A Proposed Future for the Progressive Realization of Economic, Social, and Cultural Rights in California

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As the country's most populous state and the world's fifth largest economy, California has often been characterized as a "nation-state," historically independent in its governing priorities. Yet even as the state's political identity coalesces in favor of recognizing greater social welfare provisions for its inhabitants, formal enactment in policy often falls short. This hesitancy persists despite constitutional support for state-level leadership in areas of social welfare—from education to criminal justice to social services—through the exercise of state police power. This structure also applies to the domestication of international human rights norms.

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This Note proposes that California look to international human rights law to build a forward-looking framework for rights entitlements in the state—specifically, to the International Covenant for Economic, Social and Cultural Rights (ICESCR). Through state constitutional amendment, California's electorate should guarantee the economic, social, and cultural rights (ESC rights) enumerated in the ICESCR. This adoption should include the ICESCR's principle of progressive realization merged with a standard of adequacy rooted in the provision of social welfare. Part I of this Note will examine the ICESCR's background, the tension between state and federal power in international human rights, the mechanisms by which state power is traditionally exercised with respect to human rights, and how states might participate in international human rights jurisprudence. In Part II, the Note will explore the extent to which positive rights already exist in state constitutions and identify two major obstacles to California's positive rights efforts. Part III will propose a solution to overcome these obstacles: a state constitutional amendment recognizing ESC rights in the California Constitution, including a standard of adequacy rooted in progressive realization. The Note will model this standard for application by the California Supreme Court, and conclude by exploring potential public policy benefits engendered by this proposal at both local and international levels.

INTRODUCTION

As the country's most populous state and the world's fifth largest economy,[1] California has often been characterized as a "nation-state," historically independent in its governing priorities.[2] Yet even as the state's political identity coalesces in favor of greater social welfare for its inhabitants, formal enshrinement of those rights often falls short.[3] Today, California's Constitution lacks formal recognition of many positive rights. Even when the state has tried to provide positive entitlements to social welfare provisions, it has struggled to articulate political and judicial schemes that can meaningfully guarantee them.[4] Take, for example, California's attempt to guarantee a healthy environment for its constituents. California codified a definition of "environmental justice" which mandates state agencies to "include guidelines" to implement "the availability of a healthy environment for all people."[5] However, despite the state implementing a nationally exceptional system of pesticide tracking and reporting, Californians—particularly communities of color—are subject to extreme levels of pesticide toxicity.

In 2018, California's agricultural products were treated with 209 million pounds of pesticides.[6] Of those 209 million, the California Department of Pesticide Regulation reported that approximately 7.6 million pounds contained chemicals "known to cause reproductive toxicity,"[7] around 41.6 million

1. HANS JOHNSON, ERIC MCGHEE & MARISOL CUELLAR MEJIA, PUB. POL'Y INST. OF CAL., CALIFORNIA'S POPULATION (2021), https://www.ppic.org/wp-content/uploads/JTF_PopulationJTF.pdf [https://perma.cc/K7WS-YSLU]; Benjy Egel, *California Now World's Fifth-Largest Economy, Bigger than Britain*, SACRAMENTO BEE (May 4, 2018), https://www.sacbee.com/news/business/article210466514.html [https://perma.cc/Q5AQ-DTYU].

2. Jill Cowan, *Is California a Nation-State?*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/california-coronavirus-newsom-nation-state.html [https://perma.cc/APJ2-CFKU]; Todd S. Purdum, *Gavin Newsom's Nation-State*, ATLANTIC (Apr. 21, 2020), https://www.theatlantic.com/politics/archive/2020/04/coronavirus-california-gavin-newsom/610006/ [https://perma.cc/X8RX-RDBZ]; Henry Brady, *Is California a Nation-State?*, BERKELEY BLOG (Apr. 17, 2020), https://blogs.berkeley.edu/2020/04/17/is-california-a-nation-state/ [https://perma.cc/T7NA-S7LP].

3. *See* Thomas Fuller, Shawn Hubler, Tim Arango & Conor Dougherty, *A Big Win for Democrats in California Came with a Gut Check for Liberals*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/us/california-election-results.html [https://perma.cc/EYC8-9GST].

4. *See* Anne D. Gordon, *California Constitutional Law: The Right to an Adequate Education*, 67 HASTINGS L.J. 323, 344–45 (2016).

5. CAL. GOV'T CODE § 65040.12 (West 2021).

6. *Summary of Pesticide Use Report Data – 2018*, CAL. DEPT. OF PESTICIDE REGUL. (2020) [hereinafter *PUR Report*], https://www.cdpr.ca.gov/docs/pur/pur18rep/18sum.htm#datasum [https://perma.cc/5RF9-JF4B]; *see also* Jane Sellen, *Pesticide Use in California Remains at Record High, New Data Show*, CALIFORNIANS FOR PESTICIDE REFORM (Jan. 21, 2021), https://www.pesticidereform.org/pesticide-use-in-california-remains-at-record-high-new-data-show/ [https://perma.cc/R98R-ZCXU].

7. *PUR Report*, *supra* note 6, tbl.5.

contained carcinogens,[8] 371,311 contained top-tier groundwater pollutants,[9] 41.2 million contained toxic air contaminants,[10] and 38 million contained fumigants.[11] Geographically, these usages are weighted heavily toward California's more rural agricultural production regions. The top five pesticide-impacted counties in the state—Fresno, Kern, Tulare, San Joaquin, and Madera, lining the San Joaquin Valley agricultural basin—together account for over half of the state's pesticide use in weight.[12] The harmful impacts of pesticide use also fall disproportionately along racial lines. As reported by Californians for Pesticide Reform, "California counties with a majority Latinx population use 906% more pesticides by square mile than counties with fewer than 24% Latinx residents."[13]

At highest risk of direct exposure are California's agricultural workers. The State estimates that around four hundred thousand people work in California's fields.[14] Direct in-field pesticide exposure causes health effects from allergic reactions to migraines to seizures to hypertension to cancer,[15] but pesticide toxicity is not limited to fields alone. Schools, playgrounds, and homes close to fields expose children and families to pesticide drift, causing devastating developmental delays and health effects in young children.[16]

Current federal and state standards are inadequate to fully capture and prevent the effects of pesticide toxicity. Limited by industry capture, practical limitations on private tort suits, and gaps in regulation and enforcement,[17] individual workers are unable to effectively demand protection against the threats posed by pesticides.[18] Ultimately, these Californians are left without

8. *Id.* tbl.7.
9. *Id.* tbl.11.
10. *Id.* tbl.13.
11. *Id.* tbl.15.
12. *Id.* tbl.17.
13. Sellen, *supra* note 6.
14. CAL. EMP. DEV. DEP'T, CALIFORNIA AGRICULTURAL EMPLOYMENT 2019 ANNUAL AVERAGE (2020), https://www.labormarketinfo.edd.ca.gov/file/agric/ca-ag-employ-map-2019.pdf [https://perma.cc/FUE3-WDL8].
15. Elizabeth Lincoln, *Accountability for Pesticide Poisoning of Undocumented Farmworkers*, 24 HASTINGS ENV'T L.J. 383, 383, 389 (2018).
16. *See* FARMWORKER JUST., EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION'S FARMWORKERS 6 (2013), http://kresge.org/sites/default/files/Exposed-and-ignored-Farmworker-Justice-KF.pdf [https://perma.cc/4ZDB-TTCZ]; Press Release, Earthjustice, Farmworkers Come to Capitol Hill Seeking Safeguards (July 15, 2013), https://earthjustice.org/news/press/2013/farmworkers-come-to-capitol-hill-seeking-safeguards [https://perma.cc/3W4Z-GYZC].
17. *See* Danica Li, *Toxic Spring: The Capriciousness of Cost-Benefit Analysis Under FIFRA's Pesticide Registration Process and Its Effect on Farmworkers*, 103 CALIF. L. REV. 1405, 1424–26 (2015) (analyzing the worker health and safety gaps in the federal pesticide regulatory regime); Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 456–58 (2004) (investigating California's historically grower-friendly county agricultural inspection process).
18. Lincoln, *supra* note 15, at 404–05; Cunningham-Parmeter, *supra* note 17, at 463–65 (detailing the unavailability of legal services to non-citizens based on federal funding requirements from

meaningful recourse against uncontrolled environmental threats to their health, work, families, and lives.

Pesticide toxicity represents just one of several examples of positive rights efforts falling short of creating the open and reliable protections of a healthy social safety net. To better affirmatively protect its residents, California should look to international human rights law: specifically, to the International Covenant for Economic, Social and Cultural Rights (ICESCR), which contains the blueprint for many of the rights already recognized and protected in other state constitutions.[19] By adopting the ICESCR's provisions and merging its scheme for so-called progressive realization of its core rights with a standard of adequacy rooted in public welfare, California could equip itself to structurally address its most pressing social inequalities.

Part I of this Note will present ICESCR's background, the tension between state and federal power in the United States' practice of international human rights, the mechanisms by which state power in human rights has been traditionally exercised, and the doctrines in which the strength of federal power in international foreign affairs is called into question. Part II will explore the extent to which positive rights exist in state constitutions, including California's, and explore two major obstacles to the successful implementation of these rights. Part III will introduce a proposal to overcome these obstacles: a state constitutional amendment to recognize the economic, social, and cultural (ESC) rights in the California Constitution based on a standard of adequacy rooted in progressive realization. Part III will then model this proposal as a standard for application by the California Supreme Court and conclude with an exploration of potential public policy benefits engendered by the recognition of this new set of positive rights.

