.³ The domestic controversy over the United States’ healthcare quickly became mired in Cold War geopolitics and international uncertainties surrounding the decline of empire.

Because scholars typically compartmentalize their studies of domestic constitutional law on the one hand, and international human rights law on the other, legal historians have yet to explore how this earlier struggle over healthcare occupied both spheres of law simultaneously. This Article reconnects these important pieces of the history of healthcare reform. Indeed, negative domestic media campaigns effectively linked the idea of national healthcare with “socialized medicine” during these early days of the Cold War.⁴ At the United Nations, the State Department caved under the mounting domestic opposition and took the necessary steps to define socioeconomic rights as limited “goals” or “principles” rather than actual universal human “rights.” Then, in 1952, the original plan for a single international covenant that contained both civil and political rights and socioeconomic rights was scrapped. Despite the protests from many other furious UN member states, the Covenant on Human Rights (the Covenant) was split up into the two International Covenants we have today.⁵

3. The socioeconomic rights under consideration included the right to medical care. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights art.12, ¶ 2(d), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“The steps to be taken by the States Parties . . . shall include those necessary for [t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.”).

4. This epithet is of course still hurled about six decades later. *See, e.g.*, Howard Rich, Special to the Tribune, *Federal Overspending Is Path to Poor House*, TAMPA TRIB., July 18, 2010, Views at 1 (criticizing the Patient Protection and Affordable Care Act as a “socialized medicine plan that represents one of the largest expansions of entitlement spending in American history”); *Michele Bachmann and Ron Paul on WHO Radio* (C-SPAN Dec. 29, 2011), available at <http://www.c-spanvideo.org/program/ORad> (describing the Patient Protection and Affordable Care Act as “socialized medicine”).

5. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). On February 5, 1952, the General Assembly adopted GA Resolution 543 (VI), which called for two covenants. G.A. Res 543 (VI), ¶ 1, U.N. Doc. A/2112 (Feb. 5, 1952).

The central argument presented in this Article is that the opponents of U.S. healthcare reform in the late 1940s and early 1950s created and reinforced enduring ideational and institutional structures that now act as “safe havens” for continued legal opposition against incorporating universal healthcare provisions and international human rights law into U.S. domestic law. And now over sixty years later, both the United States and the global community remain constrained and beholden to a series of social, political, and legal conflicts of an era that has long passed.

Part II of this Article outlines the early conflict between U.S. domestic law and the human rights that were under consideration at the United Nations in the mid-to-late 1940s. Part III chronicles the previously unknown impact that the domestic opponents of healthcare reform had upon the State Department’s policies and actions at the United Nations. Part IV shows how human rights historically have developed through organized struggle. Finally, Part V provides several theoretical and historical lessons gleaned from this earlier struggle over healthcare and human rights.

II. THE LIMITS OF THE U.S. CONSTITUTION

At the opening meeting of the Commission on Human Rights on April 29, 1946, Henri Laugier, the Assistant Secretary-General for the UN Department of Social Affairs, instructed the Commission to include socioeconomic rights in the bill of human rights they would soon draft.⁶ Because modern industrialization inflicts “intolerable servitude” on otherwise free individuals, Laugier informed the Commission that “the declaration of the rights of man must be extended to the economic and social fields” to include rights such as labor rights and the rights to education, social security, and adequate medical care.⁷ A year later, during the First Session of the Commission on Human Rights Drafting Committee, Eleanor Roosevelt reminded the representatives that because of their importance (and because they had been instructed to include them),

6. See U.N. Econ. & Soc. Council Summary Record, Comm’n on Human Rights, 1st Sess., 1st mtg. at 2, U.N. Doc. E/HR/6 (Apr. 29, 1946) (“[T]he progress of scientific and industrial civilization has created economic organizations which are inflicting on politically free men intolerable servitude, and that therefore, in the future, the declaration of the rights of man must be extended to the economic and social fields.”).

7. *Id.* This is only a partial list of rights that typically fall within the category of socioeconomic rights. See, e.g., ICESCR, *supra* note 3, arts. 12–14 (establishing the enjoyment of physical and mental health, education, and social security as economic, social, and cultural rights).

socioeconomic rights “could not be omitted.”⁸ But beneath the United States’ apparent support for these rights that enjoyed widespread backing amongst many other members of the United Nations, there existed deep anxieties about actually including them in a binding covenant. So Roosevelt, who knew that the Senate was likely to reject a covenant with strongly worded socioeconomic rights, hedged. She added that socioeconomic rights should remain minimally articulated and “could not be expanded too much in a Declaration.”⁹ This was one of the early signs of what John Humphrey—the Canadian legal scholar responsible for creating the first draft of the Universal Declaration of Human Rights—later recalled was the “considerable opposition in the Drafting Committee to their inclusion.”¹⁰

The competing desires to (1) keep socioeconomic rights out of the Covenant, while (2) appearing as a cooperative and progressive leader in international politics had the United States in a difficult position. As Eleanor Roosevelt wrote in a letter to Secretary of State George Marshall, the great political concern was having to state openly at the United Nations that the United States, “in view of the fact that Congress would have to ratify such treaties, can not agree to wording which goes beyond our own Constitution.”¹¹ Accordingly, the U.S. delegation to the United Nations advocated for a series of covenants—first, one on civil and political rights, and then others in areas such as socioeconomic rights. In this way it could give its full support for the initial covenant, while not worrying as much about subsequent ones. In 1948, the State Department remained “satisfied” that socioeconomic rights were not being considered for incorporation within the Covenant.¹²

On the domestic front, after President Truman’s reelection in 1948, many opponents of progressive social reform began to voice their concerns about his national healthcare proposal.¹³ Though this

8. U.N. Econ. & Soc. Council Summary Record, Comm’n on Human Rights Drafting Comm., 1st Sess., 9th mtg. at 11, U.N. Doc. E/CN.4/AC.1/SR.9 (July 3, 1947).

9. *Id.*

10. John P. Humphrey, *The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights*, 5 HUM. RTS. Q. 387, 407 (1983).

11. Letter from Eleanor Roosevelt, Delegate to the U.N. General Assembly, to George C. Marshall, Secretary of State (May 11, 1948), available at <http://www.trumanlibrary.org/eleanor/1948.html>.

12. For this kind of historical research, it is important to note that failing to scrutinize political discourse beyond public statements and surface-level rhetoric can lead to conclusions that run entirely contrary to actual history. See, e.g., Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUM. RTS. Q. 908, 910 (2007) (claiming that “the West was not in any way opposed to establishing binding obligations with respect to economic and social rights”). The analysis that follows provides an abundance of evidence to the contrary.

13. See Harry S. Truman, *A National Health Program: Message from the President*, SOC. SECURITY BULL., Dec. 1945, for a discussion of Truman’s plans to

opposition was focused on the narrow topic of healthcare, it was emblematic of an antipathy toward social-welfare programs and a loathing of the stronger, universal category of socioeconomic rights. A certain amount of opposition to his national healthcare proposal was not unexpected. The New Deal programs enacted by Truman's predecessor certainly had their share of opponents (and universal healthcare provisions were not popular enough at the time to gain inclusion).¹⁴ Like previous health bills that had failed to garner support over the past decade, Truman's proposal called for the expansion of hospitals, an increase in public support for mothers and children, and a system that would provide federal aid for medical education and research.¹⁵ But Truman's proposal was far more robust than the Wagner healthcare bill of 1939¹⁶ or the Wagner-Murray-Dingell bill of 1943,¹⁷ for instance. The crux of Truman's plan was a single insurance system that would cover not just the needy, elderly,

promote healthcare. See also MONTE M. POEN, HARRY S. TRUMAN VERSUS THE MEDICAL LOBBY: THE GENESIS OF MEDICARE 140-73 (1979) (discussing Truman's efforts to pass national health insurance legislation after the 1948 election); QUADAGNO, *supra* note 1, at 7, 8, 34-43, 49, 51 (describing adverse reactions to Truman's national healthcare proposal from the AMA, the U.S. Chamber of Commerce, and trade unions); PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 281-88 (1982) (describing efforts to defeat Truman's national health insurance proposal by the AMA and Republican members of Congress). See generally GEORGE W. BACHMAN & LEWIS MERIAM, THE ISSUE OF COMPULSORY HEALTH INSURANCE: A STUDY PREPARED AT THE REQUEST OF SENATOR H. ALEXANDER SMITH, CHAIRMAN OF THE SUBCOMMITTEE ON HEALTH OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE (1948) (finding that the existence of the problem addressed by compulsory health insurance was not statistically supported and that compulsory health insurance would require excessive government regulation); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1995).

14. See POEN, *supra* note 13, at 17 (discussing President Franklin Roosevelt's decision not to include national health insurance in the Social Security Act of 1935); QUADAGNO, *supra* note 1, at 22-23 (discussing Roosevelt's decision not to include national health insurance in the Social Security Act of 1935 largely because of heavy lobbying by the AMA); STARR, *supra* note 13, at 266-69, 275-79 (discussing Roosevelt's decision not to include national health insurance in the Social Security Act of 1935 and not to support the Wagner Bill in 1939 largely because of heavy lobbying by the AMA).

15. See Truman, *supra* note 13 (outlining the major parts of his proposed health program).

16. See BACHMAN, *supra* note 13, at 4 (describing Truman's compulsory health-insurance proposal); POEN, *supra* note 13, at 21-22 (describing the provisions of the Wagner Bill); QUADAGNO, *supra* note 1, at 26 (describing the Wagner Bill's plan to provide federal funds for state health programs); STARR, *supra* note 13, at 275-77 (describing the Wagner Bill's plan to leave health insurance as an option to the states); Truman, *supra* note 13, at 7, 9-12 (describing Truman's healthcare proposal, including his proposal for compulsory health insurance).

17. See BACHMAN, *supra* note 13, at 4 (describing Truman's compulsory health-insurance proposal); POEN, *supra* note 13, at 31-35 (describing the Wagner-Murray-Dingell Bill of 1943); QUADAGNO, *supra* note 2, at 26 (indicating that the Wagner-Murray-Dingell Bill proposed a national health-insurance scheme); Truman, *supra* note 13, at 9-12 (describing Truman's healthcare proposal, including his proposal for compulsory health insurance).

veterans, children, or mothers. It would include all Americans—even those who were too poor to pay the premiums themselves.¹⁸

Though in 1948 the Truman administration believed there would be enough support for such a proposal to become law, conservative forces both in Congress and within the general public were strong and well-organized.¹⁹ These opponents viewed Truman's healthcare proposal as part of a broader social and political trend that upset existing social relations as the government encroached into sacrosanct areas of social, economic, and personal life.²⁰ Increasingly, this opposition against social welfare was becoming enmeshed in the anticommunist mood that was then gathering strength in the United States.²¹

The domestic response to Truman's healthcare plan (as well as to his other domestic social-welfare proposals) became something of a political bellwether for gauging the support for an international human rights treaty that contained socioeconomic rights.²² Those members of the Senate who opposed a universal healthcare system and similarly objected to piecemeal, nonuniversal, domestic welfare initiatives, would certainly oppose the stronger, universal socioeconomic rights that would be included in a binding covenant. Procedurally, if Truman could not garner a filibuster-proof, two-thirds majority of the Senate to support his domestic health proposal, he certainly would not be able to reach the same supermajority threshold to ratify a covenant that included socioeconomic rights.²³

18. See BACHMAN, *supra* note 13, at 4 (describing Truman's compulsory health-insurance proposal); POEN, *supra* note 13, at 100 ("[T]he president stated that the heart of his total program was national health insurance."); STARR, *supra* note 13, at 281 (describing Truman's proposal to create a single health-insurance system that would include all classes of society); Truman, *supra* note 13, at 9–12 (describing Truman's healthcare proposal, including his proposal for compulsory health insurance).

