

# Strengthening the Human Right to Food

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*Despite its vast resources and overabundance of food, the United States performs poorly compared to other rich nations when it comes to food security. This Article incorporates a human rights perspective that foregrounds the right to food, arguing that the establishment of such a right is key to ending hunger in the United States. The Article then explores legal strategies that could be pursued to alleviate hunger in the United States. It argues that international law can have an influence in shaping the discussion on food insecurity in the United States and in institutionalizing the right to food. Indeed, international law serves as supplementary evidence to support the notion that the United States lags behind other nations when it comes to human rights. In turn, this evidence provides the foundation for judicial interpretation that strengthens human rights by bringing them into alignment with international norms. The Article also examines a legal remedy that has often been applied to the issue—protecting the right to share food. Despite the short-term relief that such a right can provide, the Article argues that the right to share food will not decrease food insecurity and may, paradoxically, exacerbate hunger. The Article concludes that a growing recognition that the United States is out of sync with other rich nations in addressing hunger, while disheartening, may provide the basis for the establishment of a right to food in the United States.*

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## INTRODUCTION

Why does the United States perform so poorly compared to other rich nations when it comes to food security? What potential legal strategies could be pursued to alleviate hunger in the United States? In answering these questions, this Article incorporates a human rights perspective that foregrounds the right to food, arguing that the establishment of such a right is key to ending hunger.

The human right to a basic standard of living, including enough to eat, is poorly institutionalized in U.S. law. The Article describes the startling level of hunger in the United States and notes that the nation lags far behind other rich nations when it comes to food security. It attributes food insecurity and hunger in the United States to the failure of political and legal systems to ensure that the basic needs of all people are met and argues that the most promising path to food security is through the establishment of the right to food. It considers the influence that international law can have in shaping the discussion on food insecurity in the United States, with an emphasis on the role the Supreme Court could play in recognizing a justiciable right to food. Through judicial interpretation, the Court has an opportunity to establish a fundamental right to food in the United States. Next, the Article examines a legal remedy that has often been applied to the issue—protecting the right to share food. It argues that despite the short-term relief that such a right can provide, the right to share food does not decrease food insecurity and may, paradoxically, exacerbate hunger. The Article concludes by noting that although the glaring failure of the United States to address hunger may appear discouraging, it could actually provide the impetus for judicial interpretation that would establish the right to food domestically. This is because foreign laws, decisions, and norms have, in some instances, served as supplementary evidence to support the notion that the United States lags behind other nations when it comes to social justice. This argument in turn provides the foundation for judicial interpretation that strengthens human rights by bringing them into alignment with international practices and norms.

## I. FOOD INSECURITY IN THE UNITED STATES

The United States is one of the richest countries in the world. Nonetheless, it has a significant hunger problem. About 17% of people in the United States are food insecure—that is, they have difficulties at some points during the year

affording a diet of adequate quality.<sup>1</sup> According to an annual report issued by the U.S. Department of Agriculture (USDA), in 2014, children and adults were food insecure in 9.4% of households with children (3.7 million households).<sup>2</sup> About 5.6% of all households had very low food security during the course of the year,<sup>3</sup> meaning that limited resources reduced their food intake and disrupted their normal eating patterns. To be clear from the outset, the hunger problem in the United States should not be attributed to food shortage. In fact, research demonstrates that almost half of all U.S. food produce is thrown away.<sup>4</sup> Thus, this is simply a distribution issue for which the U.S. government must be held to account.

The scale of the United States' hunger problem is emphasized by statistical comparisons with other wealthy nations. For example, a recent Gallup World Poll indicated that Americans were much more likely than people in other rich countries to report that they were unable to pay for food.<sup>5</sup> Indeed, in 2011 and 2012, 21% of U.S. citizens reported trouble buying enough food during the last year, while only 8% of British citizens, 6% of Swedes, and 5% of Germans reported similar troubles.<sup>6</sup> Thus, while food insecurity is undoubtedly a worldwide problem, the United States lags significantly behind similarly situated nations.