I.
THE ICESCR AND THE FEDERAL-STATE RELATIONSHIP IN FOREIGN AFFAIRS

A. Background: The ICESCR and the United States

The history of the ICESCR illustrates the U.S. government's traditional ambivalence toward federal protection of ESC rights. As the United Nations (UN) took shape following World War II, international diplomats adopted the UN Charter in 1945 and the non-binding Universal Declaration of Human Rights (UDHR) in 1948. The latter articulated new legal claims for the rights of the individual in international law and ushered in a new era of human rights in

the Legal Services Corporation). For a robust discussion of possible toxic tort claims and their defenses, see Cunningham-Parmeter, *supra* note 17, at 470–90.

19. *See* Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 368–89 (2006); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 91–103 (1992).

international law.[20] The UN General Assembly originally tasked the UN Human Rights Commission with creating a single "International Bill of Rights" that would serve as a binding international treaty. As work continued, however, the planned single treaty split into the International Covenant for Civil and Political Rights (ICCPR) and the ICESCR, both adopted by the UN General Assembly in its Resolution 2200(A) of 1966.[21]

While the ICCPR focuses on so-called "negative" rights with which the government must not interfere (such as speech, assembly, and religion), the ICESCR articulates "positive" ESC rights governments must seek to affirmatively provide. ESC rights incorporate both overarching principles and more specific entitlements.[22] These rights include the individual's right to work and earn a wage in a job the individual "freely chooses or accepts,"[23] under "just and favourable conditions" including fair wages and hours, and safe working conditions;[24] and the right to freely form and participate in trade unions.[25] It includes rights to "the highest attainable standard" of healthcare for both the individual and the family, including childcare for mothers after birth,[26] disease prevention, and healthy and safe working conditions.[27] The ICESCR also provides further guarantees for education[28] and standards of living, "including adequate food, clothing and housing," optimal distribution of agrarian and food resources to this effect,[29] and social security.[30] Finally, the treaty articulates rights to participate in cultural life and to "enjoy the benefits of scientific progress and its applications," wherein individuals are able to benefit from the "moral and material interests" of their own intellectual products and states are to support free scientific and creative activity.[31]

A distinctive feature of the ICESCR is its provision for "progressive[] . . . realization" of the rights it recognizes. Indeed, it does not require signatories to achieve the immediate, full realization of ESC rights. Instead, Article 2 mandates

20. *See* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., FACT SHEET NO.2 (REV.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf [https://perma.cc/8J6T-HU3N].

21. *See id.*; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

22. *See, e.g.*, Karel Vašák, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, THE UNESCO COURIER, Nov. 1977, at 29, 32; *see also* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).

23. International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICESCR].

24. *Id.* art. 7.

25. *Id.* art. 8.

26. *Id.* arts. 12, 10.

27. *Id.* art. 12.

28. *Id.* art. 13.

29. *Id.* art. 11.

30. *Id.* art. 9.

31. *Id.* art. 15.

that each signatory "take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant *by all available means*."[32] While some have argued that this provision amounts essentially to a statement of legal aspiration written into law, other human rights jurists read 'progressive realization' to comprise an affirmative obligation for countries to assess, diagnose, and ultimately meet their own areas of need in economic rights areas.[33] Unlike the ICCPR, whose rights are vested immediately, progressive realization has no specific analog in American jurisprudence, at least at the federal level.[34]

Enforcement of the ICESCR is built around the treaty's cooperative reporting procedure. In order to ensure compliance with these requirements, Part IV of the ICESCR requires signatories to submit reports of their progress in implementing ESC rights to the UN Economic and Social Council (ECOSOC).[35] Today, that obligation requires countries to submit reports to the Committee on Economic, Social and Cultural Rights (CESC)[36] within two years of first joining the treaty and on a five-year basis thereafter.[37] ICESCR Article 19 then empowers ECOSOC to review submissions and make recommendations to countries based on their reports.[38]

To this day, the United States maintains an official ambivalence toward the ICESCR and its constituent rights. In the United States, postwar enthusiasm for a new international human rights regime was tempered by opposition, particularly from Southern politicians, who did not want to see new legal measures strike down domestic policies of racial segregation and discrimination.[39] This tension fueled the United States' opposition to making the UDHR legally binding on signatory states and would become characteristic of

32. *Id.* art. 2 (emphases added). Article 2 also contains the treaty's anti-discrimination provision, specifying that the ICESCR rights shall be guaranteed "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

33. *See* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 377–81 (1990).

34. *See id.*

35. ICESCR, *supra* note 23, art. 16.

36. *See* Economic and Social Council Res. 1985/17 (May 28, 1985).

37. Economic and Social Council Res. 1988/4 (May 24, 1988).

38. ICESCR, *supra* note 23, art. 19. Additionally, the Optional Protocol to the ICESCR, to which twenty-six countries are currently party, lays out an additional procedure by which individuals or groups may submit communications to ECOSOC alleging a country's violation of ESC rights. G.A. Res. 63/117, annex, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, arts. 2–9 (Dec. 10, 2008); *Status of Treaties: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4 [https://perma.cc/4HET-Z4QU].

39. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 40 (2009); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 4–7 (2003).

the United States' approach to future human rights treaties.[40] At the federal level, advocacy for the ICESCR within the U.S. foreign policy establishment has largely stalled.[41] President Carter signed the ICESCR on October 5, 1977,[42] and sent the treaty for ratification to the Senate on February 23, 1978.[43] The Senate declined to ratify the treaty, however. The following Reagan administration took a much more restrictive view of human rights, limiting them to "political rights and civil liberties."[44] Some criticize the Reagan administration's use of this limited definition as an attempt to "simply defin[e] economic rights out of existence" in its official policy and communications.[45] To this day, the most salient feature of the ICESCR discussion in the U.S. federal government is "not the actual extent to which economic, social and cultural rights are currently being enjoyed in the United States."[46] Rather, it is the "acceptability of using the notion of human rights (with whatever implications that may have) as one of the principal underpinnings of future American policy endeavors in this domain."[47]

Even as its sister treaty, the ICCPR, was finally ratified by the Senate in 1992, the ICESCR has been left to fade at the ratification stage.[48] Today, 171 countries worldwide are parties to the ICESCR.[49] The United States is not among these. Although the treaty has been signed by the President, it has yet to be ratified by the Senate, meaning that the United States is not yet bound by its terms.[50] Pragmatically, then, efforts to recognize the terms of the ICESCR within the language of human rights must look outside of the federal government.

B. The Integral Role of State Legislation in Implementing International Human Rights

While federal engagement with the international dialogue around ESC rights has languished, participation has continued through the voice of the states. The practice of foreign affairs is ostensibly the province of the federal

40. *See* SIMMONS, *supra* note 39, at 42–49 (discussing the United States' federal debate on human rights treaties throughout the 1950s and 1960s).

41. *See, e.g.*, Alston, *supra* note 33, at 366.

42. MESSAGE FROM THE PRESIDENT TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOC. 95-2, at iii (1978), https://www.foreign.senate.gov/imo/media/doc/treaty_95-19_95-211.pdf [https://perma.cc/Z5VF-NCK5].

43. *Id.*

44. *Excerpts from State Department Memo on Human Rights*, N.Y. TIMES (Nov. 5, 1981), https://www.nytimes.com/1981/11/05/world/excerpts-from-state-department-memo-on-human-rights.html [https://perma.cc/34Q7-7VTS].

45. Alston, *supra* note 33, at 372.

46. *Id.* at 382.

47. *Id.*

48. *See* International Covenant on Civil and Political Rights, *ratified* Apr. 2, 1992, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

49. *Status of Treaties: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en [https://perma.cc/7SQ4-PZHC].

50. *See* U.S. CONST. art. II, § 2.

government under the U.S. Constitution,[51] and the federal government can supersede state law in order to implement treaty obligations.[52] However, in areas of law typically developed by state law (such as commercial law, probate law, family law, and criminal law),[53] some observers note a federal reticence to implement sweeping legal frameworks to bring the United States into compliance with its formal obligations under international law.[54] In this way, states have developed a "decentralized system of control over the development of international law" despite the formal treaty-making and diplomatic powers held by the federal government.[55]

Even where treaties have been formally ratified by the federal government, state legal authority makes their implementation complicated. The often-broad reach of many treaties' substantive provisions creates regulatory obligations that do not necessarily track cleanly within the United States' federalist structure of government, formally split between two levels of jurisdictional authority. For example, though the United States has formally ratified the Convention for the International Form of the Will, the treaty's provisions for a uniform "international will" can only come into force through each state's individual adoption of a conforming Uniform Probate Code, leaving the United States in a complicated position toward its formal obligations under international law.[56] Similar problems arise in state taxation of foreign-held property[57] and state-level criminal prosecutions of foreign nationals.[58] Some scholars even go so far as to question the entire practice of federal foreign affairs law as rooted in overreaching presumptions about the source of U.S. legal authority.[59] They emphasize that the reach of the federal government's powers under the auspices of foreign relations could, in theory, lead to subsequently expansive new areas of federal control.[60] At the very least, these arguments make a compelling case

51. *See* U.S. CONST. art. II, §§ 2–3.

52. Missouri v. Holland, 252 U.S. 416 (1920).

53. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 499 (2004); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 265 (2001).

54. *See, e.g.*, Ku, *supra* note 53, at 513–15 (citing the United States' statement of deference to state tax law in the ICJ's *LaGrand* decision as an example of formalized reluctance to override state-level legal decisions).

55. *Id.* at 481.

56. *See id.* at 501–03.

57. *See id.* at 485.

58. *See id.* at 510–14; Medellín v. Texas, 552 U.S. 491 (2008).

59. *See* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 349 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1625 (1997).