19. See POEN, *supra* note 13, at 140–73 (discussing Truman's efforts to enact national health-insurance legislation); QUADAGNO, *supra* note 1, at 7, 8, 34–43, 49, 51 (describing adverse reactions to Truman's national healthcare proposal from the AMA, the U.S. Chamber of Commerce, and trade unions); STARR, *supra* note 13, at 280–89 (discussing Truman's failed efforts to enact national health-insurance legislation).

20. See QUADAGNO, *supra* note 1, at 8, 31–32, 33 (discussing the views of those who believed that national health insurance would lead to massive government expansion and infringement of traditional liberties).

21. See POEN, *supra* note 13, at 105–13 (discussing efforts by Republican members of the House of Representatives to link national health insurance and its supporters to communism); QUADAGNO, *supra* note 1, at 27–28, 31, 32, 35 (describing Truman's opponents' characterization of national health insurance as "communist-inspired"); STARR, *supra* note 13, at 284–85 (describing Truman's opponents' characterization of national health insurance as part of a larger socialist scheme).

22. See POEN, *supra* note 13, at 140–73 (describing the domestic response to Truman's healthcare plan).

23. Rule 22 (the cloture rule) at the time required a two-thirds majority, but has since changed to its present-day three-fifths majority requirement. *Filibuster and Cloture*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Oct. 29, 2012). Article II, § 2 of the Constitution

The State Department watched attentively as a groundswell of opposition surged against Truman's national healthcare proposal. But because the fate of an international covenant on human rights soon became inseparable from the domestic battles over social welfare, Eleanor Roosevelt and her State Department colleagues were thrown headlong into what was already becoming a turbulent domestic struggle.

III. THE OPPOSITION FORMS

Under fear of universal healthcare, in 1948 the AMA mobilized rapidly. As one of the most influential organizations to oppose Truman's health plan, its ability to mobilize quickly and efficiently was largely a function of its already strong and well-organized, dues-paying membership base.²⁴ It also maintained connections with high-ranking governmental officials and media outlets and had its own high-profile publication—the *Journal of the American Medical Association (JAMA)*—in which it could disseminate its message widely.²⁵ With these existing resources, it soon became a formidable opponent of Truman's healthcare plan.²⁶ In December 1948, the AMA House of Delegates—the organization's policy-making body—voted to initiate a “national education campaign” to inform the public about the danger of national healthcare legislation.²⁷ Its stated goal was to fight “the enactment of a compulsory sickness insurance act covering every person in the United States.”²⁸ In its view, the government had no place in this sphere of human relations. Healthcare was a private

requires two-thirds of the Senate's approval on international treaties before they can be ratified. U.S. CONST. art II, § 2.

24. See POEN, *supra* note 13, at 13, 15–16 (discussing the organization of the AMA); STARR, *supra* note 13, at 284–88 (discussing the AMA's ability to assess dues, raise money for public-relations campaigns, and recruit allies in the business community).

25. See STARR, *supra* note 13, at 282–83 (describing the AMA's campaign to have doctors visit public officials and to garner the support of newspapers by increasing the AMA's expenditures on print advertising).

26. Organization materials put the membership at 140,000 in 1950. *Proceedings of the San Francisco Session: Minutes of the Annual Session of the House of Delegates of the American Medical Association, Held in San Francisco, June 26–30, 1950*, 143 J. AM. MED. ASS'N 975, 988 (1950) [hereinafter *Proceedings of the San Francisco Session*].

27. *Id.* at 987–88.

28. *AMA Tells How It Will Use \$3,500,000 To Fight Ewing's 'Health Nationalization'*, N.Y. TIMES, Dec. 11, 1948, at 13 [hereinafter *Ewing's Health Nationalization*] (quoting *A Call to Action Against Nationalization of Medicine*, 138 J. AM. MED. ASS'N 1098, 1098 (1948)).

matter that should be governed by the free market of healthcare providers and patients.²⁹

Domestic social-welfare policies on the one hand, and stronger, universal notions of socioeconomic human rights on the other hand, were actually quite similar. They both called for the government, acting in a protective capacity, to mediate aspects of social existence that were then often governed by the market, the church, the family, or simply by life chances. For some, this offered much-needed protection from the vicissitudes of a market-based civic existence. For the opponents, however, increased government involvement in these areas of society amounted to social tyranny. There were already many in the Congress who opposed Truman's domestic social-welfare agenda.³⁰ But its connection with the ongoing human rights project that the State Department was then involved with at the United Nations was not yet a legislative concern, nor was it a matter of public consciousness.

It was William Fitzpatrick, the city editor of the *New Orleans States* newspaper, who linked the parallel and ongoing debates about socioeconomic rights at the United Nations and Truman's domestic proposals as part of the same "pincer movement" to force alien laws and social customs upon the American people.³¹ As Fitzpatrick saw it, there were now two fronts to the battle: one set of threats came from domestic sources and another from the international. It was the latter movement, largely occurring outside of the public's view, that he concerned himself with in his editorials.

Now the potential for social and economic reforms came not only from legislative fiat, but from potentially binding human rights treaties. All one had to do, he warned, was read the Universal Declaration of Human Rights—upon which the Covenant would be based—to see that the United Nations had a "plan for worldwide socialism."³² He cited Article 22 (the right to social security)³³ and Article 25 (e.g., the right to an adequate standard of living for health and well-being, including food, clothing, housing, medical care, social services; and the right to security in the event of unemployment,

29. See *Proceedings of the San Francisco Session*, *supra* note 26 (indicating that the medical industry felt "threatened by socialization").

30. See POEN, *supra* note 14, at 66 (attributing the success of the Republican party in the 1946 elections to popular frustration with Truman's "economic-control policies").

31. 95 CONG. REC. A1928 (1949) (extension of remarks of Rep. F. Edward Herbert). Representative F. Edward Hebert (D-LA) inserted into the *Congressional Record* a series of editorials by Fitzpatrick. Over the next several years, he reprinted dozens of Fitzpatrick's editorials and speeches in the Congress to alert his colleagues about the specter of "government by treaty."

32. *Id.* at A1926.

33. *Id.* at A1927.

sickness, disability, widowhood, or old age).³⁴ In addition to imposing revolutionary changes to the freedoms associated with the “American way of life,” U.S. citizens would be forced to care for foreigners—“social security for all the world, with Uncle Sam . . . footing most of the bill.”³⁵ As absurd as this last assertion sounds, Fitzpatrick was quite in sync with the pressing debates of the day. At the time, there were ongoing discussions in Congress questioning the wisdom of the Marshall Plan and whether it was being used to fund socialist governments in Europe—such as Great Britain, France, and Germany—with U.S. tax dollars.³⁶

At this point, there were actually very few opponents who were speaking to a broad public audience about the connections between human rights treaties and domestic law. Most of the opposition was preaching to limited audiences of academics, legal professionals, and politicians. But as shown below, other journalists, activists, and organizations would soon join Fitzpatrick and connect the United Nations with social welfare and communism.³⁷

Given the early indications of opposition, Truman was concerned about the Senate’s filibuster. One potential way around this was to amend the rules of the Senate to disempower the southern Democrats by limiting the use of their procedural weapon of choice. Truman initiated the push for a Senate rules change that would allow a simple-majority vote for cloture to debate.³⁸ His attempt, however, was quickly foiled by a bipartisan coalition of southern Democrats and midwestern Republicans.³⁹ This setback—which amounted to maintenance of the legislative status quo—imperiled Truman’s agenda. Soon after, Truman struck a conciliatory chord and faced the reality that he would have to compromise with the conservatives or suffer defeat. Truman assured both his opponents and his allies that “the Congress and the President are working together and will continue to work together for the good of the whole country.”⁴⁰ In his

34. *Id.*

35. *Id.*

36. See 95 CONG. REC. 10,060 (1949) (Remarks of Sen. James Kem) (proposing to deny Marshall Plan funds to any country “undertak[ing] to acquire in the future any basic industry for operation by the state”).

37. This domestic/international human rights nexus is one key area of the historical record that is often overlooked.

38. See Raymond H. Geselbracht, *The Truman Administration During 1949: A Chronology*, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/chron/49chron2.htm#fair> (last visited Oct. 8, 2012) (“At President Truman’s urging, the Senate considers an amendment to its rules that would impose cloture to debate by a simple majority vote.”).

39. *Id.*

40. See *Address Before the United States Conference of Mayors*, 1 PUB. PAPERS 54 (Mar. 21, 1949), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=1072&st=&st1=> (discussing the cooperation of the executive and legislative branches in the contested housing-bill context).

own prophetic words, he promised that he and the Congress were “going to agree on a lot more things than we disagree on.”⁴¹

Throughout 1949, the AMA continued to publish articles in its journal that offered scathing critiques of Truman’s national healthcare plan. The arguments that appear in these *JAMA* articles, as well as the statements and speeches of the AMA’s president, typically counterposed themes such as a compulsory insurance program versus a voluntary one, socialized medicine versus a free-market program, foreign socialism versus the “American way,” and government domination versus liberty and independence.⁴² In this campaign, these arguments were boiled down to several well-used phrases, such as “socialized medicine,” and “the voluntary way is the American way.”⁴³

The goal of their “education campaign” was to put pressure on elected officials by raising the fear and ire of the general public through a well-coordinated grassroots movement. By July 1949, the AMA had produced 25 million copies of twenty-five different information brochures—each meant to appeal to a different target audience—and shipped millions of copies to various state and county medical societies.⁴⁴ Over 40,000 doctors had ordered color posters for their offices that implored the government to “Keep Politics Out of This Picture.”⁴⁵ In its opposition to national healthcare, the AMA claimed the support of over 800 other organizations, such as the American Farm Bureau Federation, the American Legion, the American Bar Association, the National Grange, the National Association of Small Business Men, the National Fraternal Congress, and the General Federation of Women’s Clubs (the latter boasting 5 million members).⁴⁶ In the political arena, several state legislatures (e.g., Delaware and Michigan) had already drafted resolutions to submit to Congress opposing national healthcare.⁴⁷ At this point, however, the AMA had not yet even begun to ramp up its campaign.

A. *International Support/Domestic Opposition*

In early 1949, the State Department was pleased with the draft covenant since it was limited to only civil and political rights. By the close of the Fifth Session of the Commission on Human Rights

41. *Id.*

42. *See Proceedings of the Atlantic City Session*, 140 J. AM. MED. ASS’N 685, 695–97 (1949) (discussing the role of the medical profession in curtailing the effects of “socialism” and politics regarding government intervention in the profession).

43. *Id.* at 696–97.

44. *Id.*

45. *Id.* at 696.

46. *Id.* at 697.

47. The Delaware resolution was vetoed by the governor. *Organization Section*, 140 J. AM. MED. ASS’N 413, 414 (1949).

though, things changed dramatically for the United States when Australia and the Soviet Union submitted detailed proposals calling for the inclusion of socioeconomic rights.⁴⁸ The Australian proposal included the rights to work, fair wages and reasonable working conditions; the right to social security; limitations on working hours; and the right to education; while the Soviet proposal included the right to work; gender equality with respect to pay; the rights to rest and leisure, social security and social insurance, decent living accommodations, and access to education; trade union rights; and the right to strike.⁴⁹ These two proposals were a very important development for the Commission on Human Rights since they raised the possibility that socioeconomic rights—which were already popular with a large portion of UN member states—would be placed alongside civil and political rights in the Covenant. The fact that Australia joined the Soviets showed that such proposals were not simply Cold War propaganda items—socioeconomic rights were of genuine importance to Western nations as well. This was a troubling development for the State Department.

