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Gezim Bajrami

11 January 2013

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**Negative Constitutional Rights in America versus Positive Constitutional Rights in Other  
Democratic Nations and Why Our System Should Not Change**

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Comparative Constitutional Law

Fall 2012

Professor Riccio

## Table of Contents

Table of Contents.....	2
Table of Authorities.....	3
Introduction.....	8
I. The American System.....	9
Charter of Negative Rights.....	10
Closest We've Come?.....	11
II. Positive Constitutional Rights as Distinguished From Negative Constitutional Rights.....	13
Implementation.....	14
The International Bill of Rights as the Primary Source of Positive Constitutional Rights in Today's Global Community.....	15
III. Comparative Studies.....	19
A. South Africa and Housing.....	19
B. Brazil and Healthcare.....	23
C. El Salvador and Education.....	25
D. Kosovo and Human Rights.....	26
IV. Argument Against Movement Toward Positive Rights in the United States.....	29
V. Conclusion.....	31

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## Introduction

The Constitution of the United States is the foundation on which the American legal system stands. Its significance to the United States' rank as an exemplar of functioning democracy cannot be overstated. The constitution influences America's courts, serves as a model of good governance in the eyes of some of the global community's newest members, and is believed by some public officials as a sacrosanct guide to policymaking today precisely as it was written centuries ago.

Notwithstanding all its intrinsic worth, the constitution does not contain any express assurances that the federal government will provide anything to the American people. Instead, the constitution carefully limits the government's authority by itemizing a number of things the government cannot do to people and take from people.

In contrast, other countries have incorporated positive rights directly into their constitutions. Some have done so by expressly enumerating positive rights in their constitutions while others have afforded their citizens positive rights by referencing other international laws and treaties in their constitutions. Regardless of the means, the result is the same. Countries elsewhere, developed and developing, afford their people positive rights by way of constitutional guarantees that greatly outweigh any affirmative promises the U.S. constitution can be said to provide.

Regardless, the fact such a distinction between the United States and its counterparts exists does not in itself mean the U.S. Constitution lags behind. This essay addresses positive constitutional rights in four other countries and, as demonstrated by comparative analysis, why the American system of negative rights reigns supreme as is.

The first part of this essay clarifies that the U.S. constitution is a charter of negative rights. The initial segment also glances at the U.S.' flirtation with a "Second Bill of Rights" amidst the latter stages of World War II. The second part identifies the international origins of positive constitutional rights and explains how such rights go from mere ideas to the law of their respective land. Part three of this essay discusses four countries that have implemented positive rights, how each country did so, and why none have been successful enough to warrant the U.S. to follow suit. The work concludes by arguing that given the irreconcilable differences between the movement for positive rights and the history and tradition of the U.S. constitution, replicating foreign models and moving toward a system of positive rights would be mistaken.

### I. The American System

In terms of results, debate over positive and negative rights in the United States has been more productive in academia than it has in the courts.<sup>1</sup> Judicial opinions have remained remarkably consistent with the principle that "the constitution is a charter of negative rather than positive liberties."<sup>2</sup> Time and time again, the U.S. Supreme Court has ruled that the government has no affirmative constitutional obligations to the public. All in the previous fifty years, the court has denied the right to decent housing<sup>3</sup>, the right to public education<sup>4</sup>, the right to medical care<sup>5</sup>, and the right to welfare<sup>6</sup>. The Supreme Court solidified the negative rights theory even further with its decision in *DeShaney v. Winnebago County Department of Social Services*. In

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<sup>1</sup> Positive rights are defined as rights to government action. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. Rev. 2271, 2272 (1990).

<sup>2</sup> *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989) (Posner, J.).

<sup>3</sup> *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying a fundamental right to housing).

<sup>4</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (denying a fundamental right to education).

<sup>5</sup> *Harris v. McRae*, 448 U.S. 297, 318 (1980) (rejecting a claim for equal Medicaid funding for childbirth and abortion by declaring that government has no obligation to provide any funding).

<sup>6</sup> *Dandridge v. Williams*, 397 U.S. 471, 478-83 (1970) (denying a fundamental right to minimal subsistence).

*DeShaney*, the Court held that a local social service agency could not be held liable for failing to remove a child from the custody of his father, despite substantial evidence of the father's violent tendencies.<sup>7</sup> At its core, *DeShaney* means that the constitution's Due Process Clause imposes no affirmative obligations on state government.<sup>8</sup> Thus, *DeShaney* is "perhaps the court's strongest-statement sanctioning the negative rights theory as the official guiding principle by which demands for government action will be measured."<sup>9</sup>

#### A. Charter of Negative Rights

To thoroughly demonstrate that traditional theory behind the American system, we turn to comments from the President of the United States. In 2001, then-State Senator and former professor of constitutional law Barack Obama explained in an interview with Chicago's WBEZ-FM radio that "as radical as I think people try to characterize the Warren Court<sup>10</sup>, it wasn't that radical. It didn't break free from the essential constraints that were placed by the Founding Fathers in the Constitution, at least as it's been interpreted, and the Warren Court interpreted in the same way, that generally the Constitution is a charter of negative liberties – it says what the states can't do to you. It says what the federal government can't do to you. But it doesn't say what the federal government...must do on your behalf. And that hasn't shifted."<sup>11</sup>

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<sup>7</sup> *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)

<sup>8</sup> Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. Pa. L. Review 750-782 (2001).