60. *See* Goldsmith, *supra* note 59, at 1678 ("In our post-*Erie* world, a judge-made federal common law of foreign relations in the absence of political branch authorization is only legitimate to the extent that it regulates *uniquely* federal interests."). Goldsmith cites *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), for its watershed restriction of federal common law to only a few enumerated categories of cases involving a "uniquely federal interest," thus otherwise assigning judicial interpretation of the

for shared federal-state legitimacy in areas of the law that are traditionally subject to state regulation on one hand but the legitimate target of federal foreign agreements on the other.[61]

These limitations on the federal government's ability to unilaterally enforce treaty obligations within the U.S. federalist system also apply in the area of human rights treaties, whose provisions often fall under the welfare rights traditionally managed or guaranteed by the states.[62] Indeed, the United States has acknowledged these limitations by attaching reservations and declarations to the treaties it signs.[63] For example, the Senate attached the following declaration to the ICCPR upon ratification:

> "The United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[64]

In the context of the tension between federal and state authority in U.S. treaty implementation, such a statement could be read as a formal statement of the federal government's understanding of its tandem responsibilities with state governments. Rather than an abdication of responsibility, however, such a statement should be read as an invitation for a more nuanced process of participation in human rights.[65] In this vein, Professor Catherine Powell argues for the recognition of a "dialogic" federalism in foreign affairs, envisioning a flexible and mutually constitutive process of human rights legislation between federal and state actors.[66]

An intentionally open system, allowing for the incorporation of international legal norms through multiple "ports of entry," is a particularly fruitful model in the context of human rights law, where greater adoption of

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common law to the states. *See id.* at 1625–26; *cf.* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831–33 (1998) (arguing that Goldsmith's application of *Erie* to the law of foreign relations is inapposite).

61. *See* Goldsmith, *supra* note 59, at 1666.

62. Stark, *supra* note 19, at 91–92; Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–96 (1989).

63. Risa E. Kaufman, *"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1973–74 (2012); *see also* Ku, *supra* note 53, at 521.

64. *Resolution of Ratification: Senate Consideration of Treaty Document 95-20*, LIBR. CONG. (Apr. 2, 1992), https://www.congress.gov/treaty-document/95th-congress/20/resolution-text [https://perma.cc/NB5S-UW6C].

65. *See* Powell, *supra* note 53, at 275–76.

66. *Id.* at 245.

norms contributes directly to their ongoing viability.[67] The goal of human rights law adoption, ultimately, is what Professor Cass Sunstein refers to as a "norm cascade": the point at which a legal norm gains increased moral and legal momentum such that it reaches a "tipping point" in popular discourse, allowing for rapid development and recognition of new legal norms and rights.[68] Because a "cascade" necessarily requires widespread discussion, dissemination, and ultimately adoption, it follows that a widespread and diffuse means of recognizing norms is crucial for catalyzing the dissemination of human rights recognition.[69] In light of the federal government's historic reticence to ratify human rights treaties, then, state and local input plays an important role of reinforcing the importance of the norms in these treaties.[70]

The U.S. Supreme Court implicitly reinforced states' de facto ability to exercise control over human rights prerogatives in *Medellín v. Texas*.[71] In a complicated series of facts, a Mexican national had been sentenced to death in Texas. The Mexican government brought a case on his behalf before the International Court of Justice (ICJ), alleging that the defendant's consular rights under the Vienna Convention on Consular Relations (VCCR) had been violated by the Texas criminal prosecution system.[72] The ICJ found that they had, and that the *Medellín* defendants were accordingly entitled to review and reconsideration of their convictions in the United States.[73] Separately, President George W. Bush issued a memorandum to the Attorney General, determining that the United States would "discharge its inter-national obligations" by respecting the ICJ decision and granting a retrial.[74] Texas refused.[75] The U.S. Supreme Court upheld the conviction on the basis that the President's memorandum was insufficient to overcome state prerogative without congressional authorization. Finding that the VCCR was "non-self-executing," the Court held that Congress needed to pass implementing legislation before the VCCR could be the law of the United States. It explained that although "[t]he President has an array of political and diplomatic means available to enforce international obligations, . . . unilaterally converting a non-self-executing treaty into a self-executing one is not among them."[76]

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67. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1575–82, 1626 (2006).

68. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 38 (1997); Powell, *supra* note 53, at 289–90.

69. *See* Powell, *supra* note 53, at 289–90.

70. *Id.* at 288–89.

71. Medellín v. Texas, 552 U.S. 491 (2008).

72. Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, 13 (Mar. 31); *Medellín*, 552 U.S. at 497.

73. *Medellín*, 552 U.S. at 497.

74. Memorandum from George W. Bush, U.S. President, to U.S. Att'y Gen. (Feb. 28, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html [https://perma.cc/T9ZP-FUJZ]; *see also Medellín*, 552 U.S. at 497.

75. *Medellín*, 552 U.S. at 497.

76. *Id.* at 525.

In the *Medellín* opinion, the Supreme Court supported the position that state prerogatives could take effect over even a clear expression of executive intent in foreign affairs. In one of the many implications of its complex legacy, *Medellín* "seems to confirm the notion of state [power within the contours of international law], but ties it directly to the international system rather than routing it through the federal structure."[77] As a result of *Medellín*, states bear some discretion to decide whether and how to participate in the international legal system—including whether or not to fulfill the United States' treaty obligations—in the absence of controlling federal legislation.[78] Taken together with the history of federal inaction on passing legislation implementing or enforcing the human rights provisions contained in these treaties, the most faithful characterization of the federal government's contemporary relationship with human rights is that it has, in fact, left their legislative control largely at the discretion of the states.[79]

C. The "One Voice" Doctrine as a Potential Barrier to State Constitutional Adoption of ICESCR's Provisions

The U.S. Constitution has traditionally been read to support a strong, and even exclusive, executive role in foreign affairs.[80] While this "one voice" doctrine has preempted outward-facing state policies in the international human rights sphere, it has not prevented states from enacting inward-facing policies derived from international treaties. Therefore, it is unlikely that the "one voice" doctrine would pose a barrier to California's adoption of the ESC rights enumerated in the ICESCR.

Foreign relations are traditionally understood to be the exclusive province of the federal executive, and state-level legislation that touches on international affairs is traditionally understood to be subject to federal preemption. This doctrine—known as "one voice" jurisprudence[81]—is rooted in the U.S. Constitution, which vests the President with the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," the role of "Commander in Chief of the Army and Navy," and the ability to "receive Ambassadors and other public Ministers."[82] By contrast, "No State shall enter into any Treaty, Alliance, or Confederation" or "enter into

77. Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 434 (2008).

78. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1929–30 (2015); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 340; Kaufman, *supra* note 63, at 1992–94.

79. Powell, *supra* note 53, at 267; Ku, *supra* note 53, at 524–25.

80. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952).

81. *See* Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979–84 (2001) (discussing the history of the "one-voice" doctrine in U.S. Supreme Court jurisprudence).

82. U.S. CONST. art. II, §§ 2–3.

any Agreement or Compact with another State, or with a foreign Power."[83] The U.S. Supreme Court has articulated a strong primacy of the executive in matters of foreign affairs. Indeed, in some cases the Court goes so far as to characterize the President as the "sole organ" of U.S. foreign policy, in contrast with negligible formal power vested in the states.[84]

The Supreme Court has applied the "one-voice" doctrine as a form of field preemption, striking down state legislation that threatens the federal government's primacy in foreign affairs.[85] Under the Supremacy Clause of the U.S. Constitution, federal law and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[86] Consequently, state law that conflicts with federal law can be struck down. The Court has held that this supremacy applies to treaties, such that the terms of a treaty of the United States can trump an otherwise valid state law.[87] This means that when a state law or regulation comes directly against the provision of a treaty of the United States, courts must rule the law invalid. The court has applied this theory in areas such as the dormant Foreign Commerce Clause, where the "one voice" concern was used to invalidate state international commercial agreements as a threat to the federal government's ability to freely do business.[88]

More broadly, the Court has applied the federal government's foreign affairs power to preclude state activities that touch on foreign affairs because state legislation in the area in question could challenge the United States' ability to define its own foreign policy prerogatives—even when there is no direct contradiction with a ratified treaty. In *Hines v. Davidowitz*, for example, the U.S. Supreme Court invalidated a Pennsylvania statute which would have raised additional requirements for immigrants intending to settle in the state as an impermissible incursion on the federal power to conduct foreign affairs and enter into treaties, which "[n]o state can add to or take from."[89] The extension of field preemption in foreign affairs reached its zenith in *Zschernig v. Miller*, in which the U.S. Supreme Court held that state policy "must give way if they impair the effective exercise of the Nation's foreign policy," "even in absence of a treaty."[90] As such, the Court suggested that the federal government is not required to point to a specific federal interest or treaty being contradicted, so much as to the

83. *Id.* art. I, § 10.

84. United States v. Curtiss-Wright Exp. Corp. 299 U.S. 304, 319–20 (1936); United States v. Belmont 301 U.S. 324, 330 (1937).

85. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 63 (1941); Zschernig v. Miller, 389 U.S. 429 (1968); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

86. U.S. CONST. art. VI, cl. 2; *see also Hines*, 312 U.S. at 62–63 (applying the Supremacy Clause to the federal international treaty power).

87. *See* Missouri v. Holland, 252 U.S. 416, 434–35 (1920).

88. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453–54 (1979).

89. *Hines*, 312 U.S. at 63.