By the end of the First Session of the 81st Congress in October 1949, the House and the Senate had failed to act upon (or had rejected outright) much of the social legislation bills that Truman had endorsed.⁵⁰ In addition to the civil rights legislation he failed to pass, he did not muster the necessary support for the Point Four program of assistance to underdeveloped areas, the Brannan Plan (aid for farmers' incomes), or the extension of Social Security coverage.⁵¹ Finally, his health plan, though not entirely dead in the water, was floundering on dry pavement.⁵² The AMA, nevertheless, was unremitting.

According to AMA literature, government incursions into citizens' private lives and business relationships was an alarming trend in the United States—one that had already swept through many European nations.⁵³ Those invasions were apparently destroying not only market productivity and business innovation, but were responsible for spoiling the soul of American individualism and personal autonomy. In this campaign to "educate" Americans about healthcare, the AMA often used social democratic nations (Great Britain in particular) as social and economic foils of the United

48. See Comm'n on Human Rights to the Economic and Soc. Council, Rep. on its 5th Sess., May 9–June 20, 1949, ¶ 23 U.N. Doc. E/CN.4/350 (June 23, 1949) (discussing Australia's and the Soviet Union's implementation of a methodical questionnaire including questions about social and economic considerations).

49. *Id.* at pp.48–50.

50. The Point Four program was approved by Congress the following year. Geselbracht, *supra* note 38.

51. *Id.*

52. *Id.*

53. *Id.*

States. Great Britain, the one-time dominant world power, had apparently made a wrong turn down what the economist Friedrich von Hayek had recently called “the road to serfdom”—a warning, lest the United States do the same.⁵⁴ In this respect, the AMA campaign capitalized on the U.S. public’s familiarity with the postwar difficulties many other nations were experiencing. Though not necessarily a function of state socialism, the food shortages, rationing, and even starvation in Eastern Europe had been impressed upon the U.S. public by the Truman administration’s recent efforts to garner support for the Marshall Plan.⁵⁵ While the AMA’s central concern remained with domestic healthcare, a number of emergent international social and political issues were becoming strong undercurrents within its campaign rhetoric.

Even more menacing than social democracy—though for the AMA only one step away—was the threat of communism. During this period the campaign began to borrow the language and rhetoric of the anticommunist movement that was beginning to sweep through the United States.⁵⁶ What in hindsight can be referred to as mass

54. F.A. Hayek, *The Road to Serfdom* (1st ed., 1944). For examples of articles using foreign-state economic systems such as Great Britain as a foil for the United States, see William L. Hutcheson, *Socialized Medicine Is No Bargain*, 143 J. AM. MED. ASS’N 1268, 1269 (1950) (discussing how the costs of health services in Great Britain greatly exceeded those expected); Amos R. Koontz, *The Government Cannot Force Socialized Medicine on Us*, 143 J. AM. MED. ASS’N 1113, 1113 (1949) (describing the British government’s actions toward doctors in England as “browbeat[ing] and brib[ing]”); *Proceedings of Meeting of House of Delegates*, 147 J. AM. MED. ASS’N 1576, 1577 (1951) (comparing the economic freedoms in the United States with the limited freedoms in Great Britain).

55. Both Truman and Marshall gave influential speeches in which they outlined the economic and social suffering in European nations. See, e.g., Harry S. Truman, President, Address to Joint Session of Congress (Mar. 12, 1947), http://avalon.law.yale.edu/20th_century/trudoc.asp; George Marshall, Secretary of State, Speech at Harvard on the Marshall Plan (June 5, 1947), http://www.oecd.org/document/10/0,3746,en_2649_201185_1876938_1_1_1_1,00.html.

56. See, e.g., *Atomic Spy Inquiry Takes Surprise Turn*, L.A. TIMES, Sept. 12, 1948, at 15c (revealing that Soviet efforts to access U.S. atomic information were successful); Willard Edwards, *‘Angel’ of Reds Charged with Aiding Spies*, CHI. DAILY TRIB., Sept. 21, 1948, at 7 (discussing an investigation surrounding an American who financially supported the Soviets); Willard Edwards, *U.S. Jury Paves Way for New Red Exposures*, CHI. DAILY TRIB., Nov. 21, 1950, at 18 (predicting that the indictment of twelve persons linked to the Soviet Union would lead to more information on Soviet supporters); *Espionage: Two More Links*, TIME MAG., Aug. 7, 1950, at 15 (detailing the arrest of persons described as “links in the Soviet atomic spy chain” and “in cahoots with Harry Gold”); Joseph E. Evans, *Compulsory Freedom*, WALL ST. J., 1949, at 4; *Extinction of America*, CHI. DAILY TRIB., Nov. 9, 1949, at 24 (referring to the “world government crowd” that sought to unify all countries as “silly people”); *House Group To Sift Astronomy Lab in Congo Uranium Area*, CHI. DAILY TRIB., Sept. 7, 1948, at B5 (explaining the investigation of the House “un-American activity committee” on stargazers in the Belgian Congo); Samuel D. Menin, *The Universal Declaration of Human Rights: A Challenge to America*, 26 DICTA 122, 122–27 (1949) (presenting analysis that suggests the United States should not enter into binding contracts with other states

hysteria or a “moral panic” was simply an opportunity for the AMA.⁵⁷ The AMA—like so many others during this period—could just point to a handful of current events to stir the fear and fancy of the nation’s civic imagination. In fall 1949, for instance, eleven members of the U.S. Communist Party were convicted of attempting violent insurrection and attempting to overthrow the U.S. government.⁵⁸ In January 1950, as the AMA was beginning to ramp up its campaign, a former State Department employee, Alger Hiss, was convicted in a case surrounding state secrets and a communist spy ring.⁵⁹ And finally, with the outbreak of the Korean War in the summer of 1950, communism became the official enemy of the state. Never mind that there was absolutely no connection between Truman’s desire to provide adequate healthcare to all Americans and these events; they all provided the AMA with the ammunition to make the case that the communist infiltrators already had breached the United States’ ramparts. The greater fear, however, were those home-grown enemies within the government who shared Truman’s social-welfare aspirations.

B. *The Campaign Blitz*

The AMA focused its campaign efforts on influencing the outcome of the 1950 mid-term elections by replacing supporters of

regarding human rights); *Mother of Two Held in Spy Net*, L.A. TIMES, Aug. 12, 1950, at 1 (discussing the arrest of a U.S. citizen allegedly linked with Harry Gold for contributing to the Soviet atomic-bomb cause); *Shocking If True*, N.Y. TIMES, Sept. 27, 1948, at 22 (revealing an anonymous spokesperson’s allegation that Truman and Attorney General Thomas Clark had information about a Soviet spy ring but did not act on it); Walter Trohan, *Atomic Spy Ring of Reds To Be Probed*, CHI. TRIB., Sept. 7, 1948, at 1 (discussing the discovery of a Soviet spy ring); *Truman Aide Linked to Spy*, L.A. TIMES, Sept. 22, 1948, at 1, 7 (revealing a presidential advisor’s relationship with a Soviet spy); *Truman Says Russ Have A-Bomb*, L.A. TIMES, Sept. 24, 1949 at 1,4 (discussing the fear of “World War III” after the announcement of an atomic explosion in Russia).

57. For more on moral panic, see STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS*, at ii–iii (1972) (explaining how individuals or groups sometimes come to be defined as a threat to the values and interests of the broader society); Jock Young, *The Role of the Police as Amplifiers of Deviancy, Negotiators of Reality and Translators of Fantasy: Some Consequences of Our Present System of Drug Control as Seen by Notting Hill*, in *IMAGES OF DEVIANCE* 27, 37 (Stanley Cohen ed., 1971) (discussing the media’s ability to “engineer” moral panic about certain types of deviance).

58. TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* 314–16 (2004); PETER L. STEINBERG, *THE GREAT “RED MENACE”: UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952*, at 157–77 (1984).

59. See T. MICHAEL HOLMES, *THE SPECTER OF COMMUNISM IN HAWAII* 12–14 (1994) (explaining the events leading up to Hiss’s arrest and the public opinion of Hiss thereafter). The fact that Hiss had served as Secretary-General of the UN founding conference in 1945 did not ease the associations that many Americans had between communism and the United Nations.

healthcare reform with steadfast opponents.⁶⁰ This effort grew considerably throughout the year as influential organizations such as the National Association of Manufacturers and the Chamber of Commerce joined the effort to warn Americans about the dangers of a state-run economy.⁶¹ The culmination of this endeavor was a massive media blitz timed to coincide with the November elections. In this unprecedented \$1.1 million advertisement campaign, the AMA placed large, five-column ads in 11,000 daily and weekly newspapers, bought airtime from 300 radio stations, and placed full-page advertisements in thirty magazines.⁶² The organization boasted that during the week of October 8, 1950, every "bona fide daily and weekly newspaper" in the United States would carry its ads.⁶³

The AMA's campaign was designed to reach not just doctors and legislators, but also to alert every American about the dangers of "socialized medicine" and the broader "threatening trend toward state socialism" in the United States.⁶⁴ Accordingly, the organization created and promoted a wide variety of campaign materials to ensure that by the November elections, virtually every major demographic category in the United States would know about the perils of "politically controlled socialized medicine."⁶⁵ As an AMA official explained, those who did not read the more "formal treatises" on the subject would find quite illuminating the sixteen-page color comic book entitled *The Sad Case of Waiting-Room Willie*.⁶⁶ This publication—for which the talents of a preeminent graphic artist were solicited—tells the story of a sympathetic patient who is unable to receive medical care in the "New Utopia" because all of his doctors are overrun by "unsick" patients.⁶⁷ On the other hand, the

60. POEN, *supra* note 13, at 176 (describing "organized medicine's multi-million dollar attack" on President Truman regarding mandatory insurance); STARR, *supra* note 13, at 284–85 (discussing the \$1.5 million campaign discouraging the support of "socialized medicine" as "the most expensive lobbying effort in American history" at the time); Austin Smith, ed., *A.M.A. Advertising Program*, 143 J. AM. MED. ASS'N 744, 744 (1950) (describing a national advertising campaign urging Americans to support voluntary health insurance and warning against the threat of "socialized medicine").

61. See *U.N. Condemned as Socialistic in Job Theory*, CHI. DAILY TRIB., Feb. 16, 1950, at 14 ("[G]overnments have no means to maintain full employment, 'except in a totalitarian society.'").

62. See sources cited *supra* note 60.

63. Smith, *supra* note 60. For an example of the advertisements see, e.g., *Display Ad 116*, N.Y. TIMES, Oct 11, 1950, at 27.

64. Smith, *supra* note 60 ("American medicine is determined to alert the American people to the danger of socialized medicine and to the threatening trend toward state socialism in this country.").

65. *Id.*

66. Will Eisner, *The Sad Case of Waiting-Room Willie* (American Visuals Corp., 1950). For a description of the comic, see *Comics in the Fight Against Government-Controlled Medicine*, 144 J. AM. MED. ASS'N 46, 46–47 (1950) (describing the comic as "readable, entertaining and non-technical enough to reach all the voters").

67. *Id.*

professional types who read national publications, such as the *New York Times*, would find the AMA's imposing full-page advertisements asking its readers in large, bold face print, "Who Runs America? The Congress? The President? OR YOU AND THE MAN NEXT DOOR?"⁶⁸ At its heart, this was a massive effort to shape public opinion and motivate civic action.

