

HOW THE TRUMP ADMINISTRATION'S EFFORTS TO REDEFINE HUMAN RIGHTS THREATEN ECONOMIC, SOCIAL, AND RACIAL JUSTICE

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ABSTRACT

In July of 2019, the United States established a federal advisory commission that is poised to undercut economic and social rights protections by narrowly re-defining human rights to exclude them. Limiting the interpretation of human rights in this way has profound implications for human rights norms and for advocates. This limitation undercuts the reality that civil and political rights and economic and social rights (ESRs) are inextricably linked. Interpreting human rights to exclude the full array of human rights has the practical impact of restricting the exercise of true freedom to a privileged few. It is a move that is antithetical to bedrock international human rights principles and longstanding human rights struggles. This piece emphasizes the centrality of economic and social rights to human rights and highlights how efforts that undercut economic and social rights threaten to harm communities historically marginalized and discriminated against, and to further entrench inequality. Our purpose is to contrast the full panoply of human rights found in the UDHR and subsequent human rights agreements with the narrow conceptualization of human rights likely to be espoused by the Commission, and to consider the implications of this narrowing. Specifically, we will highlight how a formal institution that is likely to promote a circumscribed vision of human rights will perpetuate a system where true freedom is enjoyed only by a privileged few—those who can afford it.

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INTRODUCTION

The most important area for which the law furnishes no protection for Negroes is in that of economic activity. And it is perhaps in this failing for which the government must be most criticized since the economic adversity of most Negroes has prevented them in large measure from securing for themselves the education and protection which the state has obligated itself to provide but has refused to furnish. . . . Governmental non-action in this area, however, is partly determinative of the present legal and social status of the Negro.

—*An Appeal to the World, NAACP Petition to the United Nations (1947)*¹

[A]fter the Cold War ended, many human-rights advocates turned their energy to new categories of rights. These rights often sound noble and just. But when politicians and bureaucrats create new rights, they blur the distinction between unalienable rights and ad hoc rights granted by governments. . . . The commission's mission isn't to discover new principles but to ground our discussion of human rights in America's founding principles.

—*U.S. Secretary of State, Michael Pompeo (2019)*²

In July of 2019, the United States established a federal advisory commission that is poised to undercut economic and social rights protections by narrowly re-defining human rights to exclude them. Limiting the interpretation of human rights in this way has profound implications for human rights norms and for advocates. This limitation undercuts the reality that civil and political rights and economic and social rights (ESRs) are inextricably linked. Interpreting human rights to exclude the full array of human rights has the practical impact of restricting the exercise of true freedom to a privileged few. It is a move that is antithetical to bedrock international human rights principles and longstanding human rights struggles.

Securing economic and social rights protections has been central to the modern struggle for racial justice by African Americans—one of the longest standing human rights struggles in the United States. In 1947, before the adoption of the Universal Declaration of Human Rights (UDHR), the National

1. NAACP, AN APPEAL TO THE WORLD 56 (1947).

2. Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, WALL ST. J., Jul. 7, 2019, <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448> (on file with the *Columbia Human Rights Law Review*).

Association for the Advancement of Colored Peoples (NAACP) submitted one of the very first petitions to the United Nations seeking to challenge the laws and policies then perpetuating inequality and discrimination and emphasizing that economic justice and social well-being were fundamental in changing the paradigm of vast racial inequality. Inequality could not be addressed without economic and social rights.

The United States, in partnership with global leaders, played a key role in articulating the UDHR as a foundational vision of human rights, one which recognizes that civil and political and economic and social rights must be realized together to ensure dignity and equality in practice. While the U.S. federal government has continually resisted the legal recognition of economic and social rights domestically, these rights comprise a core component of the international human rights corpus.³ Ongoing domestic struggles for racial justice illustrate the vital nature of that nexus, and highlight why prioritizing a particular category of rights subverts many of the aims of the human rights framework.

This piece emphasizes the centrality of economic and social rights to human rights and highlights how efforts that undercut economic and social rights threaten to harm communities historically marginalized and discriminated against, and to further entrench inequality. Our purpose is to contrast the full panoply of human rights found in the UDHR and subsequent human rights agreements with the narrow conceptualization of human rights likely to be espoused by the Commission,⁴ and to consider the implications of this narrowing. Specifically, we will highlight how a formal institution that is likely to promote a circumscribed vision of human rights will perpetuate a system where true freedom is enjoyed only by a privileged few—those who can afford it.

True freedom exists where individuals have the ability to participate in society on an equal basis, to influence decisions, and can enjoy to the conditions

3. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 22–27 (Dec. 10, 1948); International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195, 218 (entered into force Jan. 4, 1969); The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *adopted*, 1249 U.N.T.S. 13, (entered into force Sept. 3, 1981) (recognizing the right to sanitation specifically for rural women). While our focus here is on the U.N. System, it bears mentioning that economic and social rights are protected in regional human rights systems, including through The African Charter on Human and Peoples' Rights (articles 15–17); The European Social Charter (articles 1–14; 31); and The Inter-American Protocol of San Salvador (which includes health and access to basic services in articles 10 and 11).

4. See *infra* Part III.

necessary to a life with dignity.⁵ Civil and political rights are necessary but insufficient. The ability to live free from discrimination and torture are part of the foundation. But those rights alone fall short. A narrow vision of human rights—one that places the onus of securing an adequate standard of living solely on individuals and defines human rights primarily as requiring a lack of government intervention—leads to the result that true freedom eludes many. This narrow vision requires a willful denial of what causes and perpetuates poverty.

While the Unalienable Rights Commission is an advisory body, its positions and recommendations will inform United States foreign policy and shape the domestic human rights landscape as well. U.S. articulations of human rights can influence interpretations of human rights law, contribute to other governments' positions on (and implementation of) human rights, and impact the work of multilateral bodies. To contextualize these developments, Part I briefly introduces the Unalienable Rights Commission. Part II hones in on the fundamental interrelationship between economic and social rights and true freedom. It introduces core provisions of the UDHR that reflect this connection and draws from historical and ongoing struggles for racial justice in the United States. This section looks at current advocacy on the right to sanitation to illustrate the fundamental nature of economic and social rights. Part III concludes with a discussion of the potential harms posed by the Commission if the imputed ideology behind it proliferates. This Part highlights several ways the Commission could contribute to narrowing the contours of human rights protections, moving away from the aims the global framework was developed to help achieve.

I. THE UNALIENABLE RIGHTS COMMISSION—DESIGNED TO LIMIT ECONOMIC AND SOCIAL PROTECTIONS

In July 2019, U.S. Secretary of State Pompeo announced the establishment of a new Commission on Unalienable Rights.⁶ The stated purpose: “To provide . . . fresh thinking and propose . . . reforms of human rights

5. Our definition reflects the underlying notions of freedom reflected by A. Philip Randolph, a civil rights movement leader in 1942 when he stated that “[A] community is democratic only when the humblest and weakest person can enjoy the highest civil, economic, and social rights that the biggest and most powerful possess” and that engaging in a domestic “fight for economic, political, and social equality, thus becomes part of the global war for freedom.” A. PHILIP RANDOLPH, *WHY SHOULD WE MARCH?* (1942). This definition stands in stark contrast to a narrower vision of individual economic freedom, or freedom to be left alone. *See infra* notes 24–26 and accompanying text.

6. *See Remarks, Michael Pompeo, U.S. Secretary of State* (Jul. 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/> [<https://perma.cc/94A3-ND8P>].

discourse,”⁷ which will inform U.S. decisions related to foreign policy. The announcement sparked outcry from domestic social justice advocates, faith leaders, international human rights organizations, and former government officials.⁸

Opposition to the Commission has emphasized the opaque process that led to its creation, the narrow ideological orientation of Commissioners, and its redundancy.⁹ An entire bureau of the U.S. State Department already exists that “addresses the fundamental freedoms set forth in the founding documents of the United States and the complementary articles of the Universal Declaration of Human Rights and other global and regional commitments.”¹⁰

Significant criticism has also been levied against the Commission on substantive grounds. The overarching concern is that the Commission will provide official cover for the United States’ efforts to narrow human rights

7. Charter, *Department of State Commission on Unalienable Rights* (2019), <https://www.justsecurity.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf> [<https://perma.cc/4S6U-YPMB>]

8. See, e.g., *Letter from U.S. foreign policy, human rights, civil liberties, social justice, and faith leaders, experts, scholars, and organizations to Secretary of State Michael Pompeo*, HUMAN RIGHTS FIRST (Jul. 22, 2019), <https://www.humanrightsfirst.org/resource/coalition-letter-secretary-state-mike-pompeo-commission-unalienable-rights> [<https://perma.cc/U885-4XXN>] (summarizing highlights from collection of letters to Secretary Pompeo expressing disapproval at the creation of the Commission). See also Michael Posner, *Why a New Commission Could Undercut the U.S.’ Human Rights Efforts*, FORBES (June 11, 2019), <https://www.forbes.com/sites/michaelposner/2019/06/11/why-a-new-commission-could-hurt-undercut-the-state-departments-human-rights-efforts/#707c0eab337f> [<https://perma.cc/SC4K-2J8V>] (explaining how the Commission could potentially harm other ongoing State Department human rights programs); Conor Finnegan, *State Dept. Panel to Redefine Human Rights Based on ‘Natural Law and Natural Rights,’* ABC NEWS (May 31, 2019), <https://abcnews.go.com/Politics/state-dept-panel-redefine-human-rights-based-natural/story?id=63400485> [<https://perma.cc/W4AT-VA5G>] (explaining the Commission’s basic charter); Nahal Toosi, *State Department to Launch New Human Rights Panel Stressing ‘Natural Law,’* POLITICO (May 30, 2019), <https://www.politico.com/story/2019/05/30/human-rights-state-department-1348014> [<https://perma.cc/V3ZV-KT2S>] (highlighting the Commission’s focus on concepts of natural law).

9. See Toosi, *supra* note 8; Posner, *supra* note 8; see also *Letter from United States Senators to Secretary of State Mike Pompeo* (June 12, 2019), <https://www.foreign.senate.gov/imo/media/doc/06-12-19%20Unalienable%20rights%20commission%20letter%20signed.pdf> [<https://perma.cc/8XFC-LGA3>] (expressing concern about the potential human rights implications of the Commission’s work).