90. *Zschernig*, 389 U.S. at 440–41.

penumbra of federal foreign policy in which state involvement could "disturb foreign relations."[91]

However, despite its potentially broad implications, *Zschernig* does little to clarify the conditions which would trigger its application and has been rarely revisited by the Supreme Court to strike down state policy.[92] The most recent examples of field preemption have involved direct conflicts between a state law and executive action. In *Crosby v. National Foreign Trade Council*, the Supreme Court struck down a Massachusetts law which restricted state entities from doing business with entities that did trade with Burma under the Supremacy Clause because it conflicted with Congressionally-approved sanctions.[93] Similarly, in *American Insurance Association v. Garamendi*, the Supreme Court invalidated a California state law imposing Holocaust-related historical reporting requirements on insurers doing business in the state, this time due to a conflict between the state law and an executive agreement.[94] In both of the aforementioned cases, the challenged state provisions involved outward-facing policies from states attempting to leverage their economic power against foreign nations or individuals, leading the U.S. Supreme Court to find a direct conflict where the states "[sought] to use an iron fist where the President has consistently chosen kid gloves."[95]

Despite the force with which the U.S. Supreme Court has at times articulated the primacy of the federal executive in foreign affairs, it has never applied the one voice doctrine to overturn inward-facing state and local legislation that touch on foreign affairs, such as the adoption of human rights treaty language as a matter of local governance.[96] Indeed, state and local governments have successfully passed legislation endorsing or even implementing unratified human rights treaties with no challenge. San Francisco's 1998 law implementing the unratified Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is perhaps the most robust.[97] This legislation affirmatively required the city to not only codify the treaty's standards for equitable treatment of women, but also to create a CEDAW Task Force responsible for affirmatively collecting and analyzing data on the city's ongoing performance on gender equity issues.[98]

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91. *Id.* at 441.

92. *See* Gaylynn Burroughs, *More than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 428–31 (2006) (discussing *Zschernig*'s overbreadth and vagueness as possible reasons for its disuse).

93. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

94. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–20 (2003).

95. *Garamendi*, 539 U.S. at 427; *see also* Burroughs, *supra* note 92, at 418–20 (analyzing *Crosby* and *Garamendi* as "outward-looking" foreign affairs legislation).

96. Burroughs, *supra* note 92, at 416–18.

97. *See id.* at 422; Davis, *supra* note 77, at 418–19; Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 780–82 (2004).

98. Lozner, *supra* note 97, at 780–82.

Other initiatives include similar CEDAW legislation in Los Angeles and a Human Rights Initiative in New York City.[99] In recent years, such legislative initiatives have created a global trend of "human rights cities" around the world which have taken the lead on securing and innovating in traditionally international subject areas through use of international human rights language and concepts.[100] In the judicial space, direct international models are rare: while some authors have tried to trace the influence of international human rights treaties directly on state courts, wholesale adoption of treaty provisions seems to be an uncommon occurrence.[101] Indeed, it is more dependent on the preferences of individual judges than on the development of a systematic doctrine of international constitutionalism.[102] Within the United States, no successful challenge has been raised to date that these statutes or policies would "disturb foreign relations" of the United States.[103]

Moreover, the content of human rights treaties bears a strong resemblance to areas traditionally accorded to state authority, as discussed in section II, *infra*. Unlike the challenged statutes in both *Crosby* and *Garamendi*, where states had attempted to take the place of formal outward-facing policies negotiated by the federal government, human rights fall squarely within the individual welfare mandate—including health, education, and poverty—traditionally controlled by state governments.[104] As such, inward-facing programs at state and local levels have been permitted to directly borrow from and implement international human rights language as they wish, illuminating new opportunities to innovate in this area. In order to secure these rights for their residents, state governments should take on a more affirmative legislative role.

II.
THE PROPOSED ADOPTION OF THE ICESCR BY THE STATE OF CALIFORNIA

In the absence of federal action on ESC rights, and given that federal preemption via the one voice doctrine is unlikely, this Note proposes that California should enter this area of law by definitively "ratifying" the provisions of the ICESCR by its own political mechanisms. The state legislature should propose the various ESC rights—work, healthcare, welfare, and cultural rights—as ballot initiatives for the voters to approve as amendments to the state constitution. Importantly, these proposed rights would integrate the ICESCR's

99. Burroughs, *supra* note 92, at 417.

100. *See* Barbara Oomen & Esther van den Berg, *Human Rights Cities: Urban Actors as Pragmatic Idealistic Human Rights Users*, 8 HUM. RTS. & INT'L LEGAL DISCOURSE 160, 161–65 (2014).

101. Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After* Medellín, 115 PENN. ST. L. REV. 1051, 1065, 1070–72 (2011); *see also* Resnik, *supra* note 67, at 1632.

102. Kalb, *supra* note 101, at 1070–72.

103. Zschernig v. Miller, 389 U.S. 429, 441 (1968); Burroughs, *supra* note 92, at 437–38.

104. *See* Neuborne, *supra* note 62, at 893–96.

principle of progressive realization, rooted in obligations of "adequate" realization.

A. State Constitutions Already Feature Positive Rights as a Staple.

Positive rights, like those found in the ICESCR, are already staple guarantees of state constitutions.[105] In contrast to the substantive limitations of the U.S. Constitution, state constitutions enumerate robust responsibilities to provide for the general "welfare" of their constituents.[106] The Constitution of New York, for example, provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state."[107] A state-supported right to health is also a common provision in state constitutions.[108] Some constitutions recognize provisions of the right to work recognized in the ICESCR, including an eight-hour workday[109] or the right to collectively bargain and form trade unions.[110] In the twentieth century, state and local constitutional and statutory provisions evolved directly in response to international legal norms: New York, for example, adopted its constitutional right to health in 1938, in response to increasing domestic and international normative ideas of the state's responsibility toward affirmatively ensuring public health.[111] These provisions demonstrate an ongoing state-level dialogue with internationally recognized standards of public welfare, wherein states are able to translate international human rights norms into domestic practice.[112]

California is no exception to this tradition. California's Constitution has long served as a strong basis for individual rights within the state, leading sometimes to bold interpretations by the California Supreme Court that have diverged significantly from the federal courts. The Supreme Court of California has established the California Constitution as a "document of independent force" from the U.S. Constitution and laws,[113] and thus has used its provisions as a basis for constitutional interpretation sometimes at odds with the federal government.[114] Currently, the California Constitution recognizes rights wholly

105. Stark, *supra* note 19, at 92–94; Davis, *supra* note 19, at 360.

106. Davis, *supra* note 19, at 360; Neuborne, *supra* note 62, at 896–98.

107. N.Y. CONST. art. XVII, § 1.

108. *See, e.g.*, ALASKA CONST. art. VII, § 4; HAW. CONST. art. IX, § 1; LA. CONST. art. XII, § 8; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XVII, § 3; S.C. CONST. art. XII, § 1; *see also* Neuborne, *supra* note 62, at 893–95.

109. *See, e.g.*, MONT. CONST. art. XII, § 2; COLO. CONST. art. V, § 25a; IDAHO CONST. art. XIII, § 2.

110. *See* N.Y. CONST. art. I, § 17; N.J. CONST. art. I, § 19; HAW. CONST. art. XIII.

111. Davis, *supra* note 19, at 391–94.

112. *See* Powell, *supra* note 53, at 250–52.

113. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 808 (Cal. 1997); People v. Buza, 413 P.3d 1132, 1148 (Cal. 2018).

114. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) (recognizing a constitutionally-grounded equal protection interest in the right to education, diverging from the parallel interpretation in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)); People v. Brisendine 531

uncomprehended in the federal Constitution: most notably, California voters added a right to privacy to the Constitution in 1972, which has been used by the California Supreme Court to challenge the actions of public and private entities.[115] The California Supreme Court has also historically protected individual rights from government interference through its unconstitutional conditions doctrine, holding that once the government has agreed to provide affirmative right to individuals, the government is barred from restricting exercise of that right through other means unless a high bar of necessity is met.[116]

Though not always used, California's electorate and courts possess profound potential to constitutionally vest rights beyond those conceived under federal constitutional law, both in substantive content and in interpretation. However, in California, efforts to meaningfully implement positive rights have been stagnated by unmanageable legal standards and ineffective management and accountability structures.

B. California's Current Positive Rights Laws are Plagued by Inadequate Management and Accountability Structures.

Within the last ten years, the California legislature has used its authority to attempt to provide other positive entitlements, at times within the language of human rights. An emblematic story of ESC rights recognition in California is that of the right to water. Formally recognized as a human right by the state legislature in 2012,[117] the California water story could be seen by some as a success, but closer examination reveals several flaws in the management and accountability structures that accompany the right to water.

The human right to water has become an important yet contested element in the international framework for ESC rights.[118] Article 11 of the ICESCR recognizes a formal right to standard of living, including "the continuous improvement of living conditions."[119] Though the right to water was not explicitly included in these rights upon ratification, subsequent human rights treaties included reference to the equitable distribution of water rights under their

P.2d 1099, 1113 (Cal. 1975) (interpreting a stricter standard for unlawful search and seizure in the California Constitution than that raised by the federal Fourth Amendment).

115. White v. Davis, 533 P.2d 222, 224–25 (Cal. 1975); Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994).

116. Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885 (Cal. 1946); Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 411 (Cal. 1966) (articulating a multi-factor test for constitutional conditions, including that no alternatives less subversive of constitutional rights be available); *cf.* Evans v. City of Berkeley, 129 P.3d 394, 407–08 (Cal. 2006) (permitting the City of Berkeley to remove a government benefit over an organization's discriminatory policies despite potential First Amendment concerns).

117. Assemb. 685, 2011–2012 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. WATER CODE § 106.3 (West Supp. 2013)).

118. *See* Stephen C. McCaffrey, *The Human Right to Water: A False Promise?*, 47 U. PAC. L. REV. 221, 224–27 (2016).