Following the elections, the AMA claimed victory in two related fields. First, it claimed victory in creating a grassroots campaign of unprecedented size and power. They enlisted over 65,000 individuals and organizations that together spent an unprecedented \$2 million dollars in a two-week period on the effort.⁶⁹ Second, the AMA believed that the massive mobilization of opposition had influenced the elections. The number of advocates of national health insurance who had been replaced by opponents in the elections was cited as evidence.⁷⁰ Though it is difficult, if not impossible, to disaggregate the actual causal factors in this series of defeats, the scientific analysis of electoral politics was not of great concern to the AMA's leadership.⁷¹ Senators Claude Pepper (FL), Frank Graham (NC), Elbert Thomas (UT), and Glen H. Taylor (ID), as well as Representatives Andrew Biemiller (WI) and Eugene O'Sullivan (NE)—all supporters of healthcare reform—had each lost their seats.⁷² By the end of November, the AMA had members of the Senate on notice: support social-welfare initiatives at their own peril. These, of course, were the same individuals who eventually would be providing their "advice and consent" on the Covenant on Human Rights.⁷³ Whether or not it included socioeconomic rights would very likely determine its fate in this legislative chamber.

In a March 4, 1949, Gallup poll taken during the early days of the AMA's campaign, about 60 percent of those polled had heard or read about Truman's national health plan.⁷⁴ Fifty percent favored the AMA's "voluntary" insurance plan, while only 32 percent favored Truman's plan that was being branded by the opposition as

68. *Display Ad 116, supra* note 63; see *Ewing's Health Nationalization, supra* note 28 (revealing details of a discussion regarding Federal Security Administrator Oscar Ewing at an AMA House of Delegates secret meeting); William L. Laurence, *A.M.A. Sets \$1,100,000 Ad Drive To Kill Truman's Health Program*, N.Y. TIMES, June 27, 1950, at 1 (describing the advertising campaign and its goals).

69. Elmer L. Henderson, *President's Address to the House of Delegates*, 144 J. AM. MED. ASS'N 1268, 1269 (1950).

70. *Id.*

71. See *id.* (expressing satisfaction in the political involvement of doctors as individuals regardless of their political affiliation).

72. *Social Security History: Chapter 3: The Third Round*, SOC. SECURITY ONLINE, <http://www.ssa.gov/history/corningchap3.html> (last visited Oct. 22, 2012).

73. Article II, § 2 of the Constitution requires two-thirds of the Senate's approval on international treaties before they can be ratified. U.S. CONST. art II, § 2.

74. *Questionnaire #438*, GALLUP POLL, questions qn4a, qn4d, qn5a (Mar. 4, 1949).

“socialized” or “compulsory.”⁷⁵ Interestingly, the vast majority of those who were familiar with the ongoing healthcare debates (over 72 percent) did not know any specifics about Truman’s plan, yet still knew which plan they favored.⁷⁶ In less than two months, the percentage that had heard or read about the national health plan had increased by 16 percent to over 76 percent of the respondents.⁷⁷

Ironically, the public was still broadly *supportive* of social-welfare programs—and continued to be so throughout the campaign. By July 1949, 54 percent of respondents supported the creation of a new Department of Public Welfare that would preside over social security, public health, and education matters, while only 28 percent disapproved.⁷⁸ In March 1950, when asked about government spending on social welfare, health, and social security, 41 percent of respondents believed spending should be increased, 16 percent thought it should be decreased, and 36 percent believed it should remain the same.⁷⁹ Despite the greater support for government involvement in health and welfare, the public continued to oppose Truman’s national health plan, with 60 percent disapproving of it (versus 23 percent approving of it) by October 1950.⁸⁰ The AMA’s campaign had done something. By the end of 1950, when asked what the best argument *against* Truman’s national health plan was, the highest percentage of respondents replied that it was “socialist” or “communistic.”⁸¹

The type of social-welfare legislation being promoted by Truman domestically (as well as the stronger universal human rights that were being considered at the United Nations) was now politically toxic. It so thoroughly bore the taint of communism, internationalism, and un-Americanism that the fleeting moment in which those policies had a chance of survival in Congress was all but over. In 1950, Truman dropped any serious push for healthcare reform as his attention turned toward the Korean War.⁸²

The “socialized medicine” epithet that was thrown about so liberally by the AMA finally stuck. It represented a conceptual basket

75. *Id.*

76. There was also a category for those who offered no response. *Id.*

77. *Questionnaire #441*, GALLUP POLL, question qn12a (Apr. 30, 1949).

78. *Questionnaire #444*, GALLUP POLL, question qn18 (June 30, 1949).

79. *Questionnaire #454*, GALLUP POLL, question qn13_4 (Mar. 26–Mar. 31, 1950).

80. *Questionnaire #463*, GALLUP POLL, question qn8b (Oct. 6, 1950).

81. *Questionnaire #467*, GALLUP POLL, question qn9c (Nov. 12–Nov. 17, 1950).

Other reasons provided by respondents were categorized: “[d]octors would lose initiative, incentive”; “[u]nfair to doctors, . . . [and] would limit the doctors['] income”; “[l]ower health standards [and] inefficient service”; “cannot choose your own doctor”; the “cost of program”; “[t]oo much power for government”; “[w]orking poorly in England”; “[p]olitics would enter into it, lay the medical profession open to graft”; “would be abused”/“make people lazy and irresponsible.” *Id.*

82. STARR, *supra* note 13, at 286–89.

within which the uncertainties of the moment—as well as a broad spectrum of fears, social anxieties, and prejudices—could be placed. This strategy permitted something as valuable and universally necessary as access to decent medical care to become a “threat” to all Americans. The organization positioned itself as a last defense against the ill-conceived socialist mood that was “infecting” the world and now was threatening to destroy the United States. By joining the AMA and its growing network of supporters in the fight against national healthcare (now *socialized medicine*), Americans were taking part in a much larger battle against “the alien philosophy of a government-regimented economy.”⁸³

C. Keeping Socioeconomic Rights Out

Given the fervor of the domestic opposition against Truman’s social welfare proposals, the State Department was hard pressed to ease its own opposition to incorporating socioeconomic rights into the Covenant. In preparation for the General Assembly meetings that were to convene on September 19, 1950, the State Department met with the U.S. delegation to the United Nations and distributed briefing papers that outlined a two-prong strategy for approaching the issue of socioeconomic rights in the Covenant.⁸⁴ First, the U.S. delegation was instructed to support the creation of a covenant that mirrored the principles and rights within the U.S. Constitution—i.e., one that did not contain any socioeconomic rights.⁸⁵ James Simsarian, advisor to the U.S. delegation at the United Nations, discussed the Covenant in a State Department briefing session. He explained to those present—which included Eleanor Roosevelt, Senator Cabot Lodge, and John Foster Dulles (who was then a delegate to the UN General Assembly and would later become Secretary of State under President Dwight Eisenhower)—that the State Department wished to maintain the general status quo with respect to the Covenant.⁸⁶ Importantly, at this point “only a limited number of rights were covered—fundamentally the same area as that

83. See Smith, *supra* note 60, at 744 (quoting an announcement from the AMA’s National Education Campaign intended to solidify public support against “government-controlled medicine”) (internal quotation marks omitted).

84. Minutes of the Briefing Session of the United States Delegation to the General Assembly (Sept. 8, 1950), *reprinted in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1950: THE UNITED NATIONS; THE WESTERN HEMISPHERE 516, 516–17 (U.S. Government Printing Office ed., 1976) [hereinafter 2 FOREIGN RELATIONS].

85. See *id.* (explaining that James Simsarian, advisor to the U.S. delegation at the United Nations, highlighted the differences between the Covenant and the Declaration in order to demonstrate the State Department’s satisfaction with the Covenant).

86. See *id.* (noting that the Covenant required four years of work and the State Department considered it acceptable).

included in the United States Constitution's Bill of Rights."⁸⁷ Thus, as far as the State Department was concerned, the Covenant remained in "satisfactory" shape "since loose language covering economic and social rights had been excluded."⁸⁸ Nevertheless, the State Department conceded that it was "particularly anxious," since it appeared that many other states would try to push for the inclusion of socioeconomic rights.⁸⁹

With Cold War tensions rising, the State Department deemed the cultivation of geopolitical relationships to be an important part of its UN activities.⁹⁰ The second prong of the State Department's strategy emphasized the importance of working *with* other member states and not appearing obstructionist.⁹¹ In addition to its increasingly unpopular position on socioeconomic rights, the ongoing (and very unpopular) federal state clause battle—a proposed article that would have effectively barred many of the Covenant's provisions from applying within its federal states—opened the United States up to the charge that it was intentionally impeding not only the development of the Covenant, but also the extension of its provisions. The State Department stressed that the delegation should be prepared "to join with other countries in inviting the Commission on Human Rights to consider the desirability and feasibility of developing further covenants or taking other measures concerning economic, social and cultural rights as well as other categories of rights in the civil and political field."⁹²

Merely discussing the feasibility of socioeconomic rights at future meetings was far from what other member states had in mind, though.⁹³ In this respect, the United States, though wishing to "work" with other states on the issue, vastly underestimated the value of socioeconomic rights for many of the UN member states. Consequently, the two strategic goals were in many respects mutually exclusive of one another. If the United States adhered rigidly to its strategy of creating a covenant that mirrored the U.S. Constitution, it would be forced to oppose the inclusion of *any*

87. *Id.* at 516.

88. *Id.* at 516–17.

89. The Draft First International Covenant on Human Rights, cmt. [hereinafter Draft International Convention], reprinted in 2 FOREIGN RELATIONS, *supra* note 84, at 509, 513–15.

90. Draft International Convention, *supra* note 89, at 509–10 (expressing concern that an earlier consideration of the Refugee Convention could result in other delegations pressuring the United States to include socioeconomic rights in the draft Covenant).

91. See *id.* at 510 (noting that the United States should support the reconsideration of the draft Covenant).

92. *Id.* cmt., at 513–14.

93. See U.N. GAOR, 5th Sess., 290th mtg. to 299th mtg. at 117–90, U.N. Docs. A/C.3/SR.290–299 (Oct. 20–31, 1950) (documenting discussions regarding the measures of implementation for the draft Covenant).

socioeconomic rights at all. But if a significant number of states strongly endorsed socioeconomic rights, this strategy would run headlong into its second goal of working with other states and not appearing obstructionist. So from the start, the United States boxed itself into a contradictory policy approach.

At the General Assembly meetings, the United States' satisfaction with the limited rights in the Covenant stood in marked contrast to many of the other delegations' opinion of it; it soon became clear to the United States that its stance on socioeconomic rights did not sit well with the majority opinion of the General Assembly.⁹⁴ The State Department expected the usual Cold War diatribes from the members of the Communist Bloc who were amongst the most steadfast supporters of these rights.⁹⁵ In this regard, they did not disappoint. Stephan Demchenko, from the Ukrainian Soviet Socialist Republic, said the draft covenant appeared "to be rather a digest of limitations of human rights than a catalogue of such rights."⁹⁶ Representing Poland, Henryk Altman's comments echoed those of the other Communist representatives who all in turn voiced their revulsion that socioeconomic rights—the "very foundation of democracy [which] could not in any way be separated from the recognized civil and political rights"—had not been incorporated into the Covenant.⁹⁷

But what caught the United States off guard was the number of non-Communist Bloc states such as Mexico, Uruguay, Syria, Saudi Arabia, and Chile that shared the Communist delegations' desire to see socioeconomic rights incorporated into the Covenant.⁹⁸ What was so disturbing for these delegations, though, were the broader implications of producing an inadequate Covenant. Omitting socioeconomic rights, many believed, raised serious doubts about the future of the Covenant altogether. Dr. Raul Noriega of Mexico, for instance, voiced his concern over the Covenant by arguing that "it would be better to have no covenant at all if the economic and social rights were not included in it."⁹⁹ Omitting socioeconomic rights from the binding Covenant would only send the message that they were of little importance, and thereby "destroy the value of the Universal

94. *Id.*

95. *Id.*

96. U.N. GAOR, 5th Sess., 291st mtg. at 125–26, U.N. Doc. A/C.3/SR.291 (Oct. 20, 1950).

97. U.N. GAOR, 5th Sess., 290th mtg. at 117, U.N. Doc. A/C.3/SR.290 (Oct. 20, 1950).

98. U.N. GAOR, 5th Sess., 290th mtg. to 299th mtg., *supra* note 93. This is not at all an exhaustive list of UN member states who wished to see socioeconomic rights in the Covenant.