10. See Bureau of Democracy, Human Rights, and Labor, *About Us* (Aug. 1, 2019), <https://www.state.gov/about-us-bureau-of-democracy-human-rights-and-labor/> [<https://perma.cc/F5WF-LN64>]; see also *Letter from United States Senators, supra* note 9 (highlighting that “it is hard to envision what work the Department’s proposed Commission would conduct that DRL could not carry out”).

protections. The Trump Administration has already undercut global human rights norms through withdrawal from global institutions.¹¹ In the international arena, the Administration has stymied efforts to improve health by seeking to remove the terms “sexual and reproductive health and rights” from U.N. resolutions,¹² and by cutting funding critical to women’s health through the “Global Gag Rule.”¹³ The United States has also announced withdrawal from the Paris Agreement, risking further exacerbation of environmental and health risks.¹⁴ While the United States continues to allocate funding for U.S.AID development programs that support infrastructure abroad, including health, water, and sanitation projects, the Trump Administration has battled to reduce that funding.¹⁵

11. See, e.g., Carol Morello, *U.S. Withdraws from U.N. Human Rights Council over Perceived Bias Against Israel*, WASH. POST (Jun. 18, 2018), https://www.washingtonpost.com/world/national-security/us-expected-to-back-away-from-un-human-rights-council/2018/06/19/a49c2d0c-733c-11e8-b4b7-308400242c2e_story.html (on file with the *Columbia Human Rights Law Review*) (describing the Trump Administration decision to withdraw from the U.N. Human Rights Council); Ted Piccone, *U.S. Withdrawal from the U.N. Human Rights Council is “America Alone,”* BROOKINGS INST. (Jun. 20, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/06/20/u-s-withdrawal-from-u-n-human-rights-council-is-america-alone/> [<https://perma.cc/QX8D-8JPF>] (elaborating on the Trump Administration’s withdrawal from the U.N. Human Rights Council); Thomas Adamson, *U.S. and Israel Officially Withdraw from U.N.ESCO*, PBS NEWS (Jan. 1, 2019) <https://www.pbs.org/newshour/politics/u-s-and-israel-officially-withdraw-from-unesco> [<https://perma.cc/F2CA-MERL>] (describing the Trump Administration decision to withdraw from U.N.ESCO).

12. See, e.g., Jacqueline Howard, *Trump administration pushes U.N. to drop mentions of reproductive health from official documents*, CNN (Sep. 13, 2019), <https://www.cnn.com/2019/09/23/health/alex-azar-united-nations-universal-health-coverage-bn/index.html> [<https://perma.cc/4LMA-XW7P>] (describing the removal of language regarding reproductive health from U.N. documents).

13. See, e.g., INTERNATIONAL WOMEN’S HEALTH COALITION, *CRISIS IN CARE: YEAR TWO IMPACT OF TRUMP’S GLOBAL GAG RULE* (2019), (analyzing effects of the Trump Administration’s Global Gag Rule).

14. See, e.g., James McBride, *The Consequences of Leaving the Paris Agreement*, COUNCIL ON FOREIGN RELATIONS (June 1, 2017), https://www.cfr.org/backgrounder/consequences-leaving-paris-agreement?gclid=EAIaIQobChMI3-qaqYWD5QIVAmKGCh09DA9TEAAYBCAAEgLvUPD_BwE [<https://perma.cc/29YG-VK93>] (framing the potential environmental consequences of U.S. withdrawal from the Paris Agreement); Rick Duke, *Leaving the Paris Agreement Is a Bad Deal for the United States*, FOREIGN POL’Y (May 19, 2019), <https://foreignpolicy.com/2019/05/19/leaving-the-paris-agreement-is-a-bad-deal-for-the-united-states/> [<https://perma.cc/D3WN-ZY4C>] (explaining the foreign policy consequences of U.S. withdrawal from the Paris Agreement).

15. See, e.g., Adva Salvinger, *U.S. budget slashes global development funding, stresses burden sharing*, DEVEX (Mar. 12, 2019), <https://www.devex.com/news/us-budget-slashes-global-development-funding-stresses-burden-sharing-94464> [<https://perma.cc/M9W2-HUBX>] (“In addition to the proposed cuts, the budget repeatedly mentions the need for other countries to share the burden for funding various global

Domestically, the Administration has trampled on legal protections for health, housing, and most spheres of life, with a disproportionately negative impact on people of color. In August of this year alone, the federal government eviscerated protections against discrimination in housing¹⁶ and instituted new rules that penalize non-citizens who seek support for housing, health, and food.¹⁷ This comes on top of drastic federal cuts for funding to healthcare,¹⁸ housing,¹⁹ and education.²⁰

The Commission is particularly consequential because it signals an emboldened and official U.S. effort to literally redefine what “human rights” means—with long term implications at home and abroad.²¹

health and development priorities and pointed to aid being seen as a foreign policy tool.”); *Press Release: Congress Approves Final FY 19 Spending Bill, President Complains, But Said Likely to Sign Today*, MILLENNIUM WATER ALLIANCE (Feb. 15, 2019), <https://mwawater.org/advocacy/get-involved> [<https://perma.cc/X7EB-GQHL>] (“International Affairs, which includes U.S.AID, the Department of State, and the Millennium Challenge Corporation, got a total of \$56.1 billion, a slight increase over \$55.9 billion in FY 2018. This is another rebuke to the Administration’s three-year campaign to gut foreign assistance . . .”).

16. See Tracy Jan, *HUD Raises the Bar for Bringing Discrimination Claims*, WASH. POST (Aug. 16, 2019), <https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/> (on file with the *Columbia Human Rights Law Review*).

17. See Nermeen Arastu, *Trump’s Public Charge Rule is a Cover-up for Racism—with Disturbing Historical Origins*, NEWSWEEK (Aug. 21, 2019), <https://www.newsweek.com/trumps-public-charge-rule-cover-racism-disturbing-historical-origins-opinion-1455485> [<https://perma.cc/H2YE-E4LS>] (describing how the efforts to promulgate a new public charge rule fuel anti-immigrant sentiment and have been challenged as “xenophobic and racist”).

18. The Administration has sought to strike down provisions of the Affordable Care Act, raised healthcare premiums, removed penalties for companies that violate the individual mandate, and more recently, and allowed states to create significant conditions on Medicaid access. See Michael Hiltzik, *The 10 Worst Things Trump Has Done to Harm Your Healthcare*, L.A. TIMES (Aug. 20, 2019), <https://www.latimes.com/business/story/2019-08-20/ten-worst-trump-steps-on-healthcare> [<https://perma.cc/KQT9-785H>].

19. See, e.g., George Zornick, *How Trump Plans to Evict Poor Families From Public Housing*, NATION (Feb. 16, 2018), <https://www.thenation.com/article/how-trump-plans-to-evict-poor-families-from-public-housing/> [<https://perma.cc/7JFC-82K7>] (describing proposed cuts to the federal budget that would limit funding for affordable housing programs, particularly vouchers and lead to a likely increase in evictions from public housing).

20. See Adam Harris, *The Trump Administration Really Wants to Cut Education Funding. Congress Doesn’t*, ATLANTIC (Mar. 11, 2019), <https://www.theatlantic.com/education/archive/2019/03/trump-administration-would-cut-education-budget-again/584599/> (on file with the *Columbia Human Rights Law Review*); COLETON WHITAKER ET AL., CENTER FOR AMERICAN PROGRESS, *THE TRUMP ADMINISTRATION’S SLOW BUT STEADY UNDOING OF THE DEPARTMENT OF EDUCATION* (Nov. 20, 2017)

21. See *infra* Part III.

The Commission risks undermining economic and social protections by chipping away at the underlying normative basis of economic and social rights. From the outset, senior administration officials have emphasized that the Commission will consider the difference between “unalienable” and other kinds of rights: whether the rights to liberty or to be free from torture on the one hand are on the same level as the rights to water or other economic and social rights on the other.²² Secretary Pompeo expressed his own disdain for economic and social rights when announcing the Commission, referring to them as “ad hoc” rights.²³ The Commission launch has already perpetuated inaccurate portrayals of economic and social protections.²⁴ Even more significant is the motivating—and erroneous—belief that economic and social rights can be downgraded because if the government simply leaves individuals alone, societies will thrive. In simplest terms, the idea is that

state action or government control that interferes with individual autonomy limits economic freedom. . . . Some government action is necessary for the citizens of a nation to defend themselves and promote the evolution of civil society, but when government action rises above the minimal necessary level, it is likely infringing on someone’s economic or personal freedom.²⁵

22. See Matt Hadro, *New Commission Will Give ‘Critical Attention’ to Human Rights, Experts Say*, NAT’L. CATHOLIC REGISTER (Jul. 12, 2019), <http://www.ncregister.com/daily-news/new-commission-will-give-critical-attention-to-human-rights-experts-say> [<https://perma.cc/KDE5-GA34>] (referencing a “right to welfare payments”).

23. See *supra* note 2.

24. For example, the UDHR recognizes a “right to social security” (Art. 22) and “social protection” (Art 23) and article 25 details that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Critics of economic and social rights often mischaracterize rights protections in an effort to undercut their validity. See, e.g., Roger Pilon, *Will the State Department’s New Commission on Unalienable Rights Get It Right?*, HILL (Jul. 11, 2019), <https://thehill.com/opinion/civil-rights/452493-will-the-state-departments-new-commission-on-unalienable-rights-get-it> [<https://perma.cc/8ZDN-SL7Z>]. Pilon’s op-ed mischaracterized the UDHR’s provisions as including a right “to jobs.” *Id.* In fact, the UDHR in article 23 states that “(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”

25. See, e.g., HERITAGE FOUNDATION, 2019 INDEX OF ECONOMIC FREEDOM 2 (2019), (proffering support for limited government intervention and market-oriented systems as a pathway toward individual liberty and improved quality of life). The Heritage Foundation,

Under this view, society is at its best when government takes a hands-off approach. Laws and policies that proactively aim to achieve greater equality and ensure economic and social rights are characterized as inappropriate.²⁶

The official effort to eviscerate economic and social protections, in tandem with denial of the fundamental role of government in promoting equality and non-discrimination, is an affront to almost every social justice battle fought within the United States historically and today. From the earliest documented effort to use the U.N. as a vehicle for accountability for racial injustice (1947),²⁷ to the March on Washington (1963),²⁸ to the current Black Lives Matter Movement²⁹ and the Poor People's Campaign,³⁰ the struggle for human rights

which has praised the Commission, is an organization long skeptical of U.N. norms and institutions. The Heritage Foundation has rallied against efforts to address systemic discrimination or proactively promote equality for historically marginalized individuals—discounting the need for laws or policies that go beyond the prohibition of intentional discrimination. *See, e.g.*, STEVEN GROVES, HERITAGE FOUNDATION, FURTHERING THE U.N.'S LEFTIST AGENDA: THE U.N. CERD COMMITTEE REPORT 3 (Apr. 2008) (critiquing the recommendations from the U.N. treaty body to the United States, and the findings that racial disparities are a sign that discrimination continues).