119. ICESCR, *supra* note 23, art. 11.

terms,[120] and in 2003 the UN Committee on Economic, Social and Cultural Rights (CESCR), the U.N. organ formally responsible for organizing and implementing the ICESCR, adopted a General Comment recognizing a human right to water rooted in ICESCR Articles 11 and 12, noting its centrality to agriculture and food production, as well as the health rights served by "environmental hygiene."[121] The human right to water was later formally recognized by the U.N. General Assembly in 2010, citing its commitments under the ICESCR as well as CESCR's subsequent General Comment 15.[122] The United States abstained from voting on the measure.[123]

In California, universal access to water for drinking and sanitation is a serious problem. A recent study found that 208,000 of the state's residents had no access to a toilet, and 211,000 had no access to hot and cold running water.[124] This access varies widely across different populations, with different needs. Millions of Californians live in rural unincorporated communities:[125] such households are in danger of significant lack of drinking water and wastewater services.[126] At the same time, people experiencing homelessness account for a tremendous share of Californians without access to water: a 2018 study found that 120,000 people in this category were without toilet access and hot and cold running water.[127] Impoverished urban residents were also more likely to be affected. In San Francisco, for example, the same researchers found that areas of the city with a high proportion of Single-Resident Occupancy (SRO) units were also likely to have incomplete plumbing. In some areas, over 20 percent of housing units were found to be without toilet or hot and cold water access.[128] Across geographic areas, researchers found these disparities tracked with poverty and race, with "[m]edian [h]ousehold [i]ncome (MHI) [as] the strongest predictor of . . . incomplete plumbing [and] [r]acial makeup, defined as the percentage of white, non-Latin[x] residents, was also statistically significant."[129]

120. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women art. 14, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3.

121. Comm. on Econ., Soc. & Cultural Rts., Gen. Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 7–8, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

122. G.A. Res. 64/292 (July 28, 2010).

123. *See* Explanation of Vote by John F. Sammis, U.S. Deputy Rep. to the Economic and Social Council, on Resolution A/64/L.63/Rev. 1, The Human Right to Water (July 28, 2010), https://web.archive.org/web/20170329112014/https://2009-2017-usun.state.gov/remarks/4749.

124. LAURA FEINSTEIN & GABRIEL DAIESS, PAC. INST., PLUMBING THE DEPTHS: CALIFORNIANS WITHOUT TOILETS AND RUNNING WATER 7 (2019), https://pacinst.org/wp-content/uploads/2019/07/plumbing-the-depths.pdf [https://perma.cc/78DZ-NWW8].

125. CHIONE FLEGAL, SOLANA RICE, JAKE MANN & JENNIFER TRAN, POLICYLINK, CALIFORNIA UNINCORPORATED: MAPPING DISADVANTAGED COMMUNITIES IN THE SAN JOAQUIN VALLEY 9 (2013).

126. *See id.* at 7.

127. FEINSTEIN & DAIESS, *supra* note 124, at 7.

128. *Id.* at 9–11.

129. *Id.* at 12.

The Legislature has recently taken action. In 2011, AB 685 was introduced to the California State Assembly, establishing the state's policy that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."[130] Signed by the Governor in 2012, the law requires "all relevant state agencies . . . [to] consider this state policy" when revising or promulgating agency directives,[131] but "does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond" these obligations,[132] and emphasizes that "[t]he implementation of this section shall not infringe on the rights or responsibilities of any public water system."[133] According to analysis by the International Human Rights Law Clinic at Berkeley Law, an internationally-rooted right to water creates substantive requirements for the quantity, quality, accessibility, and affordability of water:[134] these requirements are to be implemented along the core international human rights principles of non-discrimination, opportunities for meaningful public participation in debate, and avenues of public accountability.[135]

Yet following the passage of AB 685, a 2018 survey found that despite positive citation of AB 685 by state agencies, coordination gaps remained in the state's ability to manage and provide water resources for its full population.[136] For example, the primary authority for managing California's water quality, the California State Water Resources Control Board, does not cover private wells nor water systems serving fewer than fifteen connections, like those in rural or unincorporated areas.[137] Gaps also remain in funding provisions for private sanitation projects. Though funding exists to help private homes purchase and build septic tank facilities, no agency has attempted to connect these funds with individual homeowners across the state.[138] Despite the state's stated intentions,

130. Assemb. 685, 2011–2012 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. WATER CODE § 106.3 (West Supp. 2013)).

131. CAL. WATER CODE § 106.3(b) (West Supp. 2013). As introduced by Assemblymember Mike Eng, this section would have required agencies to "employ all reasonable means to implement this state policy," including that they "shall revise, adopt, or establish policies, regulations, and grant criteria to further this state policy, including establishing affordability criteria as appropriate, to the extent that those criteria do not affect eligibility for federal funds." Assemb. 685, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (as introduced, Feb. 17, 2011).

132. CAL. WATER CODE § 106.3(c) (West Supp. 2013).

133. *Id.* § 106.3(d).

134. INT'L HUM. RTS. L. CLINIC, U.C. BERKELEY, SCH. OF L., THE HUMAN RIGHT TO WATER BILL IN CALIFORNIA: AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES 6–7 (2013) [hereinafter BERKELEY LAW REPORT], https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL(1).pdf [https://perma.cc/Q3KL-ULTK].

135. *Id.* at 8–9.

136. KENA CADOR & ANGÉLICA SALCEDA, PAC. INST., A SURVEY OF EFFORTS TO ACHIEVE UNIVERSAL ACCESS TO WATER AND SANITATION IN CALIFORNIA 25–26 (2018), https://www.aclunc.org/sites/default/files/SurveyReport.pdf [https://perma.cc/UE8T-SPK5].

137. *See id.* at 8.

138. *Id.* at 26.

implementation of the right to water remains beyond the grasp of some of the state's most vulnerable inhabitants.

Though California's legislature has demonstrated a willingness to address the human rights implications of the state's water issues, its implementation has fallen short of its full potential. Much of the criticism of AB 685 lands on its mandate that state agencies simply "consider" the right to water in their decisions.[139] Another concern is that the statutory language, which lists only the California Department of Water Resources, the California State Water Resources Control Board, and the State Department of Public Health as agencies bearing responsibility for promulgation,[140] could be interpreted to exclude myriad other agencies whose responsibilities meaningfully touch on the right to water, including environmental and social services.[141] Oversight and accountability measures also remain inadequate, with significant gaps in information, leaving households unable to understand their situation with regard to water resources.[142] A picture thus emerges of the realities of the state's efforts: despite positive intentions to implement an affirmative, universal right to water, incomplete management and accountability infrastructures create a scattered and distant response, pooling the worst public health outcomes in the state's most vulnerable communities. As the Feinstein and Daiess study indicates, these effects are also disparate across racial and socioeconomic lines, more seriously impacting communities of color.[143]

So long as individuals and groups remain who are denied access to water based on factors outside of their control, with the state unable to fully capture and remedy these efforts, the state's guarantee to an individually held human right to water thus remains just words. A natural choice to review and protect public rights guarantees would be the state court system, discussed in Part III. Yet as outlined in Section C, despite ambitious hopes, California's judiciary often shies away from substantive challenges to legislative action. Without a more robustly enforceable right to water, California's meeting of this mandate will continue to fall short.

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139. *See, e.g.*, *id.* at 25.

140. CAL. WATER CODE § 106.3(b) (West Supp. 2013); *see* CADOR & SALCEDA, *supra* note 136, at 7.

141. CADOR & SALCEDA, *supra* note 136, at 25; *see also* BERKELEY LAW REPORT, *supra* note 134, at 5, 10 (identifying "the California Environmental Protection Agency (Cal/EPA), California Health and Human Services (CHHS), California Department of Pesticide Regulation (DPR), California Delta Protection Commission (Delta Commission), California Public Utilities Commission (CPUC), California Department of Conservation (DOC), and the Division of Occupational Safety and Health (Cal/OSHA)").

142. *See* CADOR & SALCEDA, *supra* note 136, at 25–26.

143. FEINSTEIN & DAIESS, *supra* note 124, at 12.

C. California's Current Positive Rights Laws are Plagued by Judicially Unmanageable Standards.

California's positive rights efforts have also met difficulty in the courts as a result of uncertain and unmanageable legal standards. First, jurists have long debated state courts' authority to diverge from federal constitutional interpretation. Perhaps most famously, the late U.S. Supreme Court Justice William Brennan advocated strongly for state-level constitutional rights innovation beyond the more conservative reading of the federal courts, which, he argued, "must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."[144] In contrast to the limited jurisprudence of the U.S. Supreme Court, state courts are able to exercise what Professor Burt Neuborne calls a "generative ethos" with regards to the law: because they are charged with interpreting state laws providing directly for general welfare of state residents, state courts are structurally empowered to act to guarantee those benefits, beyond the more circumscribed mandate of federal courts.[145]

Some might argue that requiring state courts to adjudicate public policy matters raises its own issues, from both a logistical and a separation of powers perspective: compared with legislatures, state court judges are often unelected and arguably ill-equipped to gather data and develop the facts necessary for largescale implementation of positive rights.[146] Yet while these concerns may dominate at the federal level, state governments are built differently, often blending functions in their governmental structures and featuring frequently underfunded legislatures relative to more democratically accountable judges.[147]

Second, jurists have struggled to determine the appropriate standard of proof to apply to a right once it has been recognized. One attempt at evaluating a right has been through equal protection analysis modeled on the federal Fourteenth Amendment.[148] For example, New York's public health provision in Article XVII of its Constitution has been interpreted as requiring the state legislature to affirmatively provide for public welfare, subject to scrutiny from New York state courts.[149] The New York Supreme Court has upheld the state's use of its police power to create public health initiatives under Article XVII

144. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

145. Neuborne, *supra* note 62, at 896–98.

146. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1175–77 (1999) [hereinafter *Positive Rights*]; *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1882–86 (2001) [hereinafter *Passive Virtues*] (articulating separation of powers concerns underlying federal justiciability doctrine as extended to state courts).