<sup>9</sup> *Id*

<sup>10</sup> State Senator Obama referring to a string of Supreme Court decisions between 1953-1969 during Justice Earl Warren's term as Chief Justice whereby the court "attempted to remake American society through the aggressive enforcement of negative constitutional rights." See Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past? Reflections on the Warren Court and the Struggle for Civil Rights*, 59 Wash. & Lee L. Rev. 1055 (2002).

<sup>11</sup> *Id*

### B. Closest We've Come?

By January 1944, victory was all but assured for the allies in the European Theatre of World War II.<sup>12</sup> Riding a wave of momentum at home, President Franklin D. Roosevelt used part of that year's State of the Union Address as a platform to introduce what would be known the "Second Bill of Rights."<sup>13</sup> In that Address, President Roosevelt exclaimed that "the supreme objective for the future" could be captured in one word - "security."<sup>14</sup> However, Roosevelt's definition of security went beyond the obvious reference to military might. Roosevelt argued that American security also included "economic security, social security, (and) moral security."<sup>15</sup> He insisted that "a decent standard of living for all individual men and women" was "essential to peace" and that "freedom from fear is eternally linked with freedom from want."<sup>16</sup>

Unsurprisingly, Roosevelt pointed to the constitution to legitimize his proposal and persuade Congress of the Second Bill of Rights' virtue. Making his case, the President said:

"At its inception, the nation had grown under the protection of certain inalienable political rights - among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. But over time, these rights had proved inadequate. Unlike the Constitution's framers, we have come to a clear realization of the fact that true individual freedom cannot exist without economic security. In our day these economic truths have become...self-evident. We have accepted...a second Bill of Rights under which a new basis of security and prosperity can be established for all."<sup>17</sup>

President Roosevelt then itemized the relevant rights: (1) The right to a useful and

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<sup>12</sup> See Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 Drake L. Rev. at 205 (2005)

<sup>13</sup> *Id* at 206

<sup>14</sup> *Id*

<sup>15</sup> *Id*

<sup>16</sup> *Id* at 207

<sup>17</sup> *Id*

remunerative job in the industries or shops or farms or mines of the Nation; (2) The right to earn enough to provide adequate food and clothing and recreation; (3) The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; (4) The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; (5) The right of every family to a decent home; (6) The right to adequate medical care and the opportunity to achieve and enjoy good health; (7) The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and (8) The right to a good education.<sup>18</sup>

Before concluding his Address to Congress, Roosevelt cautioned that action speaks louder than words. The President reminded the legislature that "we must be prepared to move forward in the implementation of these rights."<sup>19</sup> Unfortunately, Roosevelt stopped short of providing further guidance as to how the Second Bill of Rights was to be realized and died just months after delivering this speech.<sup>20</sup> As a result, his proposal remained largely unknown within the United States with the public never benefitting from Roosevelt's grand designs.<sup>21</sup>

However, the Second Bill of Rights did have extraordinary influence internationally. The rights espoused by Roosevelt played a major role in the Universal Declaration of Human Rights (also "UDHR"), finalized in 1948 under the leadership of Eleanor Roosevelt.<sup>22</sup> The Universal Declaration proclaims that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness,

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<sup>18</sup> *Id* at 207-208

<sup>19</sup> *Id* at 208

<sup>20</sup> *Id* at 209

<sup>21</sup> *Id*

<sup>22</sup> *Id* at 210

disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>23</sup> The Declaration also provides a right to education and social security.<sup>24</sup> It also proclaims that everyone "has a right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."<sup>25</sup>

By virtue of its effect on the UDHR, the Second Bill has influenced dozens of constitutions throughout the world. In one form or another, it can be found in countless political and legal documents throughout the world, some examples of which will be discussed herein.<sup>26</sup>

Even so, the ironic fact that America’s Second Bill of Rights is a blueprint for other countries’ constitutions yet remains shy of constitutional significance in the United States is no coincidence.

## II. Positive Constitutional Rights as Distinguished From Negative Constitutional Rights

The basic distinction between positive and negative constitutional rights is not complicated. Constitutional rights that identify activities the government must do are positive rights, while constitutional rights that outline activities the government cannot do are negative rights.<sup>27</sup>

With positive rights, the government must take a hands-on approach to ensure that guaranteed positive rights are accessible to the rights-holders.<sup>28</sup> Positive rights therefore place a heavy burden on the government by requiring that resources be allocated in specific ways, and

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<sup>23</sup> *Id* at 209-210

<sup>24</sup> *Id* at 210

<sup>25</sup> *Id*

<sup>26</sup> *Id*

<sup>27</sup> *Positive and Negative Rights*, University of Alberta Law Foundation, Available from <http://www.law.ualberta.ca/centres/ccs/keywords/?id=73>

<sup>28</sup> *Id*

with limited flexibility.<sup>29</sup> Meanwhile, negative rights require that the government refrain from acting in certain ways; governments can respect individuals' negative rights simply by doing nothing at all.<sup>30</sup>

#### A. Implementation

For the purposes of this essay, the constitutional rights of people in the countries selected for analysis are derivative of each country's respective constitution. Accordingly, each nation chosen for analysis promises positive rights to its people vis-à-vis one of two methods.