26. HERITAGE FOUNDATION, INDEX OF ECONOMIC FREEDOM, *supra* note 25 (citing Milton and Rose Friedman for the notion that a “society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom. The use of force to achieve equality will destroy freedom . . .”). Part III.A delves further into the ways Commission supporters have espoused this view.

27. *See infra* Part II.B.

28. *See* A. Philip Randolph, *Speech at the March on Washington, reprinted in* ANDREW KERSTEN, A. PHILIP RANDOLPH: A LIFE IN THE VANGUARD, at 155–156 (2007) (“We want a free democratic society dedicated to the political, economic, and social advancement of man along moral lines. Now, we know that real freedom will require many changes in the nation’s political and social philosophies and institutions . . . The sanctity of private property takes second place to the sanctity of the human personality”)

29. The Movement for Black Lives is founded on the idea “there can be no liberation for all Black people if we do not center and fight for those who have been marginalized . . . working together to create and amplify a shared agenda, we can continue to move towards a world in which the full humanity and dignity of all people is recognized,” and the Black Lives platform demands economic justice, community control and participation. *Platform*, MOVEMENT FOR BLACK LIVES (2018) <https://policy.m4bl.org/platform/> [<https://perma.cc/6SSV-D6GB>].

30. *See Mission Statement*, POOR PEOPLE’S ECONOMIC HUMAN RIGHTS CAMPAIGN (2019), <http://economichumanrights.org/mission-statement/> [<https://perma.cc/A2X3-YNZP>] (“The Poor People’s Economic Human Rights Campaign is committed to uniting the poor across color lines as the leadership base for a broad movement to abolish poverty. We work to accomplish this through advancing economic human rights as named in the universal declaration of human rights . . .”); *see also Poor People’s Campaign Letter to the United Nations Human Rights Council*, POOR PEOPLE’S CAMPAIGN, <https://www.poorpeoplescampaign.org/united-nations/> [<https://perma.cc/88LP-995R>] (“For a nation that declared it was founded upon principles of equality, systemic inequality has never been starker. In the richest nation in

has linked economic and racial justice. And the United States has consistently fought to avoid global accountability for failing to recognize and implement them.³¹

Undermining the connection between economic and social rights and the ability to exercise true freedom for all ignores the lived experience of many individuals fighting for equality and dignity, and threatens to harm the communities on the frontlines of human rights struggles. It is the populations that have been historically marginalized that stand to lose if human rights protections are narrowed.

II. THE INEXTRICABLE LINK BETWEEN ECONOMIC AND SOCIAL RIGHTS AND TRUE FREEDOM

This Part explores the fundamental interrelationship between economic and social rights and true ability to exercise freedom, as defined above.³² Section A provides a brief normative grounding, drawing heavily from the UDHR. Section B turns from human rights text to lived experience to highlight how and why the ongoing struggles for racial justice in the United States have always emphasized economic and social rights and civil and political rights as fundamental human rights. Section C underscores this link through the lens of current advocacy for the right to sanitation.

The aim is to demonstrate the interdependence of rights as reflected in the lives and work of individuals struggling for justice. This reality is essential to the current discussion of what rights are fundamental and how true freedom can be achieved. Domestic law and policy in the United States has long resisted recognition of this reality and failed to protect economic and social rights, perpetuating injustice and inequality. If the Commission promotes a narrow vision of human rights, it can undermine long-recognized international protections, and its positions can be used to justify laws and policies that undermine equality in fact and employed to abrogate law and policies that promote an adequate standard of living in the U.S. and globally.³³

A. The Interdependence of Human Rights

The UDHR, considered one of the foundational articulations of human rights, aims to promote freedom and justice, premised upon “dignity” and “equal

the world, 140 million people live in poverty. The richest 1 percent in our country hold more wealth than the bottom 90 percent combined.”)

31. See *infra* note 50 and accompanying text.

32. See *supra* note 5.

33. Part III discusses further how the Commission’s purported ideology and activities can move in this direction.

and inalienable rights.”³⁴ Inherent in the UDHR is the understanding that providing for individual freedoms alone would never achieve a fulsome vision of human rights. The UDHR places economic and social rights on equal footing with civil and political rights.³⁵ Subsequent treaties spell out the specific obligations related to particular rights.³⁶ From their inception, modern human rights norms have reflected an understanding that governments are responsible for ensuring the full panoply of rights by proactively promoting well-being, as well as restraining actions that impede enjoyment of human rights. Fulfilling civil and political rights, as well as economic and social rights, entails positive and negative obligations.³⁷

Yet, resistance to enforceable economic and social rights, particularly from the U.S. government, impacted the drafting of subsequent human rights treaties. These impacts include the bifurcation of UDHR principles into two separate treaties and mechanisms for human rights monitoring and

34. Universal Declaration of Human Rights, *supra* note 3, pmb1. The Declaration was developed at the beginnings of the Cold War and is the result of global negotiations on the core foundations of human rights. See, e.g., Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955*, Ch. 2–3 (2003); Sally-Anne Way, *The “Myth” and Mystery of U.S. History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to be Incorporated in an International Bill of Rights*, HUMAN RTS. Q. 36.4, 869–897 (2014).

35. Universal Declaration of Human Rights, *supra* note 3. Article 30 underscores that the Declaration cannot be interpreted “as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

36. The more specific obligations related to economic and social rights and civil and political rights are spelled out in the Convention on Economic and Social Rights and the Covenant on Civil and Political Rights.

37. Considerable academic literature has addressed state obligations to implement human rights and the similarities and differences between economic and social rights and modes of implementation. See SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK (Malcom Langford, César Rodríguez Garavito and Julieta Rossi eds., 2017); Iona Cismas, *The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW, 448–472 (Eibe Riedel, Gilles Giacca and Christophe Golay eds., 2014); MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2003); Eilde Asbjørn, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35 (1989); Philip Alston and Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, HUM. RTS. Q. 9.2, 159–160 (May 1987). Regarding the U.S.’ position specifically, see Hope Lewis, *New Human Rights? U.S. Ambivalence Toward the International Economic and Social Rights Framework*, 122–127; 128–130, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Martha Davis ed. 2009).

enforcement.³⁸ This has also resulted in limited treaty ratification by the United States.³⁹ To date, the United States has only ratified three of the core human rights treaties.⁴⁰

38. Domestically, the fear of global scrutiny of Jim Crow Laws, lynching, and other forms of legal discrimination, racism and violence led to significant political pushback against the adoption of human rights treaties, and to a compromise wherein President Eisenhower agreed not to seek further ratification of human rights treaties. See Lewis, *supra* note 37, at 118–119. Coupled with Cold War politics, the reality was U.S. resistance to enforceable human rights standards, and ultimately to the bifurcation of human rights protections articulated in the UDHR into two separate covenants: the Covenant on Civil and Political Rights and the Covenant of Economic and Social Rights. The United States ratified the ICCPR in 1992, and has yet to ratify the ICESCR. Historically, the United States helped shape the UDHR, supporting the inclusion of economic and social rights. See Sally Anne Way, *The “Myth” and Mystery of U.S. History of U.S. History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to be incorporated in an International Bill of Rights*, HUM. RTS. Q. 36.4, 869, 874 (2014). Way notes that “[t]he 1947 U.S. Suggestions are significant not only because they belie standard assumptions about the U.S. position on ESC rights but also because substantial parts of the U.S. wording and provisions on economic, social, and cultural rights are closer to the text of the 1966 ICESCR than to the 1948 UDHR. A number of concepts and phrases that were later to become part of the ICESCR, including the concepts of ‘progressive realization,’ ‘maximum use of resources,’ and the specific formulation of rights such as the ‘right to the highest attainable standard of health,’ appear to have clear roots in this 1947 U.S. text.” *Id.* See also Cass Sunstein, *Economic Security: A Human Right*, AMERICAN PROSPECT (Sept. 20, 2004), <https://prospect.org/article/economic-security-human-right> [<https://perma.cc/W58E-YCWQ>] (“The Universal Declaration of Human Rights, written in the shadow of FDR and accepted by the U.N. General Assembly in 1948, explicitly includes social and economic *guarantees*. The United States enthusiastically supported the declaration (but has been exceptionally unusual in refusing to ratify the International Covenant on Economic, Social, and Cultural Rights, which would help to enforce social and economic guarantees.”); Philip Alston, *Putting Economic and Social Rights Back on the Agenda in the United States*, in THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA 120, 120–127 (William F. Schultz ed., 2008). Alston describes the support for ESCRs by United States Presidents Dwight Eisenhower, Harry Truman, Lyndon Johnson and Gerald Ford, and the shift in support that began with President Reagan. Notably, during the term of Lyndon Johnson that the U.S. joined the drafting of the Covenant on Economic and Social Rights (ICESCR) and voted for ratification, and supported inclusion of economic and social protections in the treaty on the Convention on the Elimination of All Forms of Racial Discrimination (CERD). *Id.*

39. See Lewis, *supra* note 37, at 118–119. The arguments levied against adoption of human rights treaties included protection of U.S. sovereignty and defense of the U.S. federal system. The same concerns motivate the Reservations, Understandings and Declarations that the United States has attached to the human rights treaties it has ratified since that time: The Convention on the Elimination of All Forms of Racial Discrimination; The Convention Against Torture, and the Covenant on Civil and Political Rights. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995).

40. *Id.* The U.S. has not ratified the global conventions on economic and social rights, women’s rights, disabilities, rights of children, on migrant workers and their families, or on

U.S. opposition to economic and social rights, however, does not negate the reality that ensuring equality under law requires non-discrimination in tandem with courts and due process. The right to vote necessitates systems for participation. The right to housing includes the availability of adequate and affordable housing, and requires that governments refrain from criminalizing individuals based on their status as homeless, for example.

Respecting and protecting human rights cannot be passive, nor can it be done by cherry picking which rights to protect. It is an ongoing and proactive affair. This is a lesson learned in challenging segregation in education, ensuring job opportunities for men and women, ensuring safe workplaces, facilitating well-being for the elderly. The exercise of basic rights and existence of economic and social protections go hand in hand. The following section explores how this reality has permeated civil and human rights struggles in the United States.

B. Domestic Struggles for Racial Justice

Historic struggles for racial justice in the United States illustrate that true freedom requires economic and social rights.