99. U.N. GAOR, 5th Sess., 298th mtg. at 178, U.N. Doc. A/C.3/SR.298 (Oct. 30, 1950).

Declaration of Human Rights.”¹⁰⁰ Carlos Valenzuela of Chile voiced his disappointment, saying that in its present shape, the Covenant was wholly inadequate.¹⁰¹ Like so many of the other members of the General Assembly, “the delegation of Chile could not imagine a covenant on human rights worthy of the name which did not include economic, social and cultural rights and particularly the right to work and the right to social security.”¹⁰² Perhaps, Valenzuela wondered, the Committee should admit that attempting to draft an enforceable covenant was an “over-ambitious project and even a dangerous one in that it risked compromising the moral prestige enjoyed by the Universal Declaration of Human Rights.”¹⁰³ It was not, of course, the hope or intention of these states to abandon the human rights project altogether. Much of the disappointment with the Covenant was of course directed towards the U.S. delegation, which was the chief resister. The type of diplomatic gamesmanship played here—blaming without naming—was a staple at the United Nations, particularly when confronting a much more powerful adversary such as the United States.

As in so many of the contentious debates in the General Assembly, the now very familiar division between colonial powers and the smaller and non-Western states was a central element. The Saudi Arabian representative, Jamil Baroodi, said, “It was not surprising that most of those who took that cautious position were representatives of colonial Powers. It was plainly not in their interest to accelerate the implementation of an effective covenant, since the result in dependent territories might be to awaken the population from its lethargy.”¹⁰⁴ Nizar Kayali of Syria, like many of the other delegates, voiced the opinion that the Covenant would be quite incomplete without socioeconomic rights.¹⁰⁵ With the United States and Great Britain in his crosshairs, Kayali suggested that the opposition to such rights that came from some of the powers “arose either from a superiority complex or from a keen sense of selfish colonial interest. . . . Those imbued with the colonial mentality could argue that such rights were good for the inhabitants of the metropolitan country but not for the natives of the colonies.”¹⁰⁶ The colonial powers’ steadfast resistance to including socioeconomic rights in the Covenant, he continued, could be explained because these

100. *Id.*

101. U.N. GAOR, 5th Sess., 290th mtg., *supra* note 97, at 121–22.

102. *Id.*

103. *Id.*

104. U.N. GAOR, 5th Sess., 299th mtg. at 187, U.N. Doc. A/C.3/SR.299 (Oct. 31, 1950)

105. *Id.* at 189–90.

106. *Id.*

rights would interfere with the ongoing “exploitation” of non-Western states.¹⁰⁷

The United States did not have much to say that directly addressed any of these arguments. Roosevelt provided a short statement of the U.S. position that held tightly to the State Department’s playbook. Namely, the United States did not support the inclusion of additional articles in the Covenant—it supported completion of the document without delay, and finally, it supported the future examination of socioeconomic rights for subsequent covenants.¹⁰⁸ The U.S. position in no way swayed the other delegations, for on December 4, 1950, the Assembly passed Resolution 421 (V), which stated in no uncertain terms that because the current draft of the Covenant was limited to just civil and political rights, it lacked the most basic and “most elementary” rights.¹⁰⁹ Accordingly, the Resolution called upon the Commission on Human Rights, “in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights.”¹¹⁰ The Resolution, which passed twenty-three to seventeen, with ten abstentions, not only delivered a major blow to the U.S. delegation’s hopes of avoiding socioeconomic rights, but also painted a picture of a nation that was out of touch with much of the world’s people and governments.¹¹¹

D. Domestic Opponents/International Treaties

Throughout 1951, the opposition to domestic social-welfare reform pressed on. The isolated voices of the early opponents such as William Fitzpatrick were now joined by a resounding chorus of detractors who—now mobilized and primed—trained their sights on the dangers of international human rights treaties.¹¹² All the same

107. *Id.*

108. See U.N. GAOR, 5th Sess., 298th mtg., *supra* note 99 (discussing the matter of social and economic rights).

109. G.A. Res. 421 (V), at 42–43, U.N. Doc. A/RES/421(V) (Dec. 4, 1950) [hereinafter G.A. Resolution 421 (V)].

110. *Id.* at 43.

111. See U.N. GAOR, 5th Sess., 290th mtg. to 299th mtg., *supra* note 93 (documenting discussions regarding the measures of implementation for the draft Covenant).

112. See, e.g., Norma Lee Browning, *U.N. Spreads Every Ism but Americanism*, CHI. DAILY TRIB., Dec. 16, 1951, at 9 (arguing that many of the employees at the United Nations are Socialists); *Byrd Criticizes Truman*, N.Y. TIMES, June 26, 1951, at 2 (reporting that Senator Harry F. Byrd criticized Truman’s policies as a threat to U.S. capitalism); *Dangers Are Seen in U.N. Rights Code*, N.Y. TIMES, Apr. 24, 1951, at 6 (noting that the Senate would likely not ratify a human rights covenant from the United Nations); *Truman ‘Socialism’ Attacked by Byrd*, N.Y. TIMES, Feb. 1, 1952, at 10 (detailing Byrd’s criticisms of Truman’s policies); *U.N. Promotion of Socialized Housing*

arguments that had been used in the previous years to object to Truman's Fair Deal programs (e.g., the importance of a free market, the "dangers" of socialism, and so forth) were still being hurled about—only now, the prime targets were the United Nations and the covenant the United States was then helping to draft.¹¹³

The associations with communism and socialism that the AMA had conjured in its campaign the year before were even more apparent, not because they were actually present, but because of the growing distortions of the anticommunist perspective. Many watched as the United States sat at the drafting table with Communist and Socialist nations—not only considering their proposals for socioeconomic rights, but actually succumbing to their demands (e.g., General Assembly Resolution 421 (V)).¹¹⁴ Business leaders recoiled against what was now framed as encroaching limitations upon their various industries by UN mandate. Alexander Summer, president of Real Estate Boards, for example, lashed out against the United States' involvement with the United Nations on behalf of its work on housing, which he believed would lead to "socialized housing in the United States."¹¹⁵ Conservative *Chicago Daily Tribune* editorial writer, Chesly Manly, warned about a "rising school of thought" that believed that U.S. law was subordinate to international treaty law and the dictates of the United Nations.¹¹⁶ Another reporter wrote that within the United Nations, people do not believe in capitalism and individual freedoms: "The United Nations is one world, and that world is international socialism. . . . You can read the same thing in the soviet literature that circulates freely inside the U.N."¹¹⁷

William Fitzpatrick received widespread recognition for his work. Members of Congress embraced his ideas, the legal establishment sought his company, and elite literary circles showered him with praise.¹¹⁸ After his first series of editorials, the newly

Scored, L.A. TIMES, Sept. 2, 1951, at E3 (describing president of Real Estate Boards Alexander Summer's objection to the United Nation's promotion of socialized housing).

113. See sources cited *supra* note 108.

114. See G.A. Resolution 421 (V), *supra* note 109, at 42–43 (noting that the draft Covenant did not contain "the most elementary rights").

115. See *U.N. Promotion of Socialized Housing Scored*, *supra* note 112, (critiquing UN official statement on housing as "the doctrine of Socialism applied to housing").

116. See Chesly Manly, *U.N. Aid Holds American Law Is Subordinate*, CHI. DAILY TRIB., July 29, 1951, at 18 (noting multiple expert opinions that UN treaties could lead to the United States becoming a socialist state).

117. Browning, *supra* note 112, at 9.

118. Many of the speeches he gave to various bar associations were reprinted in their respective bar journals. See, e.g., William H. Fitzpatrick, *Address by William H. Fitzpatrick: Editor, New Orleans States*, 6 ARK. L. REV. 312 (1952) [hereinafter Fitzpatrick, *Address*] (stressing the importance of resisting socialism in the United States); William H. Fitzpatrick, *An Editor Looks at Some Law*, 31 NEB. L. REV. 237 (1952) (discussing UN-proposed treaties and the theory of "Government by Treaty"); see

anointed plebian prophet stormed onto the conservative lecture circuit and spoke to bar associations around the country about the dangers of human rights treaties.¹¹⁹ He later left his local New Orleans newspaper for a position as an editor at the *Wall Street Journal*.¹²⁰ For a second series of editorials opposing human rights treaties, Fitzpatrick received a Pulitzer Prize in 1951.¹²¹

There was still support for human rights, social welfare, the United Nations, and socioeconomic rights—it was just drowned out by the opposition and silenced by the rising mood that condemned all things international. A “leading American lawyer” quoted in the *New York Times* bemoaned “you could not get a treaty incorporating our own Federal Bill of Rights ratified by the United States Government today.”¹²² Referencing the disheartened human rights advocates from various labor, religious, and cultural groups who were monitoring the UN meetings on the Covenant, an April article in the *New York Times* expressed great doubt as to whether the Covenant would ever amount to anything, since there was little, if any, chance it would pass the Senate.¹²³

The Senate opposition was now focused and fierce. One year after the AMA declared its campaign victory, it invited two senators to speak to its House of Delegates—the den of doctors who had first “educated” the American public, molded opinion, and helped sink Truman’s domestic health proposal.¹²⁴ Still strong and mobilized, on a flag-draped stage in Los Angeles’s opulent Shrine Auditorium, they welcomed Senators Robert A. Taft (R-OH) and Harry F. Byrd (D-VA) to speak to an audience of over 6,800 doctors and members of the public.¹²⁵

Just how strong the opposition was against virtually *any* form of social welfare—let alone socioeconomic rights—was made clear. As the informal leader of the “anti-Truman Southern Democrats,” Senator Byrd maintained that the President was destroying the United States’ system of free enterprise—a system that was “a more dependable guardian of peace than [the] United Nations [would] ever

also PULITZER PRIZE EDITORIALS: AMERICA’S BEST WRITING, 1917–2003, at 117 (WM. DAVID SLOAN & LAIRD B. ANDERSON eds., 2d ed. 2003) [hereinafter PULITZER PRIZE EDITORIALS] (winning a Pulitzer Prize for a series on “Government by Treaty”).

119. See, e.g., Fitzpatrick, *Address*, *supra* note 118.

120. Tony Germanotta & Steve Stone, *William Fitzpatrick, Ex-Editor at the Ledger-Star, Dies at 96*, VA. PILOT, July 25, 2004, at B4.

121. See PULITZER PRIZE EDITORIALS, *supra* note 118 (winning a Pulitzer Prize for a series on “Government by Treaty”).

122. *Dangers Are Seen in U.N. Rights Code*, *supra* note 112, at 6.