147. Hershkoff, *Passive Virtues*, *supra* note 146, at 1882–90.

148. Neuborne, *supra* note 62, at 888.

149. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977); Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1092–93 (N.Y. 2001); Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 217–19 (E.D.N.Y. 2000); *see also* Hershkoff, *Positive Rights*, *supra* note 146, at 1139.

Section 3, including a challenge to New York City's fluoridation of its water supply in the interest of public health[150] and a requirement that public school employees certify their freedom from tuberculosis.[151] However, as authoritatively catalogued by Professor Helen Hershkoff, standards of review have been difficult for New York's state courts to find: while some decisions have treated New York's constitutional welfare guarantee as a property-like entitlement,[152] others have emphasized the court's role in adjudicating the merits of the petitioner's claim themselves,[153] while still others have examined the substantive adequacy of state aid.[154] Hershkoff argues that this state-level judicial review thus collapses into a form of rational basis review, wherein "the Court functions as an umpire whose sole job is to maintain legislative power within institutional limits, not to ensure that power is used to reach a prescribed end."[155] Ultimately, the courts provide little pushback to political branch decisions.[156] While rational basis review may make more sense as a way of measuring individuals' rights against government overreach, or negative rights, it is an inadequate tool for examining the individual rights to government resources, or positive rights. Because it sees the source of these individual problems as outside of the government's control (such as wealth inequality or other need for government services), rational basis review often leads to the conclusion that, at least at the federal level, government has no constitutionally obligated role in their solutions.[157]

Thus, when state courts model their constitutional approaches on federal constitutional doctrines of rights interpretation, despite foundational differences in the type and degree of rights provided for at each level, they hinder their own ability to apply the law.[158] When it comes to protecting positive rights, state courts' reliance on equal protection doctrine can provide substantive limitations on the scope of relief a state court is able to recognize. Further, state courts'

150. Paduano v. City of New York, 257 N.Y.S.2d 531 (N.Y. Sup. Ct.), *aff'd* 260 N.Y.S.2d 831 (N.Y. App. Div. 1965), *aff'd* 218 N.E.2d 339 (N.Y. 1966).

151. Conlon v. Marshall, 59 N.Y.S.2d 52, 54 (N.Y. Sup. Ct. 1945), *aff'd* 68 N.Y.S.2d 438 (N.Y. App. Div. 1947).

152. *See, e.g.*, *Tucker*, 371 N.E.2d at 451 (finding that because recipients held a property-like right in the public aid they were awarded, additional due process rights were justified where standing evidentiary requirements would have resulted in the denial of public aid); Hershkoff, *Positive Rights*, *supra* note 146, at 1146–47; *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739–56 (1964).

153. *See* Hershkoff, *Positive Rights*, *supra* note 146, at 1148–49.

154. *Id.* at 1149–50.

155. *Id.* at 1154.

156. *Id.* at 1153.

157. *Id.* at 1155; *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17–30 (1973) (finding that unequal funding of public schools did not violate the federal Fourteenth Amendment based, *inter alia*, on a narrow reading of poverty as a "disadvantaged class . . . not susceptible of identification in traditional terms"); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (finding that the federal Fourteenth Amendment Due Process Clause imposes no affirmative obligation on states to prevent private harm to citizens).

158. *See* Hershkoff, *Positive Rights*, *supra* note 146, at 1195–96.

limitations from ruling on the constitutionality of the policy at issue can mean they are limited to determining circumscribed questions of case-specific adjudication, preventing them from arriving at conclusions that would challenge U.S. constitutional norms.[159]

A similar narrative can be found in California's most famous attempt to constitutionally guarantee ESC rights: the right to education. Since its inception, Article IX of the California Constitution recognizes a right to a system of free public schools, managed by the state and funded by state and local taxes.[160] During the drafting of the California Constitution throughout the mid- to late-1800s, the framers emphasized the importance of the education provisions as necessary for the good citizenship of Californians, prefacing Article IX with a demand that the Legislature "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[161] The California Supreme Court relied on the breadth of these provisions in *Piper v. Big Pine School District*, where it held that the federal school system for Native American children necessarily did not meet California's constitutional education guarantees because it was outside of California's educational jurisdiction.[162] Based on the state's lack of regulatory authority, the court allowed the plaintiff to attend the state-run school in her local district, in effect protecting the right of California-resident children to Californian schools.[163]

Over the last fifty years, California has struggled to mobilize education into an actionable positive entitlement. In its most famous education case of the twentieth century, *Serrano v. Priest* (*Serrano I*), the California Supreme Court heard a challenge to California's public school financing scheme under the Equal Protection Clause of the U.S. and California Constitutions.[164] The court began by finding that the financing scheme was permitted under the language of Article IX, which specifically permitted school financing through local taxes. Regarding a more substantive entitlement, the court found that "we have never interpreted the constitutional provision to require equal school spending . . . only that the educational system must be uniform in terms of the prescribed course of study and the educational progression from grade to grade."[165]

However, the *Serrano I* court established that discrimination based on wealth is a compelling state interest under the federal and California Constitutions deserving of strict scrutiny, and struck down California's education financing system on that basis.[166] As the foundation for its analysis,

159. *Id.* at 1196.
160. CAL. CONST. art. IX, §§ 5–6.
161. *Id.* art. IX, § 1; *see* Gordon, *supra* note 4, at 329–36.
162. Piper v. Big Pine Sch. Dist., 226 P. 926, 930–31 (Cal. 1924).
163. *Id.*; *see also* Gordon, *supra* note 4, at 338.
164. Serrano v. Priest (*Serrano I*), 487 P.2d 1241 (Cal. 1971); Serrano v. Priest (*Serrano II*), 557 P.2d 929 (Cal. 1976) (upholding under the California Constitution alone).
165. *Serrano I*, 487 P.2d at 1249.
166. *Id.* at 1244.

the *Serrano I* court understood education as a "fundamental interest" guaranteed to the public, based upon its "indispensable role . . . in the modern industrial state,"[167] citing the U.S. Supreme Court's reasoning in *Brown v. Board of Education*[168] and comparing education favorably to the constitutionally protected right to vote.[169]

Thus, in *Serrano I* the California Supreme Court found original ways to achieve a new progressive paradigm. Though it shied away from reading a positive entitlement directly from California's constitutional right to education, the court endorsed education as a "fundamental right" akin to others accorded the highest levels of federal protection. In following the federal equal protection model, it avoided the rational basis analysis noted by Hershkoff and instead defined wealth as a suspect classification deserving strict scrutiny.[170]

However, in the decades following these sweeping guarantees for equity across the state's education system, the California Supreme Court also recognized the principle of local control over schools and acknowledged that the constitutional guarantee of a right to education does not necessarily require an identical education across the state, so long as a "basic" education was provided. The California legislature put forth new school financing plans to comply with the *Serrano* decisions throughout the 1970s, attempting to move funds from high- to low-income school districts.[171] However, in 1978, California voters passed Proposition 13, halting *Serrano*'s momentum and resulting in a state constitutional amendment that capped state property tax collection and dramatically limited the public funds available for education.[172] Some commentators argued that the fiscal impact of *Serrano* directly "caused" taxpayers to support Prop 13.[173]

The California Supreme Court has similarly walked back some of *Serrano*'s more radical implications. In *Butt v. State*, a challenge to a school district's early term ending due to budgetary constraints, the court found that a "requirement that [the State] provide [strictly] 'equal' educational opportunities would thus seem to present an entirely unworkable standard" for statewide implementation, derived from "inevitable variances in local programs, philosophies, and conditions."[174] Even though the state's constitutional education provision engendered heightened scrutiny, the court found that the

167. *Id.* at 1255–56.

168. 347 U.S. 483 (1954).

169. *Serrano I*, 487 P.2d at 1257–58 (finding this rationale articulated in CAL. CONST. art. IX, § 1).

170. *Id.* at 1255–56; Hershkoff, *Positive Rights*, *supra* note 146, at 1155.

171. William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 608, 610–12 (1996).

172. *Id.* at 612–14.

173. *See, e.g.*, *id.* at 635–36.

174. Butt v. State, 842 P.2d 1240, 1252 (Cal. 1992) (quoting Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 198 (1982)).

right it created was to a "basic" education, as evaluated against the median of other districts: "[u]nless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs."[175] Perhaps most significantly, the court held that the trial court had erred in authorizing the disbursement of state funds to remedy harm where those funds had been earmarked by the state legislature for other purposes,[176] echoing separation of powers concerns advocating for the limitation of the judicial role in legislative affairs.[177] This logic, casting the state court system in a subsidiary role in matters closer to public affairs, has become further entrenched in the California Supreme Court's education policy decisions: most recently, the court declined to hear a challenge to California's teacher tenure provisions as a violation of equal protection, meaning that the challenged law remained in effect.[178]

The California Supreme Court's jurisprudence since *Serrano I* embodies an ambivalence toward guaranteeing state-sponsored entitlements under current pressures and parameters. The passage of Prop 13 illustrated that the state electorate would potentially retaliate strongly against wealth redistribution, resulting in a worse net outcome for redistribution effects.[179] Thus, in *Butt* and thereafter, including its refusal to hear *Vergara*, the California Supreme Court has moved away from a stance of sweeping rights-based judicial review and toward a more deferential relationship with the legislature, similar to the New York state courts' rational review process analyzed by Hershkoff, as discussed above.[180] Yet as Hershkoff suggests, there are other ways to resolve the tensions between fiscal responsibility and public rights guarantees, and as demonstrated below, California has other options to frame and ultimately meet largescale public need.