Some countries expressly enumerate positive constitutional rights directly in their constitutions.<sup>31</sup> When this is the case, one needs to look no further than the plain language of the constitution itself for the source of positive rights.

Positive rights can also be granted via adherence to international laws and treaties and thereby implied by the constitution.<sup>32</sup> Countries preferring this approach do not expressly promise positive rights in their constitutions. Instead, they refer citizens to a separate body of law that has been ratified by the government, the relevant rights of which thereby apply to the public.

Here, it is important to identify the significant distinction between implied rights in the international constitutional sense and implied constitutional rights as they are traditionally understood in the United States. The Supreme Court has ruled on many occasions that citizens themselves have positive rights not based on express language but on the implied meaning of

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<sup>29</sup> *Id*

<sup>30</sup> *Id*

<sup>31</sup> See Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 Drake L. Rev. at 210 for just a few examples of countries with expressly enumerated positive rights.

<sup>32</sup> See Article 22 of Kosovo's Constitution [Direct Applicability of International Agreements] for that country's broad commitment to guaranteeing human rights by way of international agreements and instruments.

words or phrases in the Constitution.<sup>33</sup> For instance, the term “Liberty”, which the courts have understood to guarantee a right to marital privacy and abortion, among other things, is a good example.<sup>34</sup> However, American jurisprudence associated with implied constitutional rights is consistent with the principle of negative rights in that substantively, such rights do not translate to a requirement that government do things *for* people. It merely means the government may not unconstitutionally encumber the public’s right to exercise those implied rights. On the other hand, the context discussed in this essay deals with the affirmative obligations of a nation’s government to do or provide something for the public based on the implied meaning of a word or phrase found within that country’s constitution.

B. The International Bill of Rights as the Primary Source of Positive Constitutional Rights in Today’s Global Community

The worldwide contemporary movement for positive constitutional rights began with the United Nations Charter.<sup>35</sup> Relevant portions of Article I of the Charter shed light on the very purpose of the United Nation’s existence.<sup>36</sup> The language paints a clear picture of the theory behind positive constitutional rights within the international community of nations. Specifically, Section Three explains that the point of the United Nations is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian

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<sup>33</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973) & progenies for detailed discussion chronicling implied right to privacy under the penumbras of liberty, notwithstanding the fact that the word “privacy” cannot be found in the constitution.

<sup>34</sup> See *Griswold* 381 U.S. 479 at 486 (Goldberg, Brennan, C.J., concurring) - “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. “

<sup>35</sup> See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 31 December 2012]

<sup>36</sup> See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Chapter I: Article 1: The Purposes of the United Nations, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 31 December 2012]



character” and to promote and encourage “respect for human rights and fundamental freedoms for all.”<sup>37</sup>

For countries first drafting or revising their constitutions with the intent of providing their people with positive rights, the UN Charter provided important guiding principles. However, the Charter had at least one significant weakness.<sup>38</sup> It imposed no concrete obligations whatsoever on signees.<sup>39</sup> Without question, the Charter alone was inadequate for nations interested in providing the public with more in the constitution than vague ideas reduced to writing. As such, attention now turns to a trio of subsequent documents that, in conjunction with the UN Charter, constitute the full International Bill of Rights.<sup>40</sup>

The first of these writings, the Universal Declaration of Human Rights, has been addressed and thus demands no additional discussion.<sup>41</sup>

The remaining components of the International Bill of Rights can most easily be recalled as the Covenants. As a point of clarification, it is important to remember in any discussion of the Covenants that, unlike the Universal Declaration of Human Rights, they will apply only to those states that ratify them.<sup>42</sup> The Covenants, moreover, can be ratified with reservations and a state can ratify either without accepting provisions for international implementation apart from simple reporting requirements.<sup>43</sup>

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<sup>37</sup> See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Chapter I: Article 1(3), available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 31 December 2012]

<sup>38</sup> See John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 Wm. & Mary L. Rev. 527 (1976).

<sup>39</sup> *Id*

<sup>40</sup> *Id*

<sup>41</sup> See pages 11-13 supra.

<sup>42</sup> See John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 Wm. & Mary L. Rev. at 533 (1976).

<sup>43</sup> *Id*

The International Covenant on Civil and Political Rights (hereafter “ICCPR”) expands on language found in the UDH. The ICCPR promises “freedom from fear and want, universal economic, social, and cultural rights”, “universal respect for human rights and freedoms”, as well as other guarantees similar to those expounded on in the UDH<sup>44</sup>.