123. See *id.* (pointing out fears that the Covenant would do more harm than good).

124. See Robert A. Taft, Senator, Address to the AMA House of Delegates, *reprinted in* 147 J. AM. MED. ASS’N 1576, 1576–78 (1951) (discussing the threat of socialism upon individual liberties).

125. See *id.* at 1576.

be."¹²⁶ For Byrd, the "vague altruism" of Truman's social programs and policies was influenced by socialist and communist principles. As he saw it, the Covenant (which now included socioeconomic rights) would destroy the United States' best asset against Soviet aggression—a strong economy.¹²⁷ Taft offered the standard warnings about the misguided path Great Britain had taken—a critique quite familiar to any of the doctors who had attended past AMA meetings or had even just glanced at the organization's campaign materials. For Taft, it was more than obvious how outrageous and shockingly dreadful things had become in Great Britain, where "the government furnishes free service for the birth of babies, for the support of children, for burial at death, and for every misfortune of life."¹²⁸ This, Taft forewarned, was also the goal of the U.S. Federal Security Administration. This type of government control, he argued, destroys businesses' freedom and individuals' incentives to innovate, while reducing "everyone to the dead level of mediocrity."¹²⁹ For Byrd, the type of programs in Truman's Fair Deal would irrevocably put the United States on the "road to socialism."¹³⁰ What Byrd saw at the end of this "one-way street" was the welfare state. This, he told the doctors as he drifted into a poetic lilt, was a "state of twilight in which the glow of democratic freedoms is fading beyond the horizon, leaving us to be swallowed in the blackness of socialism, or worse."¹³¹

Short of a major existential conversion, there was little chance of changing the minds (and voting behavior) of these senators. Accounting for all the others in the Senate like them, as Eleanor Roosevelt saw it in 1951, the United States "would never ratify economic and social rights in a treaty."¹³² Though conversions do happen, to date the United States has not yet ratified the International Covenant on Economic, Social and Cultural Rights.¹³³

E. A Legal Sleight of Hand

As the domestic opponents painted vivid images of the pending dissolution of the United States' market society that were reminiscent

126. *Byrd Criticizes Truman*, *supra* note 112, at 2.

127. *Truman 'Socialism' Attacked by Byrd*, *supra* note 112, at 10 (charging Truman's "socialist" policies would destroy America's productivity).

128. Taft, *supra* note 124, at 1576–78.

129. *Id.*

130. See Byrd, *supra* note 124, at 1579–81 (1951) (expressing the need to strengthen free enterprise and prevent implementation of socialist programs).

131. *Id.* at 1579.

132. Minutes of the Tenth Meeting of the United States Delegation to the General Assembly (Nov. 13, 1951), *reprinted in* 2 FOREIGN RELATIONS, *supra* note 84, at 765, 767.

133. Although signed by President Jimmy Carter in 1977, the ICESCR has not been ratified by the United States. See ICESCR, *supra* note 4.

of Hayek's allegorical return to serfdom, the State Department struggled to maintain its position of moral and political leadership at the United Nations. Having lost the battle to keep socioeconomic rights out of the Covenant, the State Department chose to focus much more intensely on the first of its two-prong UN strategy (creating a covenant that mirrored the U.S. Constitution) while using "creative" legal drafting techniques to honor the second prong (not appearing obstructionist).¹³⁴ To do so, it focused heavily on employing legal mechanisms that would limit the reach and strength of socioeconomic rights while maintaining the outward appearance that the United States did in fact support socioeconomic rights. If successful, the United States would appear to be a willing and cooperative participant in the drafting process.

A State Department memo entitled, "Instruction to the United States Delegation" outlined the specifics of this approach. This memo stated that the draft covenant should be limited to "general language" that related to the *promotion and development of socioeconomic principles* rather than any articulation of them as actual enforceable rights.¹³⁵ To this end (and depending on the general sentiment of other states at the Commission), the State Department proposed three options that varied in specificity and strength. Each option was intended to show other states that the United States was "prepared to support the inclusion of such language in the Covenant," while in substance creating a definition that would be as consistent as possible with the Constitution.¹³⁶ The first proposal, designed to substitute for the explicit mention of any substantive socioeconomic rights (e.g., right to work, right to strike, right to adequate medical care, etc.), referred to as "Option A," read:

Each State party hereto undertakes to promote conditions of economic, social and cultural progress and development for a higher standard of life in larger freedom for all, with due regard to the organization and resources of the State; and to cooperate for effective international action in economic, social and cultural matters with organs of the United Nations and with specialized agencies established by intergovernmental agreement and brought into relationship with the United Nations under the provisions of the Charter of the United Nations.¹³⁷

134. Department of State Instruction to the United States Delegation to the Seventh Session of the Commission on Human Rights (Apr. 1951), *reprinted in 2 FOREIGN RELATIONS*, *supra* note 84, at 735, 735–38 (advising that the language in the Covenant should be in harmony with U.S. practice and constitutional principles).

135. *See id.* at 737 (stating that the "articles are now phrased in terms of rights to which all individuals are entitled immediately" and that "many of them must be rephrased as objectives to be promoted").

136. *Id.* at 735.

137. *Id.* at 737–38.

Note the legal sleight of hand: the proposed article mentions "economic, social and cultural *progress*," "economic, social and cultural *matters*," but never anything concerning "economic, social and cultural *rights*." With the above text, in reality, the United States would not be ceding any ground at all. Legally, this statement could not even be classified as a "statement of rights." This, of course, was the entire purpose of the statement—to establish a working definition of socioeconomic rights that did not actually constitute "legal rights." The U.S. delegation was after a definition that amounted to progressive realization of principles and goals, rather than legally binding rights. If, however, the other members of the Commission on Human Rights did not support this vague, thin articulation of socioeconomic rights, the State Department provided the delegation with a second and a third statement (referred to as "Option B" and "Option C"), each increasing in strength and specificity. Even with the most forcefully worded "Option C" though, socioeconomic rights were still articulated as goals or principles rather than being raised to the level of "rights."¹³⁸

In the event that the Commission rejected all three of the United States' vaguely worded proposals and opted to list specific socioeconomic rights, the fourth contingency plan outlined by the State Department was to limit the "language as far as possible along practical lines generally in harmony with American practice and constitutional principles."¹³⁹ Fifth, the State Department also reminded the U.S. delegation of another legal backstop it could rely upon: any socioeconomic rights that did enter the Covenant would be subject to the limitations created by the federal state clause.¹⁴⁰ According to the sixth and final contingency plan to defeat socioeconomic rights proposals, the State Department instructed the delegation to emphasize that much of the work on socioeconomic rights is being, and should be, completed by specialized agencies, such as the International Labour Organization, the World Health Organization, and the United Nations Educational, Scientific and Cultural Organization.¹⁴¹

The U.S. delegation carried out its mission with great faithfulness to the State Department playbook, deploying its mechanisms to limit or forestall the adoption of specific provisions on socioeconomic rights one by one.¹⁴² With respect to the actual drafting

138. See *id.* (emphasizing U.S. opposition to the specific and concrete rights-based proposals of the Soviet Union and Yugoslavia).

139. *Id.* at 735–36.

140. See *id.* (advising that it should be assumed that provisions in the Covenant "will be subject to a federal state article").

141. *Id.* at 737.

142. The Seventh Session of the Commission on Human Rights, Palais de Nations, Geneva, met from April 16 through May 19, 1951. See Comm'n on Human

of proposals, at times the delegation was allowed to “freelance.” But typically the U.S. delegation, which kept in close contact with Washington during each of the sessions, was guided by the State Department’s policy papers, memos, and ad hoc instructions.

In addition to the official plan, another method the United States regularly employed in its attempt to weaken what the State Department referred to as “extremist” socioeconomic rights resolutions was to submit a series of U.S.-sponsored amendments that, little by little, whittled away at the strength and force of the initial resolution.¹⁴³ For example, when discussions turned to healthcare, the Soviet Union submitted a proposal stating that all states had the duty to “provide conditions which would assure the right of all its nationals to a medical service and medical attention in the event of sickness.”¹⁴⁴ The United States countered with a much more delicately worded proposal that read, “The States parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁴⁵ The tactic of waging “proposal battles” was quite common at the United Nations, and other delegations certainly practiced it just as fiercely as the United States.¹⁴⁶

Having assessed the support for socioeconomic rights amongst the other delegations, the United States decided that it would need to submit its proposal of last resort, its most strongly worded “Option C,” which read: “Each State party to this Covenant undertakes, with due regard to its organization and resources, to promote conditions of economic, social and cultural progress and development for securing”: education, improved standards of living, “measures of social security,” “effective recognition of trade unions,” labor rights, and “the preservation and development of science and culture.”¹⁴⁷

Rights, Rep. on its 7th Sess., Apr. 16–May 19, 1951, U.N. Doc. E/1992; ESCOR, 13th Sess., Supp. No. 9, at 29 (1951).

143. General United States–United Nations Relations (Feb. 26, 1952), *reprinted in* 3 FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954: THE UNITED NATIONS; THE WESTERN HEMISPHERE 1, 93 (U.S. Government Printing Office ed., 1979) [hereinafter 3 FOREIGN RELATIONS] (noting the U.S. strategy of “diluting extremist resolutions” to the point that it could vote with the General Assembly majority).

144. Comm’n on Human Rights, Draft International Covenant on Human Rights and Measures of Implementation, 7th Sess., U.N. Doc. E/CN.4/583 (May 1, 1951) (emphasis omitted).

145. U.N. ESCOR, Comm’n on Human Rights, 223d mtg., U.N. Doc. E/CN.4/SR.223 (June 13, 1951).

146. See General United States–United Nations Relations, *supra* note 139, at 96 (highlighting “[t]he development of the GA into a theater of propaganda battles . . . where success is measured by votes on resolutions”).

147. Comm’n on Human Rights, Draft International Covenant on Human Rights and Measures for Implementation, USA: Proposed Separate Part in International Covenant on Human Rights, 7th Sess., E/CN.4/539/Rev.1. (Apr. 25, 1951) [hereinafter Proposed Separate Part].

What on the surface presents as a respectable list of socioeconomic rights, was severely limited for two reasons. For one, just as with the aforementioned "Option A," the "rights" within this proposal cannot, in fact, be considered legal rights at all. They were articulated as important social, economic, and cultural *goals* that states should "promote." Nowhere in the proposal are these principles raised to the level of a right—i.e., an affirmative duty that signatory states are under legal obligation to ensure. Over the next several years, the State Department would continue to speak of socioeconomic rights as not constituting "true legal rights," using quotation marks around the word "rights" whenever mentioning socioeconomic rights in its writings.¹⁴⁸ Second, the United States soon after submitted a "limitations clause" that further eroded the strength of this already weak proposal. It read:

Each State Party to this Covenant recognizes that in the enjoyment of those rights provided by the State in conformity with this Part of the Covenant, the State may subject such rights only to such limitations as are determined by law and solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁴⁹

Thus, any state that would be obligated to enact socioeconomic rights would also be able to limit its obligations to guarantee those rights only to the extent it determines that the socioeconomic rights do not conflict with others' rights and freedoms. Since rights usually, if not always, conflict with other existing provisions of law, this limitations clause would essentially give a signatory carte blanche ability to derogate from its socioeconomic rights obligations. With this proposal (which did not survive the drafting process), the United States essentially would be able to decide whether any of the socioeconomic rights applied. The State Department later wrote that the U.S. delegation

urged the inclusion of this provision . . . to make it clear that the economic, social, and cultural rights recognized would not be absolute

148. For examples of this practice, see Eleanor Roosevelt, *Progress Toward Completion of Human Rights Covenants*, 26 DEPT ST. BULL. 1024 (1952) (asserting that the "rights" in the ICESCR are "quite different from the civil and political rights which will go into a separate covenant"); James Simsarian, *Economic, Social, and Cultural Provisions in the Human Rights Covenant: Revisions of the 1951 Session of the Commission on Human Rights*, 24 DEPT ST. BULL. 1003, (1951) [hereinafter Simsarian, *Provisions*] (clarifying two different meanings of the term "rights" in the Covenant); James Simsarian, *Progress in Drafting Two Covenants on Human Rights in the United Nations*, 46 AM. J. INT'L L. 710, 711 (1952) (discussing the different effectuation times for civil and political "rights" and economic, social, and cultural "rights").