The NAACP drafted one of the earliest and most historically significant petitions to the U.N. charging human rights violations against the United States.⁴¹ The 1947 *Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and An Appeal to the United Nations for Redress* is a 95-page document that spells out the reality of life for African Americans, describing legal, political, and economic barriers to equality in vivid detail. The authors presented the disparities between Black and White Americans in spheres of health, occupational opportunities, housing, and education.⁴² The *Appeal* detailed how even where some opportunity existed, as in the realm of education, the quality and the resources available for Black students were substantially lower than what White children received.⁴³

enforced disappearances. When the U.S. does ratify treaties, it does so with significant limitations on their domestic applicability. See Lewis, *supra* note 37.

41. The NAACP's 1947 *Appeal to the World* was preceded by a submission to the U.N. by the National Negro Congress in 1946. See Carol Anderson, *From Hope to Disillusion: African Americans, the United Nations, and the Struggle for Human Rights, 1944–1947*, *DIPLOMATIC HISTORY*, Vol. 20.4, at 544–547 (Fall 1996) (describing the petition as part of a larger history of engagement of prominent African American scholars and activists in the development of the U.N.).

42. NAACP, *Appeal to the World*, *supra* note 1, 36–39, 62–84.

43. For example, in Mississippi, White teachers were paid 244% less than White teachers. *Id.* at 63.

The *Appeal* further documented the extent that state and federal law continued to foster discrimination, referring to “inequalities that exist because of the law,” including the right of private actors to refuse to sell or rent to African Americans, which limited access to housing; barriers to educational opportunity as a result of the doctrine of separate but equal,⁴⁴ permissible segregation through Jim Crow laws, ongoing practices of preventing Black individuals from voting through poll taxes and other barriers to the franchise and the exercise of civil and political rights.⁴⁵ The *Appeal* highlighted that despite expanded legal protections, the persistence of violence and discrimination at the hands of law enforcement ensured freedom remained out of reach, demonstrating “calloused disregard for human rights.”⁴⁶ African Americans were continually denied economic and social protections, and despite federal prohibitions on discrimination, inequities on the basis of race proliferated. As the authors described:

[I]t is now apparent that the Emancipation Proclamation and the 13th, 14th, and 15th Amendments were not sufficient to overcome the handicap of 250 years of chattel slavery in the economic struggle which characterizes an industrial civilization. Governmental non-action in this area, however, is partly determinative of the present legal and social status of the Negro.⁴⁷

The *Appeal* concluded that “the combined impact of economic and social discrimination in America casts a shadow over the Negro which extends from the maternity bed to a premature grave.”⁴⁸

The *Appeal* was filed amid global turbulence and deep power struggles in the United States. While the United States federal government contributed to the creation of the United Nations architecture, there was also a strong push to ensure the U.N. would not weigh in on questions of domestic affairs, particularly related to racial discrimination, Jim Crow laws, and lynching.⁴⁹ U.S. reticence to engage with U.N. human rights mechanisms has persisted, and been roundly critiqued as hypocritical.⁵⁰ U.S. scholars have noted that “in the cathedral of human rights, the United States is more like a flying buttress than a

44. *Id.* at 35–39, 44–46.

45. *Id.* at 6–1, 25, 37–39, 42, 45, 54.

46. *Id.* at 49.

47. *Id.* at 56.

48. *Id.* at 82.

49. See Anderson, *supra* note 41 at 4, 58–165, 180 (describing how the Genocide Convention was not placed before the U.S. Senate because “Southern senators ‘were afraid’ in particular that the Genocide Convention was a ‘back door’ method of enacting federal anti-lynching legislation.”); Lewis, *supra* note 37, at 114–121.

50. See *generally* American Exceptionalism and Human Rights (M. Ignatieff, ed.) (Princeton Press: 2005).

pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.”⁵¹

National and international political forces ultimately led to the result that the U.N. never formally reviewed the petition and the United States never responded to the claims presented. The NAACP was threatened with being labeled a communist organization that would be blacklisted if it pursued global accountability. As a result, the NAACP stepped away from U.N. engagement and focused greater attention to advancing civil and political rights at the domestic level.⁵² Concerns that the U.N. would have authority to address domestic policy perpetuated ongoing domestic backlash against human rights in the United States.⁵³ Despite these outcomes, the history of *the Appeal* makes it clear that economic and social rights have long been central to the fight for equality for African Americans.

Twenty years after *the Appeal to the World*, Martin Luther King Jr. emphasized that racial justice depends on recognition of the full panoply of human rights for African Americans:

You are going beyond purely civil rights to questions of human rights. That is a distinction. . . . Now our struggle is for genuine equality, which means economic equality. For we know, that it isn't enough to integrate lunch counters. What does it profit a man to be able to eat at an integrated lunch counter if he doesn't have enough money to buy a hamburger?⁵⁴

Still today, genuine equality remains elusive. Despite significant gains in legal protections against discrimination, racial and ethnic disparities abound across almost all social indicators in the United States. The failure to embrace and protect economic and social rights has left many behind and entrenched inequality. Compared to OECD countries, the United States ranks poorly along indicators of income inequality and the poverty rate.⁵⁵ According to 2016 data

51. See Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002) (paraphrasing statement by Louis Henkin).

52. See, e.g., Anderson, *supra* note 41, at 146–155.

53. See *supra* notes 38–41 and accompanying text.

54. Martin Luther King, *Speech to strikers in Memphis, Tenn., March 18, 1968*, reprinted in Martin Luther King Jr., *The Radical King*, 248 (2016).

55. For poverty rate the U.S. comes in 35th and the only countries with a higher rate are Israel, Costa Rica and South Africa. See Org. for Econ. Co-operation and Dev. [OECD], *Poverty rate (indicator)*, https://www.oecd-ilibrary.org/social-issues-migration-health/poverty-rate/indicator/english_0fe1315d-en (on file with the *Columbia Human Rights Law Review*).

For income inequality, the United States is 34th, with higher rates found in Turkey, Chile, Mexico, Costa Rica, and South Africa. Org. for Econ. Co-operation and Dev. [OECD], *Income inequality (indicator)*,

from the Bureau of Labor Statistics, Black and Hispanic individuals are twice as likely to be among the working poor than White or Asian individuals.⁵⁶ This stays constant even for those with a higher education degree.⁵⁷ The U.S. rates last in healthcare access and quality when compared to similarly wealthy OECD Countries.⁵⁸ Maternal mortality rates have been on the rise over the past two decades, with Black women 3–4 times more likely than White women to die as a result of pregnancy and childbearing.⁵⁹ When we take stock of where we are, it is clear that an approach that eschews economic and social protections leads to poor outcomes across the board, but communities of color are the most negatively impacted.

To address these persistent inequities, domestic social justice organizations continue to center economic and social rights in the fight for equality and racial justice. As one of the founders of Black Lives Matter has underscored, “[T]he black liberation movement in the U.S.—from its inception as an anti-slavery movement, through the Civil Rights Era, and up to now—has never been only for civil rights. The movement is a struggle for the human rights and dignity of black people in the U.S.”⁶⁰

Today, efforts to foster equality by addressing disparities in health and maternal mortality are framed in human rights terms.⁶¹ Support for the right to

https://www.oecd-ilibrary.org/social-issues-migration-health/income-inequality/indicator/english_459aa7f1-en (on file with the *Columbia Human Rights Law Review*).

56. Bureau of Labor Statistics, *A profile of the working poor, 2016* (July 2018), at <https://www.bls.gov/opub/reports/working-poor/2016/home.htm>.

57. *Id.*

58. Bradley Sawyer & Daniel McDermott, *How does the quality of the U.S. healthcare system compare to other countries?*, HEALTH SYSTEM TRACKER (Mar. 28, 2019), <https://www.healthsystemtracker.org/chart-collection/quality-u-s-healthcare-system-compare-countries/> [<https://perma.cc/U23T-BPLU>]

59. Rachel Meyer et al., *The United States Maternal Mortality Rate Will Continue to Increase Without Access to Data*, HEALTH AFFAIRS, Feb. 4, 2019, <https://www.healthaffairs.org/doi/10.1377/hblog20190130.92512/full> [<https://perma.cc/7CUY-TFCU>]; see also GOPAL SINGH, U.S. DEP’T OF HEALTH & HUMAN SERVICES, HEALTH RESOURCES & SERVICES ADMINISTRATION, MATERNAL & CHILD HEALTH BUREAU, MATERNAL MORTALITY IN THE UNITED STATES, 1935–2007: SUBSTANTIAL RACIAL/ETHNIC, SOCIOECONOMIC, AND GEOGRAPHIC DISPARITIES PERSIST 2 (2010) (noting that despite an overall reduction in maternal mortality in the U.S., there are significant ongoing disparities based on race and socio-economic status).

60. Opal Tometi and Gerald Lenoir, *Black Lives Matter is Not a Civil Rights Movement*, TIME, Dec. 10, 2015, <https://time.com/4144655/international-human-rights-day-black-lives-matter/> [<https://perma.cc/GL29-85RA>]

61. See Amanda Mull, *What It Means for Health Care to Be a Human Right*, ATLANTIC, Jun. 24, 2019, <https://www.theatlantic.com/health/archive/2019/06/health-care-human-right/592357/> (on file with the *Columbia Human Rights Law Review*) (highlighting the prevalence of universal healthcare in presidential debates and popular support

housing proliferates, underscoring that affordable, adequate housing is a fundamental component to a life with dignity.⁶² Across the country, from California to Pennsylvania, there is mobilization to secure the right to water, and law and policy in place to implement this right, which is essential to life and health.⁶³

To further illustrate the fundamental nature of economic and social rights, we now turn briefly to the example of the right to sanitation, which comprises an essential component of an adequate standard of living just like water, housing, and health.

C. Efforts to Secure Adequate and Affordable Sanitation

In 1947, Mahatma Gandhi famously stated that “sanitation is more important than political independence.”⁶⁴ His goal was sanitation for all

for guaranteed health care coverage); *What is the Human Right to Health and Health Care?*, NESRI (2019), <https://www.nesri.org/programs/what-is-the-human-right-to-health-and-health-care> [https://perma.cc/3FD5-CC5E] (“Healthcare as human right campaigns now exist in several U.S. states, inspired by the example of Vermont, which in 2011 became the first state to pass a law for a universal, publicly financed health care system.”); ADVANCING MATERNAL HEALTH AS A HUMAN RIGHTS ISSUE, CENTER FOR REPRODUCTIVE RIGHTS (2016).