The centerpiece of the federal government's response to food insecurity is the Supplemental Nutrition Assistance Program (SNAP), which "guarantees a certain level of benefits to persons or other entities who meet requirements set by law . . . . It thus leaves no discretion with Congress on how much money to appropriate, and . . . [can] carry permanent appropriations."<sup>7</sup>

SNAP is one of the United States' more robust antipoverty programs. Unlike programs such as the Housing Choice Voucher Program—the federal government's primary vehicle for affordable housing—SNAP is an entitlement program. It expands with need and is available by right to all eligible people. Housing Choice vouchers, by contrast, reach only around a quarter of all people who qualify, and the number of vouchers has stagnated over the last ten years.<sup>8</sup> Because affordable and supportive housing is in such scarce supply, more than half a million people are

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1. ALISHA COLEMAN-JENSEN ET AL., ECON. RESEARCH SERV., U.S. DEPT OF AGRIC., ERR-194, HOUSEHOLD FOOD SECURITY IN THE U.S. IN 2014, at 8 (2015).

2. *Id.*

3. *Id.*

4. Suzanne Goldenberg, *Half of All U.S. Food Produce Is Thrown Away, New Research Suggests*, GUARDIAN (July 13, 2016), <https://www.theguardian.com/environment/2016/jul/13/us-food-waste-ugly-fruit-vegetables-perfect> [<https://perma.cc/UB3R-28Z2>].

5. ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT [OECD], SOCIETY AT A GLANCE 2014: OECD SOCIAL INDICATORS, THE CRISIS AND ITS AFTERMATH, 28 fig.1.7 (2014), <http://www.oecd.org/els/soc/OECD2014-SocietyAtAGlance2014.pdf> [<https://perma.cc/9XHF-PDS7>].

6. *Id.*

7. *Entitlement Program*, THE LECTRIC LAW LIBRARY, [www.lectlaw.com/def/e081.htm](http://www.lectlaw.com/def/e081.htm) [<https://perma.cc/9BAC-TG3K>] (last visited Oct. 23, 2016).

8. CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: FEDERAL RENTAL ASSISTANCE 2 (Dec. 2015), <http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13RA.pdf> [<https://perma.cc/9X2G-KLMY>].

homeless on any given night, nearly a third of which are living outdoors.<sup>9</sup> Yet despite SNAP's status as an entitlement, the United States is still plagued by hunger and food insecurity.

## II. ENSURING THE HUMAN RIGHT TO FOOD

Why is SNAP ineffective in ending hunger and food insecurity? In this Article we follow the insights of Jean Drèze and Amartya Sen, who attribute hunger to “entitlement failure.”<sup>10</sup> They argue that food security depends on political and legal systems to ensure that the basic needs of all people are met. As such, food insecurity for certain population groups (e.g., poor people), even when food is available at the national level, is directly attributable to the breakdown of these systems—in other words *entitlement failure*—resulting in the failure of government to ensure food security for all.

Attributing responsibility for food security to political and legal systems suggests the appropriateness of a human rights-based framework to alleviate food insecurity and hunger. Stemming from Article 25 of the Universal Declaration of Human Rights, the right to food is:

The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.<sup>11</sup>

Thus, the human right to food places legal obligations on states to overcome hunger and malnutrition and realize food security for all. It is closely aligned with the right to food security, defined by the United Nations Food and Agriculture Organization as “[a] situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.”<sup>12</sup>

The definition of food security provided by the USDA parallels the United Nations’ definition, which is “access by all people to enough food for an active, healthy life.”<sup>13</sup> The definition includes two conditions that must be satisfied to ensure food security and freedom from hunger: (1) ready availability of nutritionally

9. MEGHAN HENRY ET AL., U.S. DEP’T OF HOUS. AND DEV., THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2015), <http://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf> [https://perma.cc/7TWG-YKXP].

10. JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 22–23 (1989).

11. Jean Ziegler (Special Rapporteur on the Right to Food), *Economic, Social and Cultural Rights: The Right to Food*, ¶ 26, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002), <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200258.pdf> [https://perma.cc/CFL3-NUB4].

12. UNITED NATIONS [U.N.], FOOD & AGRIC. ORG. [F.A.O.], THE STATE OF FOOD INSECURITY IN THE WORLD 2001, at 49 (2002).

13. THE WORLD BANK, POVERTY AND HUNGER: ISSUES AND OPTIONS FOR FOOD SECURITY IN DEVELOPING COUNTRIES 1 (1986).

adequate and safe foods, and (2) an ability to acquire acceptable foods in socially acceptable ways.<sup>14</sup> Thus, the *adequacy* of and *access* to food necessary for an active and healthy life are the two pillars of the right to food. SNAP falls short with respect to both of these domains.