149. Comm'n on Human Rights, Draft International Covenant on Human Rights and Measures for Implementation, USA: Proposal Relating to a General Clause Concerning Economic, Social and Cultural Rights, 7th Sess., U.N. Doc. E/CN.4/610/Add.2 (May 5, 1951); Proposed Separate Part, *supra* note 143.

but subject to reasonable limitations. In the case of social security, for example, it is sometimes necessary to condition disability benefits payable to disabled workers on their willingness to take vocational rehabilitation courses.¹⁵⁰

The State Department later wrote about its strategy in the *State Department Bulletin* that was published just after the Commission's meetings. It maintained that the Covenant was being drafted in the image of the U.S. Bill of Rights—"The basic civil and political rights set forth in the draft covenant are well known in American tradition and law."¹⁵¹ The socioeconomic rights in the draft covenant, however, "were recognized as objectives to be achieved 'progressively':"

The term "rights" is used with respect to both the civil and political provisions as well as the economic, social, and cultural provisions. This term is used, however, in two different senses. The civil and political rights are looked upon as "rights" to be given effect almost immediately. The economic, social, and cultural rights although recognized as "rights" are looked upon as objectives toward which states adhering to the covenant would undertake to strive.¹⁵²

Just as the United States had done with its reservation in the Commission, the State Department used the *Bulletin* to publicize its position that socioeconomic rights did not constitute "real rights." Thus, largely through the submission of substantive proposals, the United States set up a legal gauntlet, hoping that these socioeconomic rights would become skewered upon one or more of its procedural barbs.

Historians typically treat UN deliberations as matters of politics and law—and indeed these were. But from the perspective taken in the present study, they are also the *indicators* of the underlying domestic and international social struggles of the day. The use of what the State Department termed "creative" legal drafting was part of the very same social struggle that the smaller and non-Western states, William Fitzpatrick, the AMA, and Senators Taft and Byrd were all engaging in. Though each fought in their own theater; they were all attempting to create structures (be they legal, ideological, political, or institutional) that permitted a certain type of social ordering to take root within their confines. Once these structures became a reality and took form, they would shield certain specific, desired social relationships (e.g., a market-centered society) from outside assault by competing social configurations (e.g., a state-centered society).

In form, the social and economic rights that were being drafted at the United Nations permitted particular *international* relationships to develop. For the United States, they allowed key Cold

150. Simsarian, *Provisions*, *supra* note 148, at 1004–05.

151. *Id.* at 1003.

152. *Id.* at 1004.

War alliances between itself and the smaller and non-Western states. For the smaller and non-Western states, socioeconomic rights represented a progressive alternative to the past era of colonial domination. On the domestic side, the U.S. delegation also used its legal drafting techniques to carve out an institutional sphere within which a particular class of *domestic* social and political relationships could flourish. These social relationships, in large part, were the ones that the domestic opposition had already defined: a relatively small, noninterventionist government and a free-market environment.¹⁵³ In essence, the United States sought to draft social and economic rights, *without* social and economic “rights” (and perhaps this is why the State Department referred to its drafting techniques as “creative”).

Once the U.S. delegation had defined socioeconomic rights, not as “rights” but as “goals” or “principles,” it had paved the way for its next move. On May 19, 1951, it informed the Commission that it was “now of the view that the provisions in the [draft covenant] dealing with economic, social, and cultural rights—being loosely drafted and not being expressed in terms of legal rights and with different implementation and undertaking—should be dealt with in a separate legal instrument.”¹⁵⁴ What the State Department had not anticipated fully, however, was that the strength and force with which it executed its agenda might in fact lead to its own undoing.

III. RIGHTS EMERGE FROM STRUGGLE

While the United States’ comparatively vast diplomatic resources permitted a powerful approach and a technical dexterity over matters of law that was virtually impervious to attack, it was quite vulnerable to public opinion. For when members of the United Nations excoriated the United States over its human rights drafting policies, they were talking—through the media—to the people of the world. Charles Malik of Lebanon (then-chairman of the Commission on Human Rights), for example, lamented before the press that the draft covenant embodied a “certain lack of balance” between civil and

153. To explain such dilemmas, political scientists often invoke Putnam’s two-level game model that explains state action as a function of both external and internal political constraints. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988) (discussing the entanglement of domestic and international politics). But this two-level game model, however, focuses on the *state* as the central actor. While the state is an extremely important actor in such histories, it is not the only one, and in certain cases not even the most important one.

154. U.N. Doc. E/1992, *supra* note 142. This desire to reconsider the inclusion of socioeconomic rights within a single covenant was incorporated into a formal resolution (G.A. Res. 349 (XII)) that was ultimately defeated.

political rights and socioeconomic rights.¹⁵⁵ This, of course, was the very lack of balance that Eleanor Roosevelt and the State Department were fighting for.¹⁵⁶ But suddenly, what in the United Nations was simply a matter of legal and political difference, in the *New York Times* became an epic struggle between the two titans of the United Nations—a news story wonderfully fit for print.

As reported in the *New York Times*, the problem for Malik was that certain rights, such as social security, were only listed in the vaguest of terms, and signatory states only agreed to “progressively” strive for the socioeconomic rights within the limits of available resources.¹⁵⁷ Both items were entirely consistent with the State Department’s policy approach discussed above. In the same *New York Times* article, Eleanor Roosevelt is cited (off the record) as saying that progress had been made toward defining the difference between civil and political rights as legal *rights* and socioeconomic rights as “no more than aspirations or norms . . . to aspire to.”¹⁵⁸ Furthermore, no matter how these rights were defined, the United States would not sign any covenant without a federal state clause that would prevent socioeconomic rights from being implemented in the U.S. federal states.¹⁵⁹ And finally, “[w]ith such a clause the convention would have very little practical impact on United States law or practice.”¹⁶⁰

This debate was difficult enough to navigate within the confines of the United Nations. Now, it was on display for the world—a world that often interpreted the same human rights in entirely different ways. U.S. opponents of the Covenant, for example, were outraged at *any* mention of socioeconomic rights, which to them implied an assortment of social evils ranging from increased government involvement in their lives to a full-fledged state-run economy, socialism, communist infiltration, and the end of American life as it was. The smaller and non-Western states saw socioeconomic rights as indicating the end of a long era of imperialism in which human

155. *Rights Covenant Partly Drafted*, N.Y. TIMES, May 20, 1951, at 18.

156. See U.N. Doc. A/C.3/SR.298, *supra* note 95, at 177 (France stating in agreement with the United States that economic, social, and cultural rights could not be included in the first covenant on human rights).

157. *Rights Covenant Partly Drafted*, *supra* note 155.

158. *Id.*

159. See *id.* (noting that the United States would not sign a convention “without a clause providing for the special problems of its individual states”).

160. *Id.* Though these are not direct quotes, and the *Times* article does not provide the source of these assessments, it closely associates them with Roosevelt. These assertions are consistent with relevant State Department papers, private meetings among delegation officials, and other State Department publications written both by Roosevelt and others (e.g. Simsarian). See, e.g., *U.S. in U.N. Urges Two Rights Pacts*, N.Y. TIMES, Dec. 6, 1951, at 22 (reporting the reasons the United States “regarded political and economic-social rights as essentially unmixable”).

livelihood was sacrificed for the economic gain of the metropole.¹⁶¹ A power such as the United States refusing to abide by basic principles that the rest of the world supported indicated a broad chasm between the “West and the rest” and was reminiscent (if not an outright reproduction) of the very systems of imperialism they were trying to shed.¹⁶² Finally, the Communist states had based their entire economy and social order on related principles that, if subordinated in the Covenant to the civil and political rights the United States prized, would send a message to the world about the appropriateness of their own system.¹⁶³ The very same human rights had a wide range of disparate civic meanings and social translations. In the UN debates, the representatives were speaking about the same subject, using the “universal” language of human rights to do so, while engaging in familiar diplomatic conventions and well-trying legal drafting techniques. But they were a universe away from one another once human rights were given social meaning.

Less than two weeks after their differences had been aired to the world in the *New York Times*, Malik and Roosevelt were sitting together trying to locate common ground.¹⁶⁴ Malik explained the deeply important social meaning of the human rights that the United States was now opposing.¹⁶⁵ Their conversation revealed a major blind spot for the United States. Many of the lesser-developed nations, he explained, were experiencing degrees of social and

161. See, e.g., U.N. GAOR, 5th Sess., 290th mtg. to 299th mtg., *supra* note 93 (expressing smaller countries' disapproval that national self-determination, among other “rights,” was not included in the Covenant draft); U.N. GAOR, 3d Sess., 180th mtg. to 183d mtg. at 852–935, U.N. Docs. A/PV.180–183 (Dec. 9–10, 1948) (including criticism from the Ukrainian Soviet Republic of the economic system of private enterprise due to its “constant expansion of capitalist monopolies and the growth of military expenditure,” in contrast to an alleged lack of provision for the needs of workers); Letter from Eleanor Roosevelt, Chair, U.N. Comm'n on Human Rights, to Harry S. Truman, President (May 27, 1951), *available at* <http://www.trumanlibrary.org/eleanor/eleanordoctemplate.php?pagenumber=4&docum entid=hst19510527> (emphasizing the developing world's desire for a higher standard of living and its willingness to fight for “tangible” social and economic rights); see also *Rights Covenant Partly Drafted*, *supra* note 155 (listing what the Commission considered to be economic and social rights).

162. See U.N. GAOR, 5th Sess., 290th mtg. to 299th mtg., *supra* note 93 (reporting the United States' minority position at odds with the majority of small nations).

163. See U.N. GAOR, 3d Sess., 180th mtg. at 855, U.N. Doc. A/PV.180 (Dec. 9, 1948) (outlining the various priorities of the different countries).

164. See Memorandum of Conversation, by Mr. James Simsarian of the Office of United Nations Economic and Social Affairs (May 29, 1951) [hereinafter Simsarian Memorandum], *reprinted in* 2 FOREIGN RELATIONS, *supra* note 84, at 740, 740–44 (reporting on a meeting and conversation between Roosevelt and Malik, among others, concerning the Covenant).