62. See, e.g., Meetal Jain, *Bringing Human Rights Home: The DC Right to Housing Campaign*, HUMAN RTS. BRIEF 17, no.3, 10–14 (2010) (describing organizing efforts in Washington, DC to secure the right to housing, grounded in international human rights principles); Eric Tars, *Housing as a Human Right*, NAT’L LOW INCOME HOUSING COALITION 1–2 (2019), https://nlihc.org/sites/default/files/AG-2019/01-06_Housing-Human-Right.pdf [https://perma.cc/9P5A-EFJU] (highlighting ongoing national and international advocacy for the right to housing in the United States, providing comparative examples, and noting that at the time of writing, two federal agencies were working to “address criminalization of homelessness as a human rights issue.”); COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 15 (2012) (detailing local efforts to implement the human right to housing in Madison and Dane County, Wisconsin, as well as Eugene, Oregon).

63. See, e.g., S.B. 1215, 2018 Leg., Reg. Sess. (Cal. 2018)—California’s Right to Water Law; Rejane Frederick, *Water as a Human Right: How Philadelphia Is Preventing Shut-Offs and Ensuring Affordability*, CENTER FOR AMERICAN PROGRESS, Nov. 8, 2017, <https://www.americanprogress.org/issues/poverty/news/2017/11/08/441834/water-human-right-philadelphia-preventing-shut-offs-ensuring-affordability/> [https://perma.cc/TF4J-UAVC] (discussing Philadelphia’s Water Affordability Plan); PATRICIA JONES, THE INVISIBLE CRISIS: WATER UNAFFORDABILITY IN THE UNITED STATES, UNITARIAN UNIVERSALIST SERV. COMM. (2016) (focusing on the perpetual challenge of water affordability).

64. PM addresses the Third South Asian Conference on Sanitation, GOV’T OF INDIA INFORMATION BUREAU, Nov. 18, 2008, <http://pib.nic.in/newsite/erelease.aspx?relid=44884> [https://perma.cc/ANB3-GJRN].

because it is essential for well-being and full engagement in society.⁶⁵ The global community has echoed that sanitation is vital to dignity and human rights, expressly recognizing sanitation as a basic human right that should be affordable, accessible, and available without discrimination.⁶⁶ This right is recognized constitutionally in several countries.⁶⁷

When the Unalienable Rights Commission was first announced, supporters of “fresh thinking” on human rights took the opportunity to disparage the right to sanitation, on the basis that focusing on sanitation “diverts our attention from basic rights like freedom of speech.”⁶⁸ The message: adequate sanitation lacks the same fundamental character, and is instead a privilege.

It is unlikely that the critics that disavow that basic sanitation is essential to freedom have ever struggled to pay their water bills, or paid a significant portion of a paycheck for a wastewater system that continues to dump human waste back into their homes. For most Americans, when the need arises, using the toilet poses little problem. Indeed, the majority Americans have the luxury to simply flush and forget. But, every day, more than a million people

65. See Dr. Shubhangi Rathi, *Importance of Gandhian thoughts about Cleanliness* (2014), <https://www.mkgandhi.org/articles/gandhian-thoughts-about-cleanliness.html> [https://perma.cc/7AGY-MPPP].

66. G.A. Res. 64/292 (July 28, 2010); see also CATARINA DE ALBUQUERQUE & VIRGINIA ROAF, ON THE RIGHT TRACK—GOOD PRACTICES IN REALISING THE RIGHTS TO WATER AND SANITATION 23 (2012); UNITED CITIES & LOCAL GOV'TS, THE SUSTAINABLE DEVELOPMENT GOALS: WHAT LOCAL GOVERNMENTS NEED TO KNOW 8 (May 1, 2018); see also G.A. Res. 71/313, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, ¶ 6.B.1 (July 6, 2017) (providing indicators to achieve Goal 6 of the Sustainable Development Goals, which is to “[e]nsure availability and sustainable management of water and sanitation for all”). The U.N. Special Rapporteur on the human rights to safe drinking water and sanitation has identified the need for governments to “ensure that self-supply solutions comply with human rights obligations and are appropriate and affordable. States need to put appropriate systems in place, including regulation and financial support for those who need it.” Léo Heller (Special Rapporteur on the Human Rights to Water and Sanitation), *Rep. to the U.N. General Assembly on Different Levels and Types of Services*, U.N. Doc. A/70/203, ¶ 60 (July 27, 2015).

67. See Pedi Obani and Joyeeta Gupta, *The Evolution of the Right to Water and Sanitation*, REV. EUR. COMM. & INT'L ENVIR. L. 27, 32 (2015) (referencing Kenya, Maldives, Mexico, and Uruguay). While water and sanitation have been articulated formally as rights on the global stage in recent years, water has long been understood as vital for life, and water and sanitation have been part of the global dialogue on human rights for decades. See Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over Privatization*, 31 BERKELEY J. INT'L L. 89, 92–94 (2013).

68. Aaron Rhodes, *Pompeo Tries to Rescue the Idea of Human Rights*, WALL ST. J. (June 10, 2019), <https://www.wsj.com/articles/pompeo-tries-to-rescue-the-idea-of-human-rights-11560207792?mod=e2fb> (on file with the *Columbia Human Rights Law Review*).

living in the United States, nearly 540,000 households, are forced to live without this basic necessity.⁶⁹ This paints a picture of stark inequality.⁷⁰

In 2017, the United States, one of the wealthiest countries in the world, received only a D+ grade for wastewater infrastructure from the American Society of Civil Engineers.⁷¹ Decades of neglect and exclusion⁷² of entire communities from upgrades have left many behind. The same communities who today lack basic affordable wastewater and sanitation are those long denied political power.

Lowndes County, Alabama is one community where the inextricable link between economic and social rights and civil and political rights is clear. Alabama's long history of discrimination and political suppression on the basis of race, as well as current demographics provide context for the situation today.⁷³ Lowndes is 75% Black. An estimated 90% of households in Lowndes, where the median income is around \$28,000, have failing or inadequate wastewater and sanitation. Families face raw sewage backing up into their yards, homes, and bathtubs. Households must spend money they don't have on costly cleanup, and are forced to take off hours from work or school when overflows occur. Residents prohibit their grandchildren from playing outside to avoid playing in feces and wastewater.⁷⁴ A recent study confirms that lack of adequate sanitation is connected to a resurgence of hookworm and other parasites.⁷⁵

69. RURAL COMMUNITY ASSISTANCE PARTNERSHIP, STILL LIVING WITHOUT THE BASICS IN THE 21ST CENTURY: ANALYZING THE AFFORDABILITY OF WATER AND SANITATION SERVICES IN THE UNITED STATES (2015); Stephen Gasteyer et al., *Basics Inequality: Race and Access to Complete Plumbing Facilities in the United States*, 13 DU BOIS REV.: SOC. SCI. RES. ON RACE 305, 306 (2016)

70. The lack of access to affordable sanitation systems is detailed in a 2019 report written by two of the authors of this article. See ACRE ET AL., FLUSHED AND FORGOTTEN: SANITATION AND WASTEWATER IN RURAL COMMUNITIES IN THE UNITED STATES 25 (May 2019),

71. See AM. SOC'Y OF CIVIL ENG'RS, 2017 INFRASTRUCTURE REPORT CARD: WASTEWATER I (2017).

72. Reed Colfax, *Kennedy v. City of Zanesville, Making the Case for Water*, 36.4 ABA HUM. RTS. MAG. 18, 18–19 (2009).

73. Alvin Benn, *Formerly 'Bloody Lowndes,' County to Celebrate Role in Civil Rights*, MONTGOMERY ADVERTISER (Apr. 8, 2018), <https://www.montgomeryadvertiser.com/story/opinion/columnists/2018/04/08/formerly-bloody-lowndes-county-celebrate-role-civil-rights/493999002/> (on file with the *Columbia Human Rights Law Review*); Maggie Astor, *Seven Ways Alabama Has Made it Harder to Vote*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html> (on file with the *Columbia Human Rights Law Review*); See FLUSHED AND FORGOTTEN, *supra* note 70.

74. Ashley Cleek, *Filthy Water and Shoddy Sewers Plague Poor Black Belt Counties*, AL JAZEERA AM. (June 3, 2015), <http://america.aljazeera.com/>

The conditions in Lowndes County are not unique in the United States. In Alaska, Appalachia, California, Florida, Louisiana, Michigan, Mississippi, the Navajo Nation, New York, North Carolina, Ohio, Puerto Rico, Texas, and West Virginia, the pattern repeats. Residents struggle to afford the basic ability to use the bathroom with dignity. The impacts fall disproportionately—yet not exclusively—on Black, Latinx, and Indigenous communities. White communities living in poverty are affected too.⁷⁶ Spread across the United States, what ties these communities together is a lack of economic and social protection and a lack of political power. And the struggle to secure basic needs and to stave off the impacts of neglect and disenfranchisement in these communities has significant costs, which individuals must bear: environmental costs, dignity costs, financial burdens, and the looming threat of criminalization. The lack of adequate and affordable sanitation further compromises the ability of households across the United States to exercise or enjoy the full range of rights to which they are entitled. This includes fully participating in decision-making. True freedom remains out of reach because of residents' inability to afford it.

Sanitation, like water, housing, and health, is a fundamental ingredient of a life with dignity. When law and policy fail to ensure these basic needs are met, human rights will remain out of reach. Accordingly, economic and social rights protections will remain at the core of struggles for equality and racial justice until they are fulfilled. Efforts to undermine the fundamental role that economic and social rights play in ensuring a fair and equal society ignore history and current reality, and will continue to entrench inequality because they fail to make this connection.

III. POTENTIAL IMPACTS OF THE RENEWED ASSAULT AGAINST ECONOMIC AND SOCIAL RIGHTS FOR HUMAN RIGHTS PROMOTION AND PROTECTION

Part II discussed the 1947 *Appeal to the World*—one of the earliest examples of employing human rights in the fight for racial and economic justice—and how forces in the U.S. responded to advocacy to address racial injustice in global forums, significantly pushing back on international human rights norms and mechanisms.⁷⁷ While domestic social justice advocates

articles/2015/6/3/filthy-water-and-poor-sewers-plague-poor-black-beltcounties.html [https://perma.cc/7W5H-KEF6].

75. Megan McKenna et al., *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*, 98 AM. J. TROPICAL MED. HYGIENE 1623, 1624 (2017); see also Peter J. Hotez, *Neglected Infections of Poverty in the United States of America*, PLOS NEGLECTED TROPICAL DISEASES 1, 7.