### III. SNAP AND THE RIGHT TO FOOD

The “entitlement failure” described by Jean Drèze and Amartya Sen is clearly reflected in the shortcomings of SNAP. These shortcomings are twofold: First, the SNAP benefits to which eligible people are entitled are not sufficient to prevent hunger and food insecurity. Second, bureaucratic barriers, mix-ups, and onerous requirements hinder access to SNAP benefits.

#### *A. Inadequacy of the Benefit*

A review of the research by the Executive Office of the President of the United States shows that the SNAP benefit formula underestimates need.<sup>15</sup> As a result, “[d]iminished food budgets at the end of the month are associated with a drop-off in caloric intake of about 10 to 25% over the course of the month.”<sup>16</sup> In other words, beneficiaries cannot satisfy their food requirements using the SNAP benefit, putting them at increased risk of hunger when benefits run out toward the end of the month. Indeed, by the second week of the month the average participating household has spent 79% of their SNAP benefit.<sup>17</sup> This is hardly surprising when you consider that in 2015, the maximum benefit for a family of four was just \$649 per month. Broken down, this figure challenges a family of four to survive on just \$1.80 per person per meal. As a direct result of the inadequacy of the SNAP benefit, “[o]ver half of SNAP households currently report experiencing food insecurity . . . .”<sup>18</sup>

Many people are not eligible for year-round benefits, reducing the adequacy of the entitlement even more. As part of 1996 welfare reform, unemployed, nondisabled childless adults (termed “able-bodied adults without dependents”) are limited to three months of SNAP benefits in any three-year period when they are not employed, or in a work or training program for at least twenty hours a week.<sup>19</sup> This limit is enforced irrespective of whether employment or work training

14. Sue Ann Anderson, *Core Indicators of Nutritional State for Difficult-To-Sample Populations*, 120 J. NUTRITION (SUPPLEMENT) 1559, 1560 (1990).

15. EXEC. OFFICE OF THE PRESIDENT, LONG-TERM BENEFITS OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 33 (Dec. 2015), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/SNAP\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/SNAP_report_final_nonembargo.pdf) [<https://perma.cc/5KGB-NKHZ>].

16. *Id.* at 3.

17. CTR. ON BUDGET AND POLICY PRIORITIES, CHART BOOK: SNAP HELPS STRUGGLING FAMILIES PUT FOOD ON THE TABLE pt. 2, at 8 (Mar. 2016), <http://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table> [<https://perma.cc/A9SS-TX6S>].

18. EXEC. OFFICE OF THE PRESIDENT, *supra* note 15, at 6.

19. *Id.* at 13.

programs are readily available and even if they are diligently looking for work. States and localities are not obligated to help secure jobs or provide a place in a job-training program for able-bodied adults without dependents, and very few do so. In effect, able-bodied adults without dependents are more likely to have their SNAP benefits drastically reduced when they lose their income and thus are presumably less able to buy food.

According to Stacy Dean of the Center on Budget and Policy Priorities:

[T]he three-month time limit for childless, non-disabled adults who are unable to find 20 hours a week of work is one of the harshest provisions in SNAP. By 2000, three years after it was first implemented, an estimated 900,000 individuals had lost benefits. Since the time limit has been in effect, it has severely restricted this group's access to the program. Many of those who have lost benefits have faced serious hardship and have not been eligible for other kinds of public assistance.<sup>20</sup>

States can apply for waivers to the time limit requirements during periods of high unemployment, and many did so during the great recession. Yet as unemployment decreases, more states are reinstating the time limits, which will cut off more than 500,000 and as many as one million of the nation's poorest people from the program, according to a report by the Center of Budget and Policy Priorities.<sup>21</sup> As the report notes, people at risk of being cut off are extremely economically vulnerable—it points to USDA data showing that the gross income of people at risk of being cut off from SNAP averages 17% of the poverty line, or about \$2000 per year for a household of one in 2015.<sup>22</sup>

#### *B. Access to the Program*

The SNAP program is plagued by several barriers that limit access to the benefits to which people are entitled, including bureaucratic complexities and mix-ups, and local office practices that suppress participation.