In 1992, the United States Senate ratified the ICCPR.<sup>45</sup> However, the Senate’s ratification, with five reservations, five understandings, and four declarations, was largely symbolic.<sup>46</sup> The legislature made as much rather unambiguous. Included in the Senate’s ratification was the declaration that “the provisions of Article 1 through 27 of the Covenant are not self-executing”<sup>47</sup>, and in a Senate Executive Report stated that the declaration was meant to “clarify that the Covenant will not create a private cause of action in U.S. Courts.”<sup>48</sup> Of course, where a treaty or covenant is not self-executing, and where Congress has not acted to implement the agreement by way of legislation, there is no private right of action within the U.S. judicial system.<sup>49</sup> Thus, while the ICCPR may be binding upon the United States as a matter of international law, it does not represent American domestic law.

The final work that comprises the International Bill of Rights is the International Covenant on Economic, Social and Cultural Rights (hereafter “ICESCR”). The ICESCR distinguishes itself from the aforementioned bodies of work in two significant ways.

First, the document promises far more in terms of positive rights than both its counterparts. Specifically, the ICESCR insists that everyone “has the right to work, the right to

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<sup>44</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>45</sup> “U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights (S.R. 4781-01).” Congressional Record 138 (April 2, 1992)

<sup>46</sup> *Id*

<sup>47</sup> *Id*

<sup>48</sup> S. Exec. Rep. No. 102-23 (1992), reprinted in 31 I.L.M. 645, 658- 659

<sup>49</sup> *Fujii v. State* 38 Cal.2d 718, 242 P.2d 617 (1952)

wages ensuring a decent living, the right to an adequate standard of living for himself and his family, adequate food, clothing and housing, the right to be free from hunger, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to free education”, and even “the right to take part in cultural life and enjoy the benefits of scientific progress.”<sup>50</sup>

The second noteworthy difference is that the ICESCR compels governments to make good on the rights mentioned above. The text requires that every party to the covenant “undertake steps to the maximum of its available resources to achieve progressively the full realization of the rights in this treaty” because “everyone is entitled” to these rights.<sup>51</sup> The ICESCR casts the positive rights it promises into permanency by warning that “no person, group or government has the right to destroy any of these rights.”<sup>52</sup>

Unlike the ICCPR, the United States has not even gone so far as to ratify the ICESCR, with reservations or without. The U.S. did place its signature on the covenant during the Carter Administration but ever since has not taken sufficient steps to implement the agreement into law.<sup>53</sup> At least one notable expert in the field has traced the U.S.’s lack of enthusiasm in ratifying the agreement to an apparent conflict with the U.S. constitution.<sup>54</sup>

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<sup>50</sup> See Articles 6, 7, 11, 13 & 15 of ICESCR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967)

<sup>51</sup> *Id* at Articles 2 and 5

<sup>52</sup> *Id*

<sup>53</sup> "International Covenant on Economic, Social and Cultural Rights, United Nations, New York (UNTS 3 and 3 – United States a Signatory on 5 Oct 1977), Available from <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>

<sup>54</sup> See Louis Henkin’s piece arguing that the United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution, that the United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice, that the United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation of application of human rights conventions and that Every human rights treaty to

### III. Comparative Studies

To take the theoretical analysis to task, the following segment analyzes several countries that have undertaken the practice of providing positive rights to their people vis-à-vis their national constitutions. For every country selected, a significant positive right will be identified, how that country implements that right will be explained, and significant problems associated with that implementation will be discussed.

#### A. South Africa and Housing

South Africa is a nation steadfast in its commitment to provide positive constitutional rights on a grand scale.<sup>55</sup> The positive constitutional right of the people to housing is studied here. First, an abridged historical anecdote is offered to explain South Africa's near instantaneous transition from a de jure segregationist government to one that drafted what experts have called "the most admirable constitution in the history of the world."<sup>56</sup> The South Africa study concludes with statistical evidence about the country's current state of affairs showing the relative impossibility of providing the rights it has expressly promised.

Infamously, South Africa is a unique case compared to the other international studies in this article. During South Africa's apartheid regime, the government instituted strict housing laws based on racial division.<sup>57</sup> Then, government assistance in housing was limited mostly to

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which the United States adheres should be subject to a 'federalism clause' so that the United States could leave implementation of the convention largely to the states at Louis Henkin, Editorial Comments - *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341 (1995).

<sup>55</sup> See *Government of the Republic of South Africa v Grootboom*, a landmark South African Constitutional Court case holding in part that the state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.

<sup>56</sup> See Cass Sunstein's *Designing Democracy: What Constitutions Do* § 10 (2001).