76. See generally FLUSHED AND FORGOTTEN, *supra* note 70 (documenting this).

77. See *supra* Part II.B.

continue to seek recognition and protection of the full panoply of human rights, the current administration is rolling back the protections that do exist and continually undermining the mechanisms put in place to monitor and promote human rights compliance.⁷⁸ The United States has withdrawn from U.N. engagement: leaving the U.N. Human Rights Council,⁷⁹ cutting U.N. funding,⁸⁰ and shirking its treaty reporting obligations.⁸¹

The Unalienable Rights Commission offers a new example of backlash against human rights through U.S. policy—a formal manifestation of current attacks on the international norms that provide for dignity and an adequate standard of living for all. These attacks bear similarities to earlier examples of pushback against strong human rights norms, seeking to limit how human rights are interpreted and what obligations accrue to governments. The formal status of the Commission and its connections to the Secretary of State magnify the potential that its findings and recommendations may influence interpretations and implementation of human rights law at home and abroad, and shape the work of multilateral bodies.

In this Part, we zoom out from the domestic terrain to examine the possible global impacts of the Commission’s “fresh thinking” around human rights. This Part provides a more detailed account of the Commission’s likely posture towards economic and social protections, and identifies specific ways the Commission can perpetuate harm to human rights norms and practice. While

78. See *supra* Part II.B and *infra* Part III.B.

79. See, e.g., Morello, *supra* note 11 (describing the Trump Administration decision to withdraw from the U.N. Human Rights Council).

80. See Nick Cummings Bruce, *Budget Cuts May Undercut the U.N.’s Human Rights Committees*, N.Y. TIMES, May 24, 2019, <https://www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html> (on file with the *Columbia Human Rights Law Review*).

81. Human Rights Watch, *U.S. Does Not Nominate Representative to Critical Rights Body* (Apr. 16, 2019), <https://www.hrw.org/news/2019/04/16/us-does-not-nominate-representative-critical-rights-body> [<https://perma.cc/QN38-BM4P>]; See also ACLU, Lawyers’ Committee for Civil Rights, NAACP & U.S. Human Rights Network, *Deadline Looms for U.S. Report to the U.N. on Racial Discrimination* (Nov. 2017), <https://www.naacp.org/latest/deadline-looms-u-s-report-un-racial-discrimination/> [<https://perma.cc/G5WF-E4LV>]. The U.S. has also withdrawn from engagement with U.N. Special Procedures—declining to extend invitations for visits to the United States or respond to communications from these independent experts. See Ed Pilkington, *U.S. halts cooperation with U.N. on potential human rights violations*, GUARDIAN (Jan. 4, 2019), <https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations> [<https://perma.cc/Q9R9-5DKS>] (noting that “the state department has ceased to respond to official complaints from U.N. special rapporteurs, the network of independent experts who act as global watchdogs on fundamental issues such as poverty, migration, freedom of expression and justice.”)

the United States cannot unilaterally redefine global human rights laws and protections, U.S. positions on human rights can damage the fundamental fabric of human rights.

A. An Officially Sanctioned Effort to Leave Already Marginalized Groups Behind

Since the rollout of the Commission, Secretary Pompeo has spoken openly about its aims, indicating that the intent is to narrow rights and reset the policy priorities of the United States to guide government actors and work in international fora.⁸²

Recent remarks signal that the Commission may even be developing a new, U.S. version of the Universal Declaration:

[U]ltimately [Commissioners] will deliver to our organization this foundational document that I hope will become a document that the State Department will turn to for decades to come, so that as our officers . . . are moving around the world, they have something to look back to. So as they talk about religious freedom or they talk about these central ideas of personal autonomy—that they'll have something they can turn back to.⁸³

Religious freedom is repeatedly named by Pompeo as “the most important freedom,”⁸⁴ a “fundamental” right that has not received sufficient attention.⁸⁵ Pompeo’s statements point to a predetermined agenda that includes a redefinition of the baseline of human rights, focused on a limited set of rights such as freedom from torture, and genocide, and discrimination, and an agenda that centers religious freedom.⁸⁶ It is significant to emphasize that religious freedom itself has at times been used as a guise for “hypocrisy . . . code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or

82. U.S. Secretary of State Michael R. Pompeo, Remarks, Secretary Michael R. Pompeo At the Concerned Women for America 40th Anniversary Luncheon (Sept. 13, 2019), <https://www.state.gov/secretary-michael-r-pompeo-at-the-concerned-women-for-america-40th-anniversary-luncheon/> [https://perma.cc/6PVG-ZUWH].

83. *Id.* See also U.S. Secretary of State Michael R. Pompeo, *Interview with Washington Watch* (Jul. 15, 2019), at <https://www.state.gov/interview-with-tony-perkins-of-washington-watch/> [https://perma.cc/AU4S-JF3N] (discussing the State Department’s Ministerial to Advance Religious Freedom and the role of the Commission in advancing religious freedom and defining basic rights).

84. See Pompeo, *supra* note 82.

85. See Pompeo, *supra* note 83.

86. Masha Gessen, *Mike Pompeo’s Faith-Based Attempt to Narrowly Redefine Human Rights*, *NEW YORKER* (Jul. 10, 2019), <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights> [https://perma.cc/S9G7-7J55].

any form of intolerance.”⁸⁷ The possible impacts on women’s rights and rights of LGBTQI individuals have received particular attention as they likely to fall outside the scope of the “unalienable rights” and “natural law” that will guide the Commission.⁸⁸

The Unalienable Rights Commission has been described as a “partisan stunt,” and one step in the Administration’s effort “weaponizing human rights.”⁸⁹ The fact that Commissioners are primarily established academics and religious leaders may provide a veneer of objectivity. However, that veneer seems to fall away when Commissioners’ ideological uniformity is taken into account.⁹⁰ The Commission Chair has been deeply involved in efforts to

87. While outside the scope of this article, we note that the meaning of religious freedom is itself contested and that claims to religious freedom have been used to justify undermine other human rights in an array of contexts. In the U.S. context, the U.S. Commission on Civil Rights has addressed this in recent years. *See, e.g.*, U.S. COMMISSION ON CIVIL RIGHTS, BRIEFING REPORT: PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (Sept. 7, 2016).

88. *See, e.g.*, Katherine Marino, *How Mike Pompeo’s new commission on ‘unalienable rights’ butchers history*, WALL ST. J. (Aug. 15, 2019) (on file with the *Columbia Human Rights Law Review*) (detailing history of recognition of the women’s rights as human rights, preceding the adoption of the UDHR); *see also* Jayne Huckerby, Sarah Knuckey, and Meg Satterthwaite, *Trump’s “Unalienable Rights” Commission Likely to Promote an Anti-Rights Agenda*, July 9, 2019, <https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-to-promote-anti-rights-agenda/> [<https://perma.cc/7N8Z-T9A3>]; Caitlin Oprysko, *Mike Pompeo unveils panel to examine ‘unalienable rights,’ POLITICO* (Jul. 8, 2019), <https://www.politico.com/story/2019/07/08/pompeo-panel-unalienable-rights-1400023> [<https://perma.cc/LJ39-LYXT>]. Supporters of the Commission have espoused views that confirm that reproductive choice and sexual freedom are likely to be trampled by the Commission. On the heels of Pompeo’s announcement, C-FAM (an organization committed to eliminating reproductive choice for women), wrote a fundraising e mail lauding the Commission: “This Commission will aim an intellectual dagger at the heart of the radical expansion of rights that are not rights that the hard left promotes at the U.N. . . . these new rights that are not rights have the inevitable tendency to undermine fundamental rights, like the right to religious freedom, the right to speech, and much else.” C-FAM, *Amazing opportunity for C-FAM and the unborn child at the U.N.*, Jul. 19, 2019, <https://email.opusfidelis.com/t/ViewEmail/j/D06B88B021F872B12540EF23F30FEDED/34A1EB8166AF5B7B46778398EADC2510> [<https://perma.cc/T3GH-SVBG>].

89. James Carden, *The Pompeo Commission is Weaponizing Human Rights*, NATION, Jul. 30, 2019, <https://www.thenation.com/article/mike-pompeo-human-rights-mary-ann-glendon/> [<https://perma.cc/MY7R-TQYV>] (quoting Jesuit Drew Christiansen who believes the Commission’s role is “to remake international human rights in the American mode, narrowing their scope to reflect an exceptionalist American view of human rights.”) A month later in August, the Economist published an article highlighting the Commission as “a partisan stunt.” Lexington, *Rowing About Rights*, ECONOMIST 34, Aug. 10, 2019 (on file with the *Columbia Human Rights Law Review*).

90. *See* James Loeffler, *How Mike Pompeo’s Professors Hijacked a Scholarly Debate*, CHRONICLE OF HIGHER ED., Jul. 31, 2019, (on file with the *Columbia Human Rights Law Review*) (discussing the likelihood that the Commission has “a deeply conservative social and

promote a particular conservative brand of Christian values,⁹¹ actively opposing a woman's right to choose, as well as marriage equality. Several members oppose contraception.⁹² While the Commissioners hail from different religious backgrounds, there is a common belief among them that religious freedom should be elevated at the expense of an array of other globally recognized human rights protection.⁹³ Undermining the fundamental nature of economic and social rights appears to be a clear aim.

Commission supporters are steeped in the perspective that there exists a class of rights essential to freedom, and these include free speech, free opinion, and freedom from torture.⁹⁴ Critics of

religious ideological agenda," which "might privilege white Christians and exclude Muslims and LGBTQ people, among others, from its umbrella of protection." And further that "[t]hose fears are heightened by the number of Christian religious conservatives involved, many of whom have staked out controversial positions on sexual equality and reproductive rights."); see also Huckerby, Knuckey, and Satterthwaite, *supra* note 88 (Highlighting a range of potential threats posed by the Commission).

91. See Loeffler, *supra* note 90. Notably, Catholic leaders and activists have also voiced opposition to the Commission. See *Letter from Catholic theologians, community leaders, and advocates to Secretary of State Michael Pompeo* (Jul. 19, 2019), <https://www.dignityusa.org/article/catholic-leaders-call-state-department-commission-be-dismantled> [<https://perma.cc/CSR6-GK58>]. The Catholic leaders wrote that "[o]ur faith and our commitment to the principles of democracy require us to view every person on earth as a full human being. We staunchly support the fundamental human rights of all people and proudly carry on the long tradition in our country of advocating for expanding human rights around the world. It is our belief that this Commission will undermine these goals by promoting a vision of humanity that is conditional, limiting, and based on a very narrow religious perspective that is inconsistent with the beliefs and practices of billions in this country and around the world. Of most urgent concern is that the composition of the Commission indicates that it will lead our State Department to adopt policies that will harm people who are already vulnerable, especially poor women, children, LGBTI people, immigrants, refugees, and those in need of reproductive health services." *Id.* See also Christopher White, *Former U.S. envoy to Vatican opposes new commission headed by predecessor*, CRUX, Jul. 23, 2019, <https://cruxnow.com/church-in-the-usa/2019/07/23/former-u-s-envoy-to-vatican-opposes-new-commission-headed-by-predecessor/> [<https://perma.cc/3ZUH-LKWQ>] (detailing other opposition).