165. See *id.* at 741 (expressing the confusion and resentment by under-developed countries at United States' unwillingness to state economic and social articles as rights).

political turmoil.¹⁶⁶ Endemic political “incompetence and corruption,” as well as “tremendous social and cultural problems,” created a situation in which they looked towards the United Nations for leadership.¹⁶⁷ Within the United Nations, it was the United States in particular that could provide that leadership.¹⁶⁸ As Malik and other representatives confided in Roosevelt, “the Economic and Social Articles had become a symbol of the aspirations and needs of these countries.”¹⁶⁹

A subsequent letter written by Eleanor Roosevelt to President Truman revealed that these conversations left an impression on her. She began by saying she believed that the United States must “understand that there is a feeling in the world of a desire to attain some kind of a better standard of living and they feel that particularly the United States has an obligation to make the plans and help them to carry them out to attain those standards.”¹⁷⁰ She went on to explain that the United States was missing key opportunities to win the support of smaller states that generally had “highly mixed” feelings about the United States and might even be leaning towards the Soviet Union.¹⁷¹ “They are afraid of the USSR,” she continued, “but in some ways most of these nations have never known freedom and therefore it is almost easier to accept the type of totalitarian system that tells them definitely what to do than it does to accept the democratic system which seems to require so much of them.”¹⁷² With respect to the nations of the Near East, Malik had assured her that “unless [the United States was] going to take hold, the USSR undoubtedly would.”¹⁷³ Unfortunately for the United States, socioeconomic rights—an issue area where it could have cultivated important allies—was the precise area in which it was actively creating opponents. Roosevelt closed her letter by outlining the bind the United States was in. For the developing states, socioeconomic rights were of utmost importance—“those are the rights that mean something tangible to them in their every day lives.”¹⁷⁴ On the other hand, the domestic opposition to the

166. *Id.*

167. *Id.*

168. *See id.* (insisting that the “United States must both tell these countries what to do and how to do it”).

169. *Id.*

170. Letter from Eleanor Roosevelt to Harry S. Truman, *supra* note 161.

171. *Id.*

172. *Id.*

173. *Id.*; Simsarian Memorandum, *supra* note 164, at 740–44.

174. Letter from Eleanor Roosevelt to Harry S. Truman, *supra* note 161.

Covenant—and certainly a covenant with socioeconomic rights—was strong and active.¹⁷⁵ In a letter to President Truman, she mused:

How we are going to explain all this to the American Bar Association and Congress I really do not know, but somehow it has to be got across because everywhere the emphasis is going to be on how they are going to get a sense of hope of attaining even one notch on the upward path.¹⁷⁶

When the Economic and Social Council met for its thirteenth session later in the summer of 1951, the U.S. delegation sensed that there might be a small opening for it to lobby again for two covenants.¹⁷⁷ Though the two-covenant solution remained hugely unpopular with many of the delegations, there were several now that backed the United States' efforts.¹⁷⁸ The United States saw it as its job to influence, sway, and actually "create" the majority that would go along with it.¹⁷⁹ Given its power and resources, one method the United States was quite adept at (acknowledged in State Department papers) was "armtwisting."¹⁸⁰ Though the United States was often accused of "throwing its weight around" too much at the United Nations, it was a price it was willing to pay to prevail on such matters.¹⁸¹ On February 5, 1952, the General Assembly adopted GA Resolution 543 (VI), which called for two covenants by a vote of twenty-seven to twenty, with three abstentions.¹⁸² The United States prevailed in its effort to see two covenants created by the United Nations, but not without inflicting significant collateral damage. John Humphrey later wrote that this decision split not only the Covenant into two, but also the United Nations itself.¹⁸³

175. See *id.* (explaining the tension between countries looking to the United States for guidance and support in incorporating economic and social "rights" and U.S. resistance to declaring economic rights).

176. *Id.*

177. See generally Paper Prepared by the U.N. Planning Staff, Bureau of U.N. Affairs, the General Assembly and the Security Council [hereinafter U.N. Planning Staff Paper], reprinted in 3 FOREIGN RELATIONS, *supra* note 143, at 90, 90–96 (providing insight into U.S. maneuvering in the General Assembly and in the Security Council).

178. See *id.* at 95 (stating that the United States planned to use its power to influence matters in the General Assembly).

179. See *id.* at 93, 95 (describing the dual U.S. strategies of diluting opposing proposals so that they were more consistent with U.S. goals and pressuring the votes of other countries to favor U.S. proposals).

180. See *id.* (stating that the United States had gained a reputation for being able to gain the support of delegates from other countries by applying its tools of diplomatic pressure).

181. See *id.* (stating that the United States was required to flex its diplomatic muscle more often than might be desired in order to pursue objectives in the General Assembly where it only had one vote).

182. G.A. Res 543 (VI), ¶ 1, U.N. Doc. A/2112 (Feb. 5, 1952); U.N. Planning Staff Paper, *supra* note 177.

183. JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS 162 (1994).

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Though the State Department's ability to execute its strategies and achieve its goals was unrivaled, when it came time to define what human rights actually were, it was often reading from a script that was not its own. So despite the momentous role that the U.S. delegation played in the actual drafting of the International Bill of Human Rights, much of the human rights formation process (perhaps the majority of it) took place far afield from the halls and backrooms of the United Nations where ink and parchment met.

In significant measure, human rights were defined by members of the conservative vanguard who connected the ongoing domestic and international struggles over the role of the market and the place of the government in society. They grounded for the U.S. public economic ideas espoused by Adam Smith and Friedrich Hayek. They translated the impenetrable complexities of international law into a social verse that mothers and fathers recited to their sons and daughters while reading about the hardships of "Waiting Room Willie."¹⁸⁴ A right was being defined. When the AMA and its supporters spent several million dollars to change the words "national healthcare" to "*socialized medicine*," a right was being defined. And when the U.S. delegation to the United Nations, no matter how hard it tried, could not shed its colonial image, the most basic aspects of existing social relations and divisions moved ever closer to becoming *right*.

Four months after the Covenant was split, Eleanor Roosevelt outlined for the U.S. public the nature of the human rights that the State Department was then fighting for.¹⁸⁵ As she spoke to members of the press with script in hand, it might have seemed as if these human rights were created not by the State Department, but by Senators such as Robert Taft and Harry Byrd.¹⁸⁶ Indeed they were. Having accepted their advice and now beseeching consent, Roosevelt promised that none of the human rights that the United States was sponsoring at the United Nations would allow anyone a "free ride through life at the expense of the government."¹⁸⁷

184. *Comics in the Fight Against Government-Controlled Medicine*, *supra* note 67 at 46–47.

185. See Roosevelt, *supra* note 148, at 1024–26 (describing the rights that were to be included in the covenants, how those rights comported with American rights and the Constitution, and the changes that needed to be made to the covenants).

186. Recall the blistering condemnations leveled by these senators at the AMA House of Delegates meeting the year before. See *supra* text accompanying notes 124–133.

187. Roosevelt, *supra* note 148, at 1024. Attaining Senate input can occur informally long before an actual treaty is officially put to vote in chamber. See U.S. CONST. art. II, § 2, cl. 2 (requiring two-thirds of senators present to concur in order for the President to make a treaty).

The human rights she spoke of could also be found in the text of William Fitzpatrick's editorials and the AMA's campaign materials. She declared that the covenants would not impress upon the United States "any provisions which depart from the *American way of life*"; a promise that would be kept, no matter what social arrangements that phrase invoked.¹⁸⁸

Roosevelt continued on, informing all those who had taken part in these struggles of the State Department's plan to enshrine the human rights they had just helped create.¹⁸⁹ The draft covenants also contained the rights of those who had come to abhor the United Nations and fear that international human rights would limit American liberty. Roosevelt explained that the State Department was busy fighting for the inclusion of several "special provisions" to prevent any "dilution or diminution of our rights and freedoms."¹⁹⁰ First, because the covenants were non-self-executing, she explained to her fellow Americans, they would not and *could not* automatically become enforceable law in the United States.¹⁹¹ Then turning to the hordes of states' rights stalwarts, she assured them that with the federal state clause in place, the covenants would have no impact on matters that fell into the jurisdiction of the individual states.¹⁹² All such affairs—whatever they might be—"will remain with the states."¹⁹³

Roosevelt revealed that the State Department was also fighting for the human rights of those who feared communism. She promised that human rights in no way contained any traces of "communism, socialism, syndicalism, or statism."¹⁹⁴ As for social and economic rights—the rights championed by so many non-Western states, though most strongly associated with the Communist Bloc—she assured the U.S. public that they were not actually "rights" but merely goals or aspirations to be achieved over time.¹⁹⁵ These principles were, in fact, of such a different species that they did not belong together with the type of civil and political rights that were in the Constitution.¹⁹⁶

188. See Roosevelt, *supra* note 148, at 1026 (emphasis added). The "American way of life" was a phrase often invoked by conservatives and segregationists.

189. See *id.* (stating that "[t]here is a long drafting job still ahead" and asking for open-mindedness until the provisions are in their final form).

190. *Id.* at 1025.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 1026.

195. *Id.* at 1024. Note: in the official text of her press statement, quotation marks are used around the word "rights" when discussing socioeconomic rights, but not when mentioning civil and political rights.

196. Roosevelt made other similar statements to the press about the need for two covenants. See, e.g., Eleanor Roosevelt, *Statement by Mrs. Franklin D. Roosevelt*, 25 DEPT ST. BULL 1059, 1059, 1064–66 (1951).

The State Department could not ignore the fact that the smaller and non-Western states (potential Cold War allies for the United States) had also named what was right for *them*. Indeed, in a previous press statement, Roosevelt circled around and said that though they should be housed in separate quarters, “each group of rights [was] of equal importance.”¹⁹⁷

And as for its own notion of *right*, the State Department chose a definition that would help it maintain its position of moral and political leadership in the international sphere: human rights were “part of an international effort designed to acquaint the world with the ideas of freedom.”¹⁹⁸

But amidst this spectacle of a supposedly natural concept turning positive, the United States’ recent political victory over socioeconomic rights amounted to a great concession: the center of the human rights project had not held. And so the Covenant was drawn and bifurcated. The supposed organic unity and universality of its constituent parts was no match for the competing social forces that wrenched right from right and fractured the nascent human rights concept along the fault lines that had been present from the start. This was not just about law, politics, or ideas—this most fundamentally was about people. So clearly imprinted on the face of the human rights that were born from these struggles are the invisible lines that at the time cut swaths through the social terrain, as the global West pulled from the East and the North from the South, separating prosperity and poverty, and people from people. These are the social struggles that in the late 1940s and early 1950s created the foundation of the modern international system of human rights.

V. CONCLUSION

The prospect of incorporating socioeconomic rights into the Covenant aroused strong opposition amongst interest groups, powerful legislative blocs, and professional organizations (most notably the AMA). Because an enforceable human rights treaty that contained those rights was sure to be rejected by the Senate, during the drafting of the Covenant, the United States became a dedicated opponent of socioeconomic rights. On the international stage, however, the United States’ dismissal of socioeconomic rights put it at a significant geopolitical disadvantage, as many of the smaller and non-Western states that were potential Cold War allies for the United States were amongst the strongest supporters of these rights. To

197. *Id.* at 1065.

198. Roosevelt, *supra* note 148, at 1026.

manage these competing forces, the United States developed a strategy to appear accommodating of socioeconomic rights in the international setting while simultaneously excluding them from domestic soil.

The history shows that in the late 1940s and early 1950s, the structures that had protected the United States' post-Civil War racial and social hierarchies were in danger of crumbling. The federal government had expanded dramatically and the United States plunged itself into international affairs—and emerged from World War II all the better for it. The world had changed. Those who wished to maintain the social status quo in the United States had to reinvent the arguments about limited government, free markets, states' rights, and isolationism that they had used in the past. They, therefore, shed the provincial character of these arguments and recast them within a frame of global relationships and human rights.

The bitter opposition that emerged against socioeconomic rights and the idea of national healthcare in the late 1940s has had lasting effects—not only on the modern international human rights regime, but on the nature of the ongoing battles over healthcare in the United States. This Article identifies the process through which the opponents of healthcare reform in the 1940s and 1950s created enduring ideational and institutional structures that now act as safe havens for continued opposition. This buried history brings to light a much more comprehensive understanding of the prehistory of the current controversy over the Patient Protection and Affordable Care Act.