<sup>57</sup> See Anita Venter & Lochner Marais, *The Neo-Liberal Facade: Re-interpreting the South African Housing Policy from a Welfare State Perspective*, U. Free State; South Africa Urban Dynamics & Housing Change at 372 (2010).

the white population while black population groups were encouraged to invest in specific geographical areas set aside for them by the government.<sup>58</sup> Notwithstanding the state's policies, considerable portions of the black population migrated to white-majority cities and housed themselves in ad-hoc settlements on the outskirts of these towns.<sup>59</sup> The government's failure to accommodate these settlements in conjunction with the widespread unpopularity of apartheid gave rise to significant political unrest and socio-economic consequences.<sup>60</sup> In the years following, racially motivated housing laws began to soften and by 1994, South Africa held its first democratic elections.<sup>61</sup> South Africa's new constitution, completed in 1996, was specifically authored with the aim of reversing some of the disastrous effects of apartheid.<sup>62</sup>

Clearly, the merits of South Africa's movement toward a system of significant positive rights are difficult to disagree with given the country's unfortunate history. For that reason, policy debate over South Africa's position on positive rights is best left for another article. Instead, critique will be in the form of data demonstrating how promises have not been kept and how little can be done to correct this.

The South African Constitution explicitly guarantees the right to adequate housing and actually compels the government to take "reasonable steps" to achieve realization of this

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<sup>58</sup> *See Id.*

<sup>59</sup> *See Id.*

<sup>60</sup> *See Id.*

<sup>61</sup> *See Id.*

<sup>62</sup> *See* Justice Richard J. Goldstone, *The South African Bill of Rights*, 32 *Tex. Int'l L.J.* 451 (1997) for a lengthy discussion on the Constitutional Court of South Africa's support for the new constitution due to South Africa's past as that of "a deeply divided society characterized by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."

directive.<sup>63,64</sup> The Constitution even goes so far as to preclude the practice of eviction except under very narrow circumstances.<sup>65</sup> In theory, the South African government should have all people housed in respectable quarters, more likely than not be advocating against evicting those who cannot pay their own housing expenses, and should be doing everything “reasonable” to extend these comforts to those who are not enjoying them. In practice however, this is far from the case.

According to Geneva-based nongovernmental organization, the Centre on Housing Rights and Evictions, 7.5 million South Africans (roughly 18% of the population) lack access to *adequate*<sup>66</sup> housing in South Africa.<sup>67</sup> Many with homes of their own in the technical sense remain vulnerable, calling into question the government’s understanding of the phrase “adequate.” Millions of South Africans not included in the figure above live in small, poorly ventilated, poorly insulated shacks built on informal settlements.<sup>68</sup> The plight of those without a home, adequate or otherwise, seemingly in blatant violation of a strict originalist’s interpretation of the South African constitution, is even worse. State-sponsored shelters for the homeless are

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<sup>63</sup> See Constitution of the Republic of South Africa, Act 26, 1 of 1996 - “Everyone has the right to have access to adequate housing” and Act 26, 2- “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”

<sup>64</sup> See *Id* at Sections 7 & 8- “The government has the obligation to respect, to protect and to realize the right to adequate housing, which applies to the executive, legislative and judicial branches and to all levels of government (local, provincial and national).”

<sup>65</sup> 3. See *Id* at Act 26, 3 - “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” and Act 28, 1(c)- “Every child has the right...to shelter;”

<sup>66</sup> Emphasis added

<sup>67</sup> See IRIN News, humanitarian news and analysis, South Africa: Winter freeze highlights homeless crisis (2007), <http://www.irinnews.org/Report/72357/SOUTH-AFRICA-Winter-freeze-highlights-homeless-crisis>

<sup>68</sup> *Id*

regularly at capacity and “churches, mosques and hostels are often the only shelters available during winter.”<sup>69</sup>

Those rushing to South Africa’s defense for its failure to keep the express promises in its constitution are likely to point to the “reasonable steps” clause of Article 26.<sup>70</sup> The argument there, perhaps, is that the public simply ought be patient until the government determines what is reasonable. It seems however the even the South African government is at a loss. To its credit, they “have been on a furious building spree” to provide enough housing since apartheid fell.<sup>71</sup> Nonetheless, the housing shortfall in South Africa stands at an estimated 2.5 million homes and counting.<sup>72</sup> This difference alone is cause enough for concern over whether South Africa can ever provide for its people what its constitution classifies as an express right. The fact is that the disparity seems quite likely to get worse before it gets better. At least one-third of South Africans live in poverty and unofficial estimates put the number of those unemployed at close to 40 percent.<sup>73</sup>

Admittedly, South Africa’s intentions are commendable given its troubling past. However, sections of South Africa’s Constitution that have been championed all over the world are being relegated by those who led the way to mere prose. Simply, the government has promised more than it can provide.

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<sup>69</sup> *Id*

<sup>70</sup> See Constitution of the Republic of South Africa, Act 26, 1 of 1996 for clause requiring government to take reasonable measures to achieve adequate housing for all

<sup>71</sup> See IRIN News, humanitarian news and analysis, South Africa: Winter freeze highlights homeless crisis (2007).