Payment errors stem from the onerous complexity of SNAP's application process, verification requirements, and recertification practices. For example, caseworkers must often verify several types of household assets to determine eligibility and benefit amounts, such as bank accounts, property, and vehicles. A U.S. Government Accountability Office (GAO) study found that mistakes in determining household income were the largest source of caseworker error, followed by mistakes related to income deductions, and nonfinancial issues, such

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20. CTR. ON BUDGET AND POLICY PRIORITIES, BALANCING STATE FLEXIBILITY WITHOUT WEAKENING SNAP'S SUCCESS 15 (Mar. 2016) (testimony of Stacy Dean), <http://www.cbpp.org/sites/default/files/atoms/files/3-2-16snap-testimony.pdf> [https://perma.cc/LL9X-DVGF].

21. ED BOLEN ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, MORE THAN 500,000 ADULTS WILL LOSE SNAP BENEFITS IN 2016 AS WAIVERS EXPIRE 1 (Mar. 2016), <http://www.cbpp.org/sites/default/files/atoms/files/1-5-15fa.pdf> [https://perma.cc/5HDG-T2LK].

22. *Id.* at 9.

as determining household composition.<sup>23</sup> The complexity of these determinations heightens the risk that caseworkers will make errors.<sup>24</sup> In fact, caseworker-caused errors account for a full two-thirds of all payment errors.<sup>25</sup>

The SNAP national payment error rate for fiscal year 2014 was 3.66%—a combined rate that reflects an overpayment rate of 2.96% and a rate of underpayment of 0.69%.<sup>26</sup> Underpayments prevent recipients from accessing the entire benefit to which they are entitled. Overpayments can also hinder access to the benefit because recipients are often required to pay back the amount overpaid, even when the error is caseworker generated. If recipients are unable to pay back the amount, their benefits may be discontinued until they repay the overpayment amount, or the state or locality may recoup the overpayment by withholding part of the benefit each month until the overpayment is paid off. In Illinois, for example, the state withholds the greater of \$10 or 10% of the benefit amount when the overpayment is an unintentional client error or an agency error.<sup>27</sup> The impact of overpayment error was also felt in May of 2016, where it was reported that more than 3000 Mainers faced bills from the state or federal government because of the state's overpayment errors.<sup>28</sup> Thus, benefits that are already inadequate are further diminished as the government recoups the losses incurred by overpayment, even when the client is not at fault.

Onerous application, verification, and recertification requirements can suppress access to the program by imposing an unreasonable burden on program applicants and clients. The program requires clients to verify much of the information they provide to workers during application. Studies show that these requirements can prove too burdensome for program clients, increasing the likelihood that they will not finish applications or will drop out of the program. For example, while not definitive, an analysis by the USDA suggests “eligible households are several times more likely to leave [SNAP] in a recertification month than in other months. This implies that less frequent recertifications would be

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23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-245, FOOD STAMP PROGRAM: STATES HAVE MADE PROGRESS REDUCING PAYMENT ERRORS, AND FURTHER CHALLENGES REMAIN 19–20 (2005), <http://www.gao.gov/assets/250/246246.pdf> [<https://perma.cc/2572-5K34>].

24. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-956T, SUPPLEMENTAL ASSISTANCE NUTRITION PROGRAM: PAYMENT ERRORS AND TRAFFICKING HAVE DECLINED, BUT CHALLENGES REMAIN 8 (2010), <http://www.gao.gov/assets/130/125135.pdf> [<https://perma.cc/HM6M-JSEA>].

25. *Id.* at 6 n.6.

26. U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: PAYMENT ERROR RATES FY 2014 (2015), <http://www.fns.usda.gov/sites/default/files/snap/2014-rates.pdf> [<https://perma.cc/3RAG-JH7U>].

27. *PM 23-05-02-a: Repayment—Active Cases*, ILL. DEP'T OF HUMAN SERVS., <http://www.dhs.state.il.us/page.aspx?item=19054> [<https://perma.cc/4XBV-HJJ5>] (last visited Oct. 23, 2016).