92. See Emily Sugarman, *Trump Admin's 'Pro-Women' Human Rights Panel Stacked with Anti-Abortion Figures*, DAILY BEAST, Jul. 11, 2019, <https://www.thedailybeast.com/state-department-loads-pro-women-commission-on-unalienable-rights-with-abortion-opponents> [<https://perma.cc/7LDA-YC5N>].

93. *Id.* ("Some of the members have also been part of efforts to interpret 'religious freedom' so as to justify undermining other rights.")

94. Mary Ann Glendon and Seth Kaplan, *Renewing Human Rights*, FIRST THINGS (Feb. 2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights> [<https://perma.cc/489R-NQEAA>] ("The framers of the Declaration did not expect uniform management of tensions or conflicts between rights. . . . A handful of rights, however, were prioritized, tightly drafted so as to allow little scope for variation. They include protections for freedom of religion and conscience, as well as prohibitions of torture, enslavement, degrading

international human rights standards consistently pit these rights in contrast to economic and social rights, and seek to elevate them above ESRs.⁹⁵ The consequence is an abdication of government responsibility to create conditions in which all individuals can thrive.

Roger Pilon and Aaron Rhodes, libertarian religious freedom advocates who support the Commission's "fresh thinking" around human rights⁹⁶ make the case plainly: "Unlike natural rights to freedom, which require only that we be left alone, . . . economic and social rights if rights at all, are not universalizable."⁹⁷ In their view, economic and social protections do not qualify as fundamental rights: "[t]he UDHR starts with a list of traditional, unalienable rights. But it goes on with a list of so-called economic and social rights."⁹⁸ The critics of modern human rights, like Pilon and Rhodes, believe these rights can be downgraded.

The Commission's Chair Mary Ann Glendon has espoused support for a narrowed conception of rights, prioritizing protections from "genocide; slavery; torture; cruel, inhuman, or degrading treatment or punishment . . . discrimination . . . and protection for freedom of conscience and religion . . . and of other grave violations of human dignity made non-derogable under the International Covenant on Civil and Political Rights."⁹⁹

punishment, of retroactive penal measures, and of other grave violations of human dignity made non-derogable under the International Covenant on Civil and Political Rights.")

95. See, e.g., Alston & Quinn, *supra* note 37, at 159–165 (describing misperceptions of economic and social rights); Aryeh Neier, *Social and Economic Rights: A Critique*, H. RTS. BRIEF 13:2 2 1–3 (2006) (positing that economic and social rights are more difficult to quantify and implement, and emphasizing "how significant civil and political rights are in dealing with economic and social inequities."); Lucky McKernan, *Economic, social and cultural rights: exploding myths and building consensus*, UNIVERSAL RIGHTS (Nov. 19, 2015), <https://www.universal-rights.org/blog/economic-social-and-cultural-rights-exploding-myths-and-building-consensus/> [<https://perma.cc/6NVZ-J6D5>].

96. See Roger Pilon, *Making Sense of the State Department's New Commission on Unalienable Rights*, CATO INSTITUTE (June 13, 2019), <https://www.cato.org/publications/commentary/making-sense-state-departments-new-commission-unalienable-rights> [<https://perma.cc/K3YU-QY2X>] ("That brings us to our first concern: Might this commission question the modern social and economic rights? It might, for they're not natural rights. . . . Were that to happen, it would be good."); Aaron Rhodes, *Pompeo Tries to Rescue the Idea of Human Rights*, WALL ST. J., June 10, 2019, <https://www.wsj.com/articles/pompeo-tries-to-rescue-the-idea-of-human-rights-11560207792> (on file with the *Columbia Human Rights Law Review*).

97. Roger Pilon & Aaron Rhodes, *U.N. Human-Rights Dissonance: From Religious Freedom to Criminalizing Blasphemy*, NAT'L REV., June 8, 2018, <https://www.nationalreview.com/2018/06/international-human-rights-community-freedom-often-must-yield/> [<https://perma.cc/8JSA-DQ9F>].

98. *Id.* See *supra* note 24 for a discussion of the authors' mischaracterization of the UDHR.

99. Glendon and Kaplan, *supra* note 94.

Commission member Peter Berkowitz, too, has criticized economic and social rights, and efforts to foster equality in fact.¹⁰⁰ These views, along with the rationales proffered for Commission's creation,¹⁰¹ indicate that economic and social rights are likely to be undermined.

The Heritage Foundation statements about the Commission substantiate this potential outcome. Proffering support for the Commission, Heritage opined that the "United States and other freedom-loving nations have the responsibility to criticize those governments that quash the universal rights to religious conscience, to life, to property, etc. These nations also have obligation to stay out of each other's internal debates over the size of the welfare state, for example. Ditto for such issues as abortion, same-sex marriage, or identity group rights."¹⁰² There are strong indications that the Commission will support selective U.S. interventions on ideological grounds.

B. The Practical Impact

The Commission holds a unique position to influence dialogue and interpretation of global human rights norms through its direct line to the U.S. Secretary of State. The Commission is mandated to "provide the Secretary of State advice and recommendations concerning international human rights matters"¹⁰³ and . . . "to guide U.S. diplomatic and foreign policy decisions and actions with respect to human rights in international settings."¹⁰⁴ Since the U.S.

100. Peter Berkowitz, *Checked and Unbalanced*, HOOVER DIGEST 2019, #3 42, 45 (Jul. 16, 2019) ("Government relief programs must neither undercut (through, for example intrusive government regulation and confiscatory taxes) property rights and the motive to produce, nor induce dependency in those who receive government services. Such programs also should reflect government's interest in promoting formal equality—equality before the law and equality of opportunity—while steering clear of enforcing equality of outcome, which can only be accomplished by drastically curtailing freedom"). Not all the Commissioners have been so openly antagonistic to economic and social rights. *See, e.g.*, Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, HUMAN RTS. Q. VOL. 25, 281; 312–313 (2003) (tracing Latin American conceptions of human rights, and contributions to shaping international human rights norms, and the emphasis that a number of Latin American governments placed on economic and social rights, including an adequate standard of living).

101. *See supra* Part I.

102. Mike Gonzalez, *Why Liberals Fear the State Department's Review of the Nature of Human Rights*, HERITAGE FOUNDATION (June 3, 2019), <https://www.heritage.org/progressivism/commentary/why-liberals-fear-the-state-departments-review-the-nature-human-rights> [<https://perma.cc/Y4KE-2CBP>].

103. *See* Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109, May 30, 2019.

104. DEP'T OF STATE UNALIENABLE RTS. COMM, DRAFT CHARTER, May 10, 2019, <https://www.justsecurity.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf> [<https://perma.cc/6ZSA-Y7J8>].

has lacked key leadership on human rights within the State Department,¹⁰⁵ the Commission may have an outsized role in justifying and shaping the positions of the United States on human rights at the U.N., in regional fora, and in engagement with other governments.

While the Commission is in its early days, statements by its members, supporters, and the U.S. Secretary of State demonstrate it aims to develop a new, narrow, human rights blueprint to guide United States actions at home and abroad. It appears that there will be prioritization of certain civil and political rights, particularly religious freedom, and evisceration of protections for women, LGBTQI individuals, as well for the economic and social rights essential for an adequate standard of living.

If the formally established Commission adopts these views, in whole or in part, it will reinforce a chipping away at the foundation of international human rights protections, and can justify new assaults on rights protections as well—providing an official stamp on such actions. At a time when global human rights norms and institutions are under constant attack,¹⁰⁶ the impact is likely to be significant. There is precedent for establishing sham commissions, like the Voter Fraud Commission, that purported to protect basic rights and institutions while in reality undermining them.¹⁰⁷

105. See David Kramer, *Human Rights Problems a Commission Won't Solve*, AMERICAN INTEREST, Aug. 30, 2019, <https://www.the-american-interest.com/2019/08/30/human-rights-problems-a-commission-wont-solve/> [https://perma.cc/HD3K-U6R3] (describing the lack of an Assistant Secretary for Bureau of Democracy, Human Rights, and Labor). The Trump Administration has sidelined the State Department in numerous ways. See Nicholas Burns, *American Diplomats Are Being Persecuted by Their Own President*, N.Y. TIMES (Oct. 2, 2019) (on file with the *Columbia Human Rights Law Review*) (“No modern president has been as dismissive and even contemptuous of the State Department as Mr. Trump.”). An Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor (DRL) was finally confirmed in September of 2019. See U.S. Dep’t of State, *Robert A. Destro, Assistant Secretary, Bureau of Democracy, Human Rights and Labor*, <https://www.state.gov/biographies/robert-a-destro/> [https://perma.cc/SNS4-9UZW].

106. See, e.g., Lindsay Maisland, COUNCIL ON FOREIGN RELATIONS, *Is China Undermining Human Rights at the United Nations?* (Jul. 9, 2019), <https://www.cfr.org/in-brief/china-undermining-human-rights-united-nations> [https://perma.cc/9SQC-GBAV] (discussing China’s efforts to avoid review of its own human rights record and undercut the work of U.N. human rights mechanisms more broadly).

107. See Editorial, *The Bogus Voter-Fraud Commission*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/opinion/sunday/the-bogus-voter-fraud-commission.html> (on file with the *Columbia Human Rights Law Review*) (highlighting that the Voter Fraud Commission aims “not to restore integrity to elections but to undermine the public’s confidence enough to push through policies and practices that make registration and voting harder, if not impossible, for certain groups of people who tend to vote Democratic”); Abigail Abrams, *California, New York and Virginia Refuse to Give Personal Data to President Trump’s Voter Fraud Commission*, TIME, July 30, 2017, <https://>

Disproportionate harm will likely fall upon communities of color, and ethnic, linguistic, and racial minorities globally. These are the individuals and communities already most impacted by historic and ongoing racism, xenophobia, and discrimination. The lack of ideological diversity on the Commission adds to the concern that its aims are a one-sided narrowing of human rights protections, which will harm already marginalized communities.¹⁰⁸

On the international level, the Commission's recommendation and positions can influence positions of human rights articulated by U.N. intergovernmental bodies, as well as by other governments. While the Trump Administration has pursued only limited engagement with U.N. human rights bodies, it has advocated for the U.N. Security Council to focus on human rights,¹⁰⁹ and has already used its influence to promote its interpretations of human rights in U.N. resolutions. At the U.N. Security Council, the United States negotiated to limit the protections for survivors of rape in conflict.¹¹⁰ The Administration has similarly sought to influence General Assembly policy statements to limit protections for LGBTQI individuals by replacing the term

time.com/4840695/trump-voter-fraud-commission-personal-data/ [https://perma.cc/7KHB-DS53] (noting state refusal to cooperate in order to avoid wasting resources).