<sup>72</sup> *Id*

<sup>73</sup> *Id*

## B. Brazil and Healthcare

In Brazil, the right of the public “to procure free universal health assistance from public as well as private providers” is express in the constitution.<sup>74</sup>

As a vehicle to implement the positive right to healthcare, the Brazilian Government developed the Unified Health System (hereafter “SUS”<sup>75</sup>), a federal law, in concert with the constitution. This law is the blueprint for how the new healthcare system is put into practice. Prior to the SUS, the healthcare model in Brazil roughly resembled the United States healthcare system.<sup>76</sup> Brazilians were separated into three categories: those who could pay for private health care services, those who had the right to public health care as dependants of government aide programs, and those who did not qualify for either category.<sup>77</sup> Under the SUS, nearly every hospital in Brazil, public, private, or university, is mandated to abide by the constitutional right of access to health care.<sup>78</sup> With the implementation of the SUS system, the number of beneficiaries soared from 30 million to 190 million people.<sup>79</sup>

Despite the constitutional injunction, an increasing majority of people with sufficient financial means continue to seek private healthcare.<sup>80</sup> Around “60% of all spending on health care in Brazil is private—a higher share than in most other Latin American countries, and higher even than in the United States.”<sup>81</sup> Worry over increased government funding of the program does

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<sup>74</sup> Braz. Const, Title 8, Art. 194 (1988).

<sup>75</sup> *Note*: “SUS” is the English acronym for Brazil’s spelling of “Unified Health System” in Portuguese.

<sup>76</sup> *Note*: Pre-Affordable Care Act of 2010.

<sup>77</sup> Brazilian Ministry of Health. *United Health Service (SUS)* Brasilia: Body of the Federal Executive Power, 2010, Available from <http://www.brasil.gov.br/sobre/health/service>.

<sup>78</sup> *Id*

<sup>79</sup> *Id*

<sup>80</sup> *See Health care in Brazil: An injection of reality, The Economist*, (Jun. 30, 2011) Available from <http://www.economist.com/node/21524879>

<sup>81</sup> *Id*



not seem to have permeated the Brazilian federal budget. Apparently, “spending on SUS accounts for just 3.1% of GDP.”<sup>82</sup> Not surprisingly, Brazilians are beginning to worry. Pollsters say that since 2007, the problems of national health care have displaced the economy to rise to the top of voters' concerns.<sup>83</sup>

Particular financial concerns over spending bolster evidence of the SUS's considerable inadequacies. Only recently were drugs to treat diabetes and heart disease added to the list of those paid for by SUS.<sup>84</sup> A recent survey of Brazilian healthcare argued that the “SUS gets poor value for the money it spends on drugs because too much goes to complying with court orders granted to patients who use the constitution's lofty promises to demand expensive treatments not automatically covered by the system.”<sup>85</sup> The World Bank highlights Brazil's difficulties prioritizing how and where healthcare funding is to be spent. The Bank states that “too much of the budget...goes to hospitals rather than the Family Health Programme” and that “turning more public hospitals over to non-profit bodies, with freedom to hire and fire and link pay to performance, would increase efficiency.”<sup>86</sup> Finally, Brazilian academics are already making the case for significant revisions to a system in effect for little over twenty years. Professor Bento Cardoso of Insper, a business school in São Paulo that offers an MBA in health-care administration, argues that “the state should pay for high-tech and emergency care for all, but

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<sup>82</sup> *Id*

<sup>83</sup> *Id*

<sup>84</sup> *Id*

<sup>85</sup> Sonia Fleury, *Brazil's health-care reform: Social movements and civil society*, 377, 9779 *The Lancet* at 1724 (2011).

<sup>86</sup> *Id* at 1725

should restrict primary provision to those who cannot afford health insurance.”<sup>87</sup> Cardoso admits that “we (Brazil) were very idealistic in 1988.”<sup>88</sup>

Taking into account the foregoing, it is difficult to argue that Brazil’s aspiration to provide free healthcare to all its citizens is not rife with major deficiencies.

### C. El Salvador and Education

The Republic of El Salvador expressly enumerates the positive right to education directly in its constitution. Section Three of El Salvador’s Constitution is entirely dedicated to the people’s positive right to free education.<sup>89</sup> Article 53 of that Section qualifies that “the right to an education...is inherent to the human person” and as a result, the “preservation, promotion, and dissemination of culture is an obligation of the State.”<sup>90</sup> Article 55 specifies that the state’s objectives in providing free education for all range from “the development of spiritual personality” to “propitiating the unity of the people of Central America.”<sup>91</sup> Article 56 is more substantive still, guaranteeing that “all inhabitants of the Republic have the right and the duty to receive free education that will train them to perform as useful citizens.”<sup>92</sup>

Should printed words alone suffice to indicate the efficacy of El Salvador’s positive right to education, there would be a strong argument that El Salvador should rank among the world’s best in terms of its educational competitiveness. Unfortunately, statistics across numerous levels tell a very different story.