28. Christopher Cousins, *Poor, Elderly Mainers Owe \$2.7 Million Because of DHHS Errors*, BANGOR DAILY NEWS (May 26, 2016), <https://bangordailynews.com/2016/05/26/news/state/poor-elderly-mainers-owe-2-7-million-because-of-dhhs-errors/> [<https://perma.cc/2KEP-H7F8>].

associated with greater participation by eligible households.”<sup>29</sup> California, for example, requires recertification every twelve months.<sup>30</sup> Failure to complete the recertification paperwork within thirty days will result in a requirement that the recipient fill out a completely new application or lose their benefits.<sup>31</sup> A study by the GAO found that state local officials believed that “too much attention on quality control ha[d] contributed to increased program complexities, decreased program participation, and high administrative costs.”<sup>32</sup>

A USDA report found that several local office practices reduced the likelihood that eligible people would complete the application process.<sup>33</sup> These practices included restricted office hours, particularly for households with earnings; negative supervisor attitudes toward applicants; fingerprinting of applicants; and prohibiting applicants from bringing children to the office.<sup>34</sup> For example, asking clients to leave children at home reduced client application completion by 21%.<sup>35</sup> The study also found that able-bodied adults without dependents were less likely to complete the application when the office imposed time limits on the benefits.<sup>36</sup> Thus, time limits not only reduce the adequacy of the benefit for able-bodied adults without dependents, but also reduce its accessibility—the study found that time limits decreased participation by 17%.<sup>37</sup>

In light of the identified SNAP failures, this Article examines the role that international law can play in institutionalizing a more robust domestic human right to food. While international law remains limited in regard to its binding effect, it contributes to the weight of international opinion in favor of establishing a justiciable right to food. Moreover, the Supreme Court has, in some instances, demonstrated a willingness to interpret and expand the Constitution’s rights to correspond with social progress and shifting international consensus. Thus, the Article argues that constitutional interpretation by the Supreme Court is a potentially fruitful strategy for institutionalizing the right to food domestically, given mounting international precedent in favor of a legally enforceable right to food.

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29. SUSAN BARTLETT ET AL., ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., FOOD STAMP PROGRAM ACCESS STUDY: FINAL REPORT E9 (2004), <http://www.ers.usda.gov/publications/efan03013/efan03013-3/> [<https://perma.cc/33BL-EPKP>].

30. *Id.* at C5.

31. CAL. HEALTH AND HUMAN SERV. AGENCY, RECERTIFICATION FOR CALFRESH BENEFITS, PROGRAM RULES 1, <http://www.cdss.ca.gov/cdssweb/entres/forms/English/CF37.pdf> [<https://perma.cc/W8B6-2B5H>] (last updated Nov. 2016).

32. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-58, MEANS-TESTED PROGRAMS: DETERMINING FINANCIAL ELIGIBILITY IS CUMBERSOME AND CAN BE SIMPLIFIED 34 (2001), <http://www.gao.gov/new.items/d0258.pdf> [<https://perma.cc/9DVV-H858>].

33. BARTLETT ET AL., *supra* note 29, at E9.

34. *Id.*

35. *Id.* at E8–9.

36. *Id.* at E8.

37. *Id.* at E8–10.



## IV. INSTITUTIONALIZING THE HUMAN RIGHT TO FOOD

*A. International Perspective*

Nations around the world have increasingly recognized the right to food as fundamental to every person's ability to live with dignity.<sup>38</sup> In the United States, the weak institutionalization of this right has contributed to domestic inadequacies, resulting in alarmingly high levels of hunger and food insecurity. Indeed, while food insecurity is an issue facing much of the world's population, such domestic inadequacies cause the United States to lag behind many other nations in regards to tackling food insecurity. For example, nations such as Brazil and South Africa have made huge strides in their fight against poverty by explicitly recognizing a justiciable right to food.<sup>39</sup> Considering the important role that international law has played in shaping issues of social justice and human rights over the last few decades, we believe that international law can play an instructive role in strengthening the right to food in the United States.

This Article considers two possible legal avenues, both of which are entwined with international law. First, it considers the role that treaties may have on the United States in regards to recognizing a justiciable right to food. Second, it considers the role the Supreme Court can play in using international law to support the notion that the Constitution should be interpreted to recognize the right to food as a fundamental right.