To institutionalize a new paradigm for the recognition of human rights, it would be helpful to change the framing which the court must apply to the question by implementing entirely new constitutional language, thus creating the opportunity to articulate a fresh body of doctrine. In seeking to generate a new direction in California's positive rights jurisprudence, discussed below, such a reshaping could prove essential.

175. *Id.*

176. *Id.* at 1259–64.

177. *See* Hershkoff, *Passive Virtues*, *supra* note 146, at 1882–84.

178. Vergara v. State, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App. 2016); *see also* Howard Blume & Joy Resmovits, *In a Major Win for Teachers Unions, California Supreme Court Lets Teacher Tenure Ruling Stand*, L.A. TIMES (Aug. 23, 2016), https://www.latimes.com/local/education/la-me-edu-ca-supreme-court-lets-teacher-tenure-survive-20160819-snap-story.html [https://perma.cc/VNX5-8Q3X].

179. *See* Fischel, *supra* note 171, at 612–13.

180. Hershkoff, *Positive Rights*, *supra* note 146, at 1153.

III.
THE ICESCR RIGHTS AS A WAY FORWARD FOR CALIFORNIA

A. Enacting ICESCR Provisions Would Facilitate the Formation of Judicially Manageable Standards.

As discussed above, specifically in the context of education, California's positive rights efforts have failed because of an insufficient judicial standard. The ICESCR's progressive realization principle offers a solution, when coupled with a substantive adequacy standard. A re-examination of education rights through an adequacy lens demonstrates why.

In education litigation, adequacy arguments "look directly at the quality of the educational services delivered . . . and ask evaluative questions about whether those services are sufficient to satisfy the state's constitutional obligations."[181] Though the adequacy standard acknowledges the realities of inequality as a factor in educational outcomes, it is not comparative. Instead, it creates a way to meaningfully recognize a right within "the range and contours of the overall distribution,"[182] thereby avoiding the comparative problems that have plagued courts seeking to expand equal protection analysis to positive rights. This standard is not limited to the education sphere; an adequacy standard can be applied to other rights within the social safety net that are part of assuring "the dignity of full membership in society."[183]

California Supreme Court Justice Goodwin Liu endorsed a similar standard in a 2006 article proposing a metric of "educational adequacy for equal citizenship."[184] In this article, Justice Liu tied the state's obligation to provide a public education as a mechanism to other recognized public interests, namely, producing an informed citizenry capable of performing public tasks such as voting, serving on a jury, and meaningfully and responsibly exercising civil liberties and participating in community life.[185] In Liu's understanding, "citizenship" goes beyond the simple legal definition to mean a status of "full members of a community," rooted in degrees of political, civil, and social equality;[186] instead, these standards are necessarily "relational" within the context of the society within which they are applied.[187] "Adequacy" thus means that the "floor" of a state's obligation to meet a public right is to "ensure not bare

181. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 109 (1995).

182. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 347 (2006).

183. *Id.* at 407.

184. *Id.* at 344–45.

185. *Id.*

186. *Id.* at 341–42.

187. *Id.* at 346.

subsistence, but the achievement of the full range of social capabilities that constitute the societal norm."[188]

Justice Liu's framework of a "bounded inequality" echoes the progressive realization provision of the ICESCR. As noted above, Article II of the ICESCR provides that each signatory "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[189] Countries' commitments under this framework are then assessed under the periodic review process.[190] Similar to the principle of adequacy, the drafters of the ICESCR recognized that the immediate realization of positive rights would not be equally feasible for all nations, and that their ratification of the treaty would be impossible without some structural provision acknowledging these background disparities. Article II reflects this understanding, in which the ICESCR acknowledges these realities while still providing a tangible goal toward which governments can work. Like Justice Liu's orientation of education toward citizenship, the progressive realization of these rights is rooted in the substantive goals that they each articulate. By recognizing a right for everyone to freely chosen work, for example, as well as its progressive realization, a state can meaningfully articulate a policy goal without immediately taking on a prohibitively onerous economic obligation.

In practice, courts could determine whether a policy is adequate via a two-step process. The first step would be to identify the right and the goals that a given program serves. For example, if faced with a question of adequacy of a state program under the right to healthcare, the California Supreme Court would ground itself in the goals served by the healthcare provision: a population whose healthcare needs are fully met so as to enable equitable participation in social life. The second step would be to adjudicate whether the limitations argued by the state, such as limited funding or other program infrastructure, were persuasive in light of the court's determination of the state's capabilities.

Examination of how such a case would play out under these standards demonstrates how enactment of ICESCR-based principles of adequacy and progressive realization would increase judicial manageability of positive rights. In our adversarial system, the plaintiff's argument would comprise of both why the entitlement is essential to the social provision—for example, affordable health insurance as part of the right to health—as well as why the state's current economic or structural position empowers it to provide that right. The state could then attack either of these points. It might argue that the provision does not fit into an enumerated positive right, or more directly, that the state is unable to currently meet it under the principle of progressive realization. The evidentiary

188. *Id.* at 347.
189. ICESCR, *supra* note 23, art. 2, § 1.
190. *Id.* arts. 16–19.

burden would thus be on the state to demonstrate why its program meets the constitutional entitlement at that time. The court would then determine whether the state's action is sufficient to adequately facilitate enjoyment of the right, when balanced against the state's limitations.

To return to the water example, as described in Part I, the new framework would require that all state agencies do more than "consider" the right to water in their decision-making, but would be required to affirmatively implement it, as to the "maximum of its available resources."[191] Further, the state will bear an affirmative burden to ensure that this standard is met, rather than allow individual agencies to fall through the cracks in their provision of rights.[192]

Applying these standards improves the judicial manageability of disputes arising under positive rights law. Most importantly, the two-step approach brings the court's incentives—as well as those of the state as a whole—in line with greater recognition of individual rights. As the California Supreme Court recognized in *Butt*, the recognition of an "equal" standard of educational opportunity under the current scheme would instantly "present an entirely unworkable standard requiring impossible measurements and comparisons" between schools and districts.[193] Where before recognition of a right can only necessarily entail its full and immediate realization by the government, the legal framework of progressive realization enables the court to formally disaggregate these rights from the political processes that fulfill them. Compared with equal protection or other more circumscribed approaches to adjudicating policy, this orientation of adequacy within progressive realization offers a way for the court to both recognize the integrity of individual entitlement to positive rights and retain the ability to take formal notice of economic or structural realities that impede their current realization. This framework recalls the analysis of the *Serrano* cases, in which the state constitutional right to education was understood by the court as a "fundamental interest," serving a substantive guarantee.[194] Finally, support for this approach is found in California legislative history and in the California Supreme Court's jurisprudence seeking to affirmatively provide a right to educational quality in California based on the state's own metrics.[195] This bifurcation in the language of rights will enable courts to better articulate and respond to social need.

191. *Compare* CAL. WATER CODE § 106.3(b) (West Supp. 2013), *with* ICESCR, *supra* note 23, art. 2.

192. *See* CADOR & SALCEDA, *supra* note 136, at 8.

193. Butt v. State, 842 P.2d 1240, 1252 (Cal. 1992) (quoting Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 198 (1982).

194. *See* Serrano v. Priest, 487 P.2d 1241, 1255–60 (Cal. 1971).

195. Gordon, *supra* note 4, at 328–43.

B. Enacting ICESCR Rights Would Enable Effective Management and Accountability Structures.

The passage of a new foundation for positive rights would give California the foundations of a new social contract. Anchored to this set of rights, legislators could create new programs specifically designed to meet the standards of progressive realization delineated by the electorate. In turn, the electorate would have a new set of tools with which to critically evaluate their representatives, creating a new, popular basis for accountability in government. With this basis, California would have the ability to gain traction on progressively meeting these new entitlements.

As a publicly actionable statement of values, the adoption of ESC rights would create more avenues to public accountability across the full range of California's electorate. Currently, one political party has governed California with near dominance,[196] making U.S. traditional partisan accountability difficult. Though California's top-two primary system helps to give voters more closely tailored electoral options, some assert that the process is still vulnerable to capture and manipulation by special interests.[197] California's electorate also has a powerful tool with which to participate directly in government in the public ballot initiative, but there are issues here as well: despite holding support of the electorate compared to elected officials, the public still supports greater funding transparency and legislative cooperation for state ballot initiatives.[198] Propositions are often duplicative or achieve something different than what they appear to voters, turning direct democracy into a confusing and exhausting process for voters.[199] In a hugely diverse state, voters can feel distant from government processes designed to directly reach their support, as well as a lack of clarity on where and how to seek change within a patchwork of political processes.

Adopting ESC rights in the California Constitution would encourage public democratic participation by giving voters an accessible and durable means of holding policies and politicians accountable to their desired goals. In the recognition of ESC rights as a constitutional provision, voters would have both an aspirational goal toward which to orient policy as well as a concrete right of

196. *See California State Executive Offices*, BALLOTPEDIA,https://ballotpedia.org/California_state_executive_offices [https://perma.cc/RC2S-QAZT].

197. *See* Jeremy B. White, *The Liberal-Moderate Rift Among Democrats Has Blown Open in California*, POLITICO (May 5, 2020), https://www.politico.com/news/2020/05/05/california-democratic-party-fractures-151712 [https://perma.cc/N25E-HDFG].

198. *See generally* MARK BALDASSARE, DEAN BONNER, SONJA PETEK & JUI SHRESTHA, PUB. POL'Y INST. OF CAL., THE INITIATIVE PROCESS IN CALIFORNIA (2013), https://www.ppic.org/wp-content/uploads/content/pubs/jtf/JTF_InitiativeProcessJTF.pdf [https://perma.cc/H3YP-KDF4].