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<sup>87</sup> See Cardoso’s interview in *Health care in Brazil: An injection of reality*, *The Economist*, (Jun. 30, 2011), Available from <http://www.economist.com/node/21524879>

<sup>88</sup> *Id*

<sup>89</sup> Const. Pol. Repub. El. Sal. §3 (2003)

<sup>90</sup> *Id* at §3, Art. 53

<sup>91</sup> *Id* at Art. 55

<sup>92</sup> *Id* at Art. 56

For starters, a child in El Salvador's is only required by law to be enrolled in school for 9 years.<sup>93</sup> This figure places El Salvador a paltry 80<sup>th</sup> out of 110 countries quizzed in the same category.<sup>94</sup> Despite its admitted obligation to educating all El Salvadorians in a manner that produces "useful citizens", the government spends only about 2.9% of its GDP on education.<sup>95</sup> This figure is good for 110<sup>th</sup> of 132 countries surveyed.<sup>96</sup> Data also shows a significant disadvantage for female students in terms of education that, according to the constitution, is intended to be equal for all inhabitants. The female enrollment share in primary school is roughly 48%.<sup>97</sup> There are 112 countries that outrank El Salvador here.<sup>98</sup> Meanwhile, the general adult literacy rate is equally alarming. Only three-fourths of adults in El Salvador can read and understand a short, simple statement in their every day life.<sup>99</sup>

Given the objective data above, El Salvador has significant work to do in order to reach the global community's upper echelon in terms of education. As a final point of reference, it should be noted that countries such as the United Kingdom, Singapore, Hong Kong, and New Zealand for example all have in common the prohibition against government preventing equal access to education.<sup>100</sup> All of these nations rank in the top 8 in the world in overall education attainment yet in none of these countries is there an express or even an implied positive

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<sup>93</sup> World Bank (2010): World Development Indicators (Edition: Enterprise Survey 2010), Available from <http://data.worldbank.org/country/el-salvador>

<sup>94</sup> *Id*

<sup>95</sup> *Id*

<sup>96</sup> *Id*

<sup>97</sup> *Id*

<sup>98</sup> *Id*

<sup>99</sup> *Id*

<sup>100</sup> See Pearson's Index of Cognitive Skills and Educational Attainment, The Economist's Intelligence Unit, (2013), Available from <http://thelearningcurve.pearson.com/index/index-ranking>

constitutional right of the people to actually be provided education by the federal government.<sup>101</sup>

On the other hand, El Salvador fails to break the top 40 in overall education attainment.

#### D. Kosovo and Human Rights

Kosovo presents a case unlike those previously discussed in terms of how its positive rights are recognized. Instead of expressly providing positive rights in its constitution, Kosovo grants positive rights to its people by way of the immediate implementation of international laws and treaties. Article 21 of Kosovo's Constitution "guarantees human rights" as provided by the document.<sup>102</sup> Article 22 elaborates on Article 21 by implicating several international agreements and instruments, each of which are the supreme law of the land according to the Constitution.<sup>103</sup> Among them, Kosovo places special emphasis on the government's promise to provide the substantial human rights prescribed by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>104105</sup>

In spite of Kosovo's systematic textual pursuit of human rights as provided by the government, the still-new nation has struggled immensely to keep its word.

The Organization for Security Cooperation in Europe (OSCE) Mission in Kosovo just issued a landmark report on the implementation of the aforementioned constitutional provisions affecting the human rights in the country.<sup>106</sup> According to the report, the extent to which core

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<sup>101</sup> *Id*

<sup>102</sup> Constitution of the Republic of Kosovo, Article 21, 9 April 2008

<sup>103</sup> *Id* at Article 22 – "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions."

<sup>104</sup> *Id* at (1) & (3)

<sup>105</sup> *Note*: The UDHR and ICCPR are discussed in detail in B. The International Bill of Rights as the Primary Source of Positive Constitutional Rights in Today's Global Community of this essay.

<sup>106</sup> See Organization for Security and Co-operation in Europe MISSION IN KOSOVO: *Implementation Measures for Legislation Impacting Human Rights in Kosovo*, 3-28, September 2012.

legislation for the protection of human rights were being implemented was key to ensuring the protection of a wide range of human rights and civil liberties in areas such as gender equality, anti-discrimination, the rights of communities and their members, language rights and protection against domestic violence.<sup>107</sup> Of course, full protection could be ensured only if the respective legal framework was implemented through subsidiary legislation and programs and through the establishment of specific bodies.<sup>108</sup> The OSCE Mission found that in order to fully implement the existing laws, 'the Kosovo government must take specific and concrete measures as provided for by the legal framework'.<sup>109</sup> In addition, the report expressed the concern of the monitoring body that implementation was not carried out similarly in all areas and urged the institutions for more serious commitment in order to address the matters at hand.<sup>110</sup> Nevertheless, the report assessed that the implementation of the laws had not been fully realized and more implementing measures needed to be undertaken, especially with regard to language laws, laws against domestic violence, laws on the protection of the rights of communities and their members.<sup>111</sup> Moreover, the report found that certain implementing institutions displayed complete lack of respect for human rights laws altogether while some implementation strategies remain stalled by bureaucratic red tape.<sup>112</sup> Last but not least, the OSCE mission report recommended that Kosovo 'take serious steps to oversee the implementation of laws in a comprehensive manner' including

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<sup>107</sup> *Id* at 5

<sup>108</sup> *Id*

<sup>109</sup> *Id* at 12

<sup>110</sup> *Id* at 4

<sup>111</sup> *Id* at 17-18

<sup>112</sup> *Id*

a strategy for the protection of rights of all communities and an independent review process to oversee compliance with the Constitution.<sup>113</sup>

Kosovo is yet another example of a country that has promised positive rights with insufficient means of carrying them forward. To be fair, this section would be incomplete without acknowledging Kosovo's war torn past.<sup>114</sup> As a country slowly emerging from conflict whose independence is but a half-decade old, perhaps there is time yet for Kosovo to implement the recommendations of the OSCE. Doing so would go great lengths toward ultimately providing Kosovars the affirmative protections its constitution guarantees. As of now though, that remains to be seen.