*B. Possible Legal Avenues**1. Treaty Ratification and Implementing Legislation*

Treaties provide the most prominent basis for the international right to food. Indeed, the right to food is explicitly recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>40</sup> The right to food is recognized in the ICESCR through the right to an adequate standard of living. Specifically, Article 11 recognizes "the fundamental right of everyone to be free from hunger."<sup>41</sup> Similarly, the right to food is also acknowledged in the Universal Declaration of Human Rights (Declaration).<sup>42</sup> While the Declaration is not a treaty itself, it has served as the foundation for many treaties, including the ICESCR. The Declaration

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38. NAT'L ECON. & SOC. RIGHTS INITIATIVE, GROWING FOOD INSECURITY IN THE UNITED STATES IS SYMPTOMATIC OF A DEVASTATING DISREGARD FOR BASIC HUMAN RIGHTS (2013), <http://www.nesri.org/news/2013/06/growing-food-insecurity-in-the-united-states-is-symptomatic-of-a-devastating-disregard-for-basic-human-rights> [https://perma.cc/2XGR-X2GM].

39. Michael J. McDermott, *Constitutionalizing an Enforceable Right to Food: A New Tool for Combating Hunger*, 35 B.C. INT'L & COMP. L. REV. 543, 545 (2012).

40. See International Covenant on Economic, Social and Cultural Rights art. 11, ¶ 2, Dec. 16, 1966, 993 U.N.T.S. 3.

41. *Id.*

42. *Id.* at 10.

therefore serves as evidence as to the international consensus that a right to food should be recognized.

Unfortunately, international recognition of the right to food can be misleading. The fact that the ICESCR requires states to protect, respect, and fulfill the international right to food does not, in and of itself, translate into a legally enforceable right. In fact, unless a treaty is self-executing, implementing legislation must be enacted domestically to give the treaty domestic effect—that is, to provide a legal domestic entitlement to food security.<sup>43</sup> Thus, by signing a treaty, the United States does little more than demonstrate international solidarity on an issue.

Giving domestic effect to the ICESCR would be a major step toward establishing the right to food in the United States. The treaty requires state parties to “improve methods of production, conservation and distribution of food . . . [and] to ensure an equitable distribution of world food supplies in relation to need.”<sup>44</sup> Therefore, giving the treaty domestic effect would not only create a justiciable right for people in the United States, but it would also demonstrate, on the world stage, the United States’ commitment to ending food insecurity.

Two major obstacles stand in the way of this prospect. First, despite the fact that 164 nations are parties to the ICESCR, the United States is one of six nations yet to ratify the treaty.<sup>45</sup> As a result of the United States’ failing to ratify the ICESCR, the treaty has no binding authority on the United States. That the United States signed the ICESCR in 1977 and has since never ratified it demonstrates the United States’ enduring reluctance to give the treaty binding authority.<sup>46</sup>

Second, and importantly, even if it were to ratify the treaty, the United States appears to be reluctant to pass the implementing legislation required to give the treaty domestic effect. The United States has demonstrated this reluctance not only through its inaction, but also through its rhetoric. For example, in 2002, the World Food Summit “produced a final declaration that called for the creation of an International Alliance Against Hunger.”<sup>47</sup> Tellingly, the United States attached a reservation to the declaration, stating, “[T]he United States believes that the attainment to the right to an adequate standard of living is a goal or aspiration to be realized progressively that does not give rise to any international obligation or any domestic legal entitlement . . . .”<sup>48</sup> The reservation also stated, “[T]he United States understands the right of access to food to mean the opportunity to secure food, and

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43. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 12 (2015), <https://fas.org/sgp/crs/misc/RL32528.pdf> [<https://perma.cc/C6R9-YSQY>].

44. *Id.*

45. See *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en) [<https://perma.cc/885A-ULAV>] (last visited 2017) (listing current signatories to the treaty).

46. *See id.*

47. GEORGE KENT, FOOD IS A HUMAN RIGHT 7 (2004), [http://www.choike.org/documentos/Food\\_Human\\_Right.pdf](http://www.choike.org/documentos/Food_Human_Right.pdf) [<https://perma.cc/9W8A-7U5Q>].

48. *Id.*

not guaranteed entitlement.”<sup>49</sup> The United States’ disappointingly noncommittal rhetoric demonstrates its unwillingness to be bound by such treaties. The legal effect of the ICESCR is therefore likely to remain limited.