199. Kelsey Piper, *California's Ballot Initiative System Isn't Working. How Do We Fix It?*, VOX (Nov. 6, 2020), https://www.vox.com/future-perfect/2020/11/6/21549654/california-ballot-initiative-proposition-direct-democracy [https://perma.cc/5NUG-S58P].

action with which to challenge the adequacy of government programs in state court. The phrasing of ESC rights is clear and direct: they can be quickly, easily, and accurately comprehended by California's vast electorate. Thus the framing of such a right would offer a check on the often-confusing language of ballot initiatives: by tapping into the vocabulary of human rights, voters would be able to understand the goals their public projects are attempting to achieve. To use the example of health: the establishment of a succinct "right of everyone to the enjoyment of the highest attainable standard of physical and mental health," in which the state of California takes responsibility for the progressive implementation of the prevention and control of disease and the "creation of conditions which would assure to all medical service and medical attention in the event of sickness,"[200] would make the state's priorities much clearer than the current absent standard. With the recognition of a right to health for each individual, California's healthcare goals would move from an inchoate set of goals, discerned piecemeal across a patchwork of statutory authorities, to a stated constitutional obligation.

The ratification of ESC rights as constitutional guarantees would also enable California's leaders to build their own coalitions around a new, affirmative framing of positive rights. Such a framing would ideally enable California's leaders to cut across the vast class and geographic divisions in our state to articulate a common vision for the state's shared future, as well as delineate a set of priorities for both the short and long term. With the backing of constitutional guarantees, California's leaders would have the ability to root new programs in the constitutional rights they are designed to meet, keeping faith with voters that their proposed legislation is part of a greater plan to meet the choices of the electorate.

At the same time, the concept of progressive realization would enable a new degree of oversight in public priorities: not just about public rights, but about the costs of their realization. As an illustrative example of the status quo, California's contemporary public education financing scheme is notoriously opaque, exacerbated by the complex revenue structure enacted with the passage of Proposition 98 in 1988.[201] The byzantine budgetary process engendered by Prop 98 is famously difficult to parse for legislators and career staffers, let alone voters, leading the independent Legislative Analyst's Office to conclude its formulas are "unable to react well to real world developments."[202] Yet even with a consensus of dissatisfaction, government officials have struggled to build the momentum necessary to retool the system, meaning the revenue for state entitlements remains out of reach.

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200. ICESCR, *supra* note 23, art. 12.

201. *See* MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., A HISTORICAL REVIEW OF PROPOSITION 98 at 16–21 (2017), https://lao.ca.gov/reports/2017/3526/review-prop-98-011817.pdf [https://perma.cc/3KEL-JJRF].

202. *Id.* at 28.

The recognition of ESC rights can animate this retooling conversation by defining these new public financing objectives, thereby creating a new mechanism for fiscal accountability. Elected officials would be able to concretely define new revenue measures in terms of the substantive right they are meant to fulfill for the electorate. In turn, the money spent toward public rights could be the basis of a future adequacy analysis, either by a court or other public process. In this way, voters can have greater confidence in state tax schemes because these new tools would chart the objectives and programs served by taxes that they pay to the state. With a new vocabulary of public interests to be met, the public would be empowered to identify and hold their elected officials accountable over mismanagement of budgetary concerns.

Finally, judicial use of these constitutional provisions to examine subsequent legislation would offer Californians a more accessible means for vindicating their rights in courts. As the California Supreme Court voiced in *Butt*, state courts can feel themselves limited from sweeping review of legislative action by separation of powers principles.[203] A constitutional commitment to progressive realization addresses that concern by inviting state courts directly to participate, giving them an explicit adjudicatory role. Further, as illustrated above, the concept of progressive realization within an adequacy framework offers courts a clearer standard of review on which to evaluate policies. Lastly, judicial review of the progressive realization of rights similarly offers a public process for court observers to chart.

In this way, individuals will be able to understand and participate in the judicial process in a way unprecedented in previous rights schemes: beyond individual court decisions, the true strength of the program's justiciability is in its accessibility to the public. With the increased transparency and accountability that these public rights would bring, Californians will be able to address the problems which plague the current legislative and ballot measure schemes. Ultimately, adoption of the ICESCR would engender a mutually reinforcing network of public rights in California, in which voters and elected officials could build movements from a commonly articulated set of values.

C. Enacting ICESCR Provisions Would Strengthen International Human Rights Standards.

California's adoption of the ICESCR would breathe new life into an uncertain period for the recognition of international human rights. Today, the so-called global "age of rights" has been tested as populist and isolationist movements have sprung up all over the globe.[204] In this environment, the affirmative ratification of human rights by a powerful political entity like

203. Butt v. State, 842 P.2d 1240, 1259–64 (Cal. 1992).

204. *See* LOUIS HENKIN, THE AGE OF RIGHTS (1990); Philip Alston, *Human Rights in the Populist Era*, JUST SECURITY (Oct. 18, 2017), https://www.justsecurity.org/46049/human-rights-populist-era/ [https://perma.cc/TY5A-UD2Z].

California carries serious potential to reaffirm and reinvest those objectives with meaning, thus making their future existence more likely.

In international legal scholarship, domestic implementation is recognized as a critical site for the enforcement of human rights beyond international organizations.[205] The ultimate effectiveness of international human rights treaties, in and of themselves, has faced scrutiny since even before the most recent populist wave.[206] In her influential critical examination of human rights treaties in 2002, Professor Oona Hathaway applied empirical methods to examine whether countries who had major international human rights instruments had experienced an actual decline in human rights abuse and found ambiguous results, without a direct correlation.[207] She concluded in part that a substantial part of the value that countries derive from ratifying these treaties is in the expressive value of agreement at the time, but that these can be unrelated, or even adverse, to the country's actual human rights performance in the future.[208] Others highlight the value of human rights treaties as a genuine political indicator of a nation's "ideal point" of commitment to human rights.[209] Similarly, Professor Ingrid Wuerth suggested that current patterns of noncompliance have arisen due to what she labels a "broken windows" theory of international norms: when costs to disobeying international human rights law appear (and are practically demonstrated to be) low, bad actors will begin to violate the law with impunity, thus reducing the overall value of the norm.[210]

In an environment of uncertainty around treaties as a mechanism for enforcing the international human rights regime, California's use of human rights language would reaffirm and strengthen the permanence of international human rights tenets. The flipside of Wuerth's broken windows thesis is that what *really* matters in protecting human rights is not expressive signing of treaties, but the actual legislation and enforcement of the rights by governments themselves. California's incorporation of the ICESCR would have this effect. As a government with the power to enact legislation to guarantee these rights, California's enactment and subsequent realization of economic rights would serve to confirm those rights' lasting value through a mechanism entirely outside

205. *See* Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 62–65 (2013) (cataloguing global implementation of international human rights in domestic constitutions); *see also* Katerina Linos & Tom Pegram, *What Works in Human Rights Institutions?*, 111 AM. J. INT'L L. 628, 633 (2017) (assessing the effectiveness of National Human Rights Institutions (NHRIs) as domestic human rights enforcement mechanisms).

206. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002); Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 281 (2017).

207. Hathaway, *supra* note 206, at 1940–41.

208. *Id.* at 2011–12; *see also* David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 108–09 (2013).

209. *See, e.g.*, SIMMONS, *supra* note 39, at 65.

210. Wuerth, *supra* note 206, at 325–26.

of international law.[211] After all, the goal of international human rights law is and has always been the recognition and fulfillment of individuals' rights by their governments and societies.[212] Even if California cannot formally "ratify" the ICESCR in the same way that the United States, Indonesia, or Malta can, the actual recognition of economic, social, and cultural rights to its forty million inhabitants would be a tremendous achievement by this measure of global human rights progress.[213]

Most directly, such state-level incorporation could serve to give real legal meaning to human rights within the United States.[214] States look to other states for ideas on legislation, and such a foundational shift by California would not go unnoticed by state legislatures with similar goals. Ultimately, with this increased attention at the state level, momentum could grow for adoption of ESC rights at the federal level, inviting federal actors to look again at formal ratification of the ICESCR. Until then, however, California's achievement alone would bring much-needed aid to millions across the state.

CONCLUSION

California's political and cultural identity is defined by reinvention and reinvestment in its values. With political leadership famous for its willingness to try new ideas, California's appetite and ability for innovation makes it the foremost of our country's laboratories of democracy. As veteran Los Angeles politician Kevin de León once claimed, "California is America before America is itself."[215] California's orientation toward an ambitious and equitable future makes it a perfect state for ambitious goals of a new chapter of prosperity.

Such a transformation begins with a delineation and recognition of fundamental human rights. By recognizing the economic, social, and cultural rights of all Californians, California most importantly would make a commitment to bind itself to protecting and recognizing those rights as a matter of public policy. Further, this would provide California with a mechanism with which to hold itself and its representatives accountable for the progressive realization of those rights. In so doing, California would be tapping into to the global language of international human rights, enabling policymakers and residents to benefit from an entirely new discourse and range of solutions. With this new set of guarantees, California will once again be able to announce a new era of public rights in the United States.

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211. *See* Resnik, *supra* note 67, at 1575–82.

212. *See, e.g.*, HENKIN, *supra* note 204, at 8.

213. *See id.*

214. *See* Resnik, *supra* note 67, at 1634.

215. Tyler Kingkade, Alicia Victoria Lozano & David Ingram, *California Has a Reputation for Progressive Politics. Don't Tell That to the State's Progressives.*, NBC NEWS (Oct. 13, 2020), https://www.nbcnews.com/politics/2020-election/california-has-reputation-progressive-politics-don-t-tell-state-s-n1243023#anchor-Veryableandeffectivelobbyists [https://perma.cc/ZN5B-49TY].