108. See Loeffler, *supra* note 90. The Heritage Foundation, which supports the Commission, has long critiqued human rights, and undercut efforts to advance racial equity in the United States through proactive measures, and critique efforts to strengthen human rights implementation in the United States. See *supra* note 25; see also Steven Groves, *U.S. National Human Rights Institution: A Bad Idea*, HERITAGE FOUNDATION (Nov. 15, 2013), <https://www.heritage.org/report/us-national-human-rights-institution-bad-idea> [https://perma.cc/8EL2-45PU] (rejecting the concept of a domestic human rights monitoring body); Emilie Kao and Grace Melton, *The U.S. Must Protect Human Rights of All Individuals Based on Human Dignity- No on Membership in Identity Groups*, HERITAGE FOUNDATION (May 2018), <https://www.heritage.org/global-politics/report/the-us-must-protect-human-rights-all-individuals-based-human-dignity-not> [https://perma.cc/2ZQZ-MHN3] (“Efforts to establish new rights and privileges based on membership in special groups undermines the logic of universal human rights, which is that every person has inherent human dignity regardless of his or her race, gender, national origin, or religion.”).

109. See CONGRESSIONAL RESEARCH SERVICE, GLOBAL HUMAN RIGHTS: MULTILATERAL BODIES & U.S. PARTICIPATION (Nov. 23, 2018) (“The Trump Administration has also advocated addressing human rights issues through the U.N. Security Council, emphasizing the connection between human rights and peace and security.”).

110. The United States threatened to veto the resolution unless provisions were removed which referenced sexual and reproductive health and set up a working group to monitor progress on ending sexual violence. Liz Ford, *U.N. waters down rape resolution to appease U.S.'s hardline abortion stance*, GUARDIAN, Apr. 23, 2019, <https://www.theguardian.com/global-development/2019/apr/23/un-resolution-passes-trump-us-veto-threat-abortion-language-removed> [https://perma.cc/3QGE-KSL6].

“gender” with “woman.”¹¹¹ Further erosion of rights is likely in future resolutions, which represent formal expressions or opinions on issues of importance to U.N. member states.¹¹² Resolutions also indicate and inform state practice, and are often employed in human rights advocacy.¹¹³ U.N. resolutions often complement interpretations of treaty bodies regarding the content of human rights norms and government obligations.¹¹⁴ They can also be used by governments as tools to undermine human rights and justify domestic action inconsistent with global norms.¹¹⁵ The Commission’s likely narrow re-interpretation of human rights may be used by the United States and other governments to justify and legitimate abandonment of economic and social rights,¹¹⁶ and further promote a narrow ideological agenda. This will affect the

111. Julian Borger, *Trump administration wants to remove 'gender' from U.N. human rights documents*, GUARDIAN, Oct. 25, 2018, <https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations> [<https://perma.cc/BY8Q-HSGJ>] (describing that “U.S. officials have been pushing for the rewriting of general assembly policy statements to remove what the administration argues is vague and politically correct language, reflecting what it sees as an ‘ideology’ of treating gender as an individual choice rather than an unchangeable biological fact.”).

112. Resolutions can be issued by the General Assembly, the Security Council, and the Economic and Social Council. Resolutions are binding only in limited circumstances. Security Council resolutions adopted under Chapter VII of the U.N. Charter are considered binding, as are GA resolutions dealing with internal and administrative matters. See Marko Divac Öberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the ICJ*, EUROPEAN JOURNAL OF INTERNATIONAL LAW 16:5, 883–884 (2006).

113. See Smita Narula, *The Right to Food, Holding Global Actors Accountable Under International Law*, VOL. 44 COLUMBIA J. OF TRANSNAT’L L. 691–797 (2006); NAACP, WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA’S CITIES 32 (2019).

114. United Nations Office to Support the International Decade for Action ‘Water for Life’ 2005–2015/U.N.–Water Decade Programme on Advocacy and Communication, *The Human Right to Water and Sanitation: Milestones*, https://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf [<https://perma.cc/Y79J-LZ83>] (tracing the evolution in the contours of the right to water from 1977 to 2011).

115. See, e.g., ARTICLE 19, *U.N.HRC 31: Egypt-led “terrorism” resolution is a danger to human rights* (Mar. 13, 2016), <https://www.article19.org/resources/unhrc-31-egypt-led-terrorism-resolution-is-a-danger-to-human-rights/> [<https://perma.cc/6HBH-UVMR>].

116. The U.S. has a track record of either abstaining from voting on economic and social rights resolutions, or joining by consensus, typically adding caveats limiting their domestic legal significance. Inga T. Winkler & Catherine Coleman Flowers, *“America’s Dirty Secret”: The Human Right to Sanitation in Alabama’s Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181, 202–203 (2017); for the Obama Administration’s articulation of its position vis-à-vis economic and social rights, see Michael H. Posner, Assistant Sec’y, Bureau of Democracy, Human Rights, and Labor, *Address to the American Society of International Law: The Four*

articulation of specific rights, as in the context of gender.¹¹⁷ More broadly, this can contribute to further destabilization of human rights norms and institutions.

The Commission's recommendations may also affect human rights monitoring and documentation. The United States has historically reported on human rights conditions in most countries.¹¹⁸ The Trump Administration has already been criticized for limiting the content of its annual human rights reports, which includes removing reproductive health and maternal mortality.¹¹⁹ The Commission's "fresh thinking" on human rights may foster further shifts in what the United States considers priorities for reporting, and ultimately for policy and funding.

In relation to human rights implementation domestically, the Commission's recommendations are likely to impact whether and how the United States engages with U.N. and regional human rights monitors. So far, the Trump Administration has withdrawn from engaging with U.N. treaty bodies and U.N. Special Procedures regarding human rights issues in the United States, but these actions have not been grounded in any formal policy.¹²⁰ Looking ahead, Commission positions may be used to legitimate decisions on the scope and breadth of participation (or lack thereof), and may undermine accountability mechanisms more broadly. The Commission may also serve to validate ongoing

Freedoms Turn 70 (Mar. 24, 2011), <https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm> [<https://perma.cc/RH7R-HQKY>].

117. For a comprehensive discussion of the new Commission as a part of a concerted effort to undermine reproductive rights, see Risa. E. Kaufman, *Commission on Unalienable Rights and the Effort to Erase Reproductive Rights as Human Rights*, HRLR ONLINE 4.1 (Oct. 2019) (detailing the Administration's efforts in domestic and global fora).

118. The U.S. Department of State annual human rights reports cover countries receiving assistance and U.N. member states, consistent with the Foreign Assistance Act of 1961 and the Trade Act of 1974.

119. See Robert Gramer, *Human Rights Groups Bristling at State Department Report*, FOREIGN POL'Y (Apr. 21, 2018), <https://foreignpolicy.com/2018/04/21/human-rights-groups-bristling-at-state-human-rights-report/> (on file with the *Columbia Human Rights Law Review*) (discussing removal of the term "reproductive rights" from the annual report); see also Amanda Klasing and Elisa Epstein, *U.S. Again Cuts Women from State Department Human Rights Reports*, HUMAN RIGHTS WATCH (Mar. 3, 2013), <https://www.hrw.org/news/2013/03/13/us-again-cuts-women-state-departments-human-rights-reports> [<https://perma.cc/GSN5-2LRT>] (highlighting maternal mortality is no longer covered); see also Human Rights First, *Press Release: State Department Human Rights Reports Selectively Criticize Abuses* (Apr. 21, 2018), <https://www.humanrightsfirst.org/press-release/state-department-human-rights-reports-selectively-criticize-abuses> [<https://perma.cc/7SAV-3MC8>] (noting removal of reference to findings of international human rights bodies, as well as selective discussion of conditions in certain countries).

120. See Pilkington, *supra* note 81 (indicating that in relation to U.N. Special Procedures, U.S. officials signaled a commitment to human rights promotion and protection and expressed support for U.N. special rapporteurs that are investigating grave violations in other countries).

domestic policies retrenchments on human rights, and to escalate future assaults on the economic and social protections that do exist.

In addition to influencing human rights norms and practice, the Commission, as a formal government body, provides a veneer of legitimacy to shape the perception of human rights. In June and July, when the Commission began to garner public attention, a flurry of op-eds and NGO statements were released, some with significant mischaracterizations of existing global human rights norms.¹²¹ As the Commission finds its footing, and continues to meet on a regular basis using State Department resources, the views of its members and supporters will continue to influence human rights discourse regarding the content of fundamental rights, who is entitled to them, and government obligations to meet basic needs, undercutting the links between equality and freedom domestically and internationally. This will undoubtedly have repercussions in domestic and foreign policy and influence public opinion.

CONCLUSION

International human rights norms are grounded in the understanding that economic and social protections are vital to true equality and freedom. The United States was an earlier supporter of economic and social rights on the global stage, but has failed to recognize their legal status in the decades since the UDHR was adopted. The state of housing, health, and sanitation in the United States exemplify who is left behind when laws and policies are not intentionally calibrated to ensure an adequate standard of living for all. To improve quality of life and advance equality, communities in the United States and across the world continue to fight in the trenches to recognize and protect economic and social rights.

The United States' most recent effort to undercut globally recognized human rights norms is a state-sanctioned body, established to provide "fresh thinking" on human rights. The new Commission is currently positioned to delegitimize longstanding struggles for economic justice, using the guise of "unalienable rights" as a weapon to harm those already economically vulnerable, and to play gatekeeper on who is able to enjoy fundamental human rights and exercise freedom. The Commission should be denied that ability by scholars, activists, and media outlets who have the power and the platforms to re-affirm a global vision of human rights that is inclusive, comprehensive, and that we each deserve by virtue of our humanity, regardless of where that is, what we look like, how much money we have, or who or how we choose to love.

121. See *supra* notes 24, 87, and 96.