Ultimately, until the United States ratifies the ICESCR, the possibility of the treaty becoming binding authority remains almost nonexistent. Due to the limitation of the ICESCR in terms of its binding effect, we consider that such treaties should serve as supplementary evidence as to the international opinion regarding food security. The fact that 164 nations have ratified the treaty adds further weight to the notion that the United States lags behind other nations in recognizing the right to food. As such, we believe that the Supreme Court should take a prominent role in recognizing a right to food through its power of judicial interpretation.

## 2. Constitutional Interpretation

A more likely avenue through which to secure the right to food may be through judicial interpretation. Historically, the Supreme Court has demonstrated a willingness, on occasion, to interpret and expand the Constitution’s enumerated rights to correspond with social progress. Through judicial interpretation, the Supreme Court could recognize a right to food through the implied right to life.

Two of the United States’ founding documents include a right to life. The Declaration of Independence first established the “right to life” as an “unalienable right.”<sup>50</sup> Additionally, while the Constitution does not explicitly recognize a positive right to life, the Fifth and Fourteenth Amendments state that no person shall be “deprived of life . . . without due process of law.”<sup>51</sup> Taken together, the two documents establish the right to life as foundational to the protection of our basic human rights. Simply, without protecting life, all other human rights protections are effectively meaningless.

Recognizing the right to food through the right to life is not without international precedent. In Ireland, for example, judges in *G v. An Bord Uchala* referred to the right to life as necessarily implying “the right to maintain that life at a proper human standard in matters of food, clothing and habitation.”<sup>52</sup> Similarly, while the Indian Constitution does not expressly enshrine the right to food, the Supreme Court of India, in *People’s Union for Civil Liberties v. Union of India*, held that the state violated the right to life by failing to implement food schemes and distribution in certain situations.<sup>53</sup> Finally, “the Swiss Federal Court, the highest court in Switzerland, ruled that an implicit constitutional right to a ‘minimum level

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49. *Id.*

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

51. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

52. LIDIJA KNUTH & MARGRET VIDAR, U.N. F.A.O., CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD 19 (2011) (quoting *G v. An Bord Uchtála* [1980] IR 32 (Ir.)).

53. *See id.* at 14 (citing *People’s Union for Civil Liberties v. Union of India & Others*, Writ Petition (Civil) AIR 2001 SC 196 (India)).

of subsistence' . . . could be enforced by courts."<sup>54</sup> Without a right to food, the right to life cannot be fully realized for many Americans. Through constitutional interpretation, the Supreme Court has an opportunity to entrench this right as fundamental to the ability of Americans to live with dignity.

The realization of rights through constitutional interpretation is not an alien concept. The right to abortion, for example, is now recognized through the right to privacy and autonomy.<sup>55</sup> Such an interpretive approach allows the Constitution to evolve in line with modern demands. With the hunger problem in the United States showing no sign of abating, and the apparent unwillingness of the government to alleviate the crisis, the Court has an opportunity to lead the way in tackling this crippling problem by recognizing the right to food as a fundamental right.

Despite its justiciable limitations, international law can play an instructive role domestically in establishing the right to food. International law demonstrates: (1) the weight of international opinion, (2) domestic inadequacies in relation to other nations, and (3) examples of successful legal strategies and remedies. International law, therefore, not only offers supplementary evidence of the United States' stagnant response to food security, but it also illustrates the fact that positive solutions are attainable.

As this Article has demonstrated, there is clear evidence on the international stage to support the notion of a right to food. To realize this right in the United States however, the Supreme Court must establish the right to food as a fundamental right.

International law has already played an instrumental role in Supreme Court cases that have strengthened domestic human rights. In a number of relatively recent decisions, foreign laws, decisions, and norms have served as supplementary evidence to support the notion that the United States lags behind other nations when it comes to social justice. In *Roper v. Simmons*, for example, the Court held that standards of decency had evolved to the extent that executing minors constitutes cruel and unusual punishment.<sup>56</sup> Writing for the majority, Justice Kennedy acknowledged the "overwhelming weight of international opinion against the juvenile death penalty."<sup>57</sup> Justice Kennedy was also sure to emphasize that recognition of international norms does not undermine the Constitution, stating, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that express affirmation of certain fundamental rights by other nations and peoples simply underscores . . . those same rights within our own heritage or freedom."<sup>58</sup>

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54. Christian