#### IV. Argument Against Movement Toward Positive Rights in the United States

According to the Center for Economic and Social Rights (CESR), "the United States stands virtually alone in the world as an opponent of economic and social rights," and that this is especially troubling in the face of calls for government austerity, which threatens the "inherent human rights" of the poor to public assistance.<sup>115</sup>

It is indisputable that many foreign systems provide positive rights, including housing, healthcare, education, and human rights, which the CESR defines as "essential to human dignity."<sup>116</sup> However, so long as the aim of the United States Constitution is to limit the government, the absence of economic and social rights is in accord with the history and tradition

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<sup>113</sup> *Id* at 24-28

<sup>114</sup> See Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 Am. U. Int'l L. Rev. 765-812 (2002) for a review of the War in Kosovo from a legal standpoint

<sup>115</sup> See the Center for Economic and Social Rights' case study of the United States, Available from <http://www.cesr.org/section.php?id=26>

<sup>116</sup> *Id*

that has made the U.S. what it is today.<sup>117</sup> Positive rights empower governments to grow without limit, and to make tradeoffs between rights.<sup>118</sup> If America wants limited government and secure rights, it must continue to reject economic and social rights.<sup>119</sup> The Constitution limits the federal government through its system of enumerated powers: every action or policy of the government must be grounded in a power specified in the Constitution.<sup>120</sup> There are only a set number of aims that the government can constitutionally pursue, like national defense and orderly interstate commerce.<sup>121</sup> The Constitution does not provide a right to everything “essential to human dignity,” as CESR puts it.<sup>122</sup> Instead, it narrows the scope of the federal government to those things which the Framers thought reasonably necessary for national life, and that they thought only the federal government could provide. The Framers deemed this approach essential for “promoting the general welfare,” and “securing the blessings of liberty.”<sup>123</sup>

Put simply, trying to secure positive rights is incompatible with the idea of enumerated powers as there is no limit to what sorts of material things could further human satisfaction.<sup>124</sup> If housing, why not a condo? If healthcare, why not plastic surgery? If education, why not law school? Once the right to the continuous improvement of living conditions is guaranteed, then the government has unlimited power to define and pursue “improvement” in “living

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<sup>117</sup> See Matt Cavedon, *Just Say No to Positive Rights*, The Bell Towers, September 17, 2012, Available from <http://thebelltowers.com/2012/09/17/just-say-no-to-positive-rights/>

<sup>118</sup> *Id*

<sup>119</sup> *Id*

<sup>120</sup> *Id*

<sup>121</sup> *Id*

<sup>122</sup> See CESR case study of the U.S., Available from <http://www.cesr.org/section.php?id=26>

<sup>123</sup> See U.S. Const., pmb1.

<sup>124</sup> See Matt Cavedon, *Just Say No to Positive Rights*, The Bell Towers, September 17, 2012, Available from <http://thebelltowers.com/2012/09/17/just-say-no-to-positive-rights/>

conditions.”<sup>125</sup> The Constitution stops serving as a limit on government power and starts becoming an excuse for expanding it.<sup>126</sup>

Once this point is reached, positive rights begin to lose their bite because they stop serving as clear demands that people can make to the government.<sup>127</sup> Imagine, for example, that the U.S. Constitution went the way of South Africa and guaranteed rights to housing. One person would claim the right to a home. The government could then go out to build public housing.<sup>128</sup> First, though, it would need land.<sup>129</sup> It would get it by using eminent domain; surely, securing people’s rights is a public use of property.<sup>130</sup> What would become of the previous landowner’s property right? It would be swept away.<sup>131</sup> In the end, no one really has a right at all.<sup>132</sup> The positive rights only serve as guideposts for government power, not limits on it.<sup>133</sup> The Constitution is no longer limiting government power, as much as giving the government the power to decide how to balance people’s “rights.”<sup>134</sup> As we have seen with other countries that have attempted to afford these rights, they become mere promises that citizens can hope government will find the means and the desire to fulfill.<sup>135</sup>

#### V. Conclusion

The American constitution may be devoid of all the positive rights that are becoming commonplace in contemporary constitutions across the world. However, the American

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<sup>125</sup> *Id*

<sup>126</sup> *Id*

<sup>127</sup> *Id*

<sup>128</sup> *Id*

<sup>129</sup> *Id*

<sup>130</sup> *Id*

<sup>131</sup> *Id*

<sup>132</sup> *Id*

<sup>133</sup> *Id*

<sup>134</sup> *Id*

<sup>135</sup> *Id*



constitution carries the torch left burning by the Framers - it limits government power and secures negative rights fundamental to our system of democratic governance. In the end, this remains plenty good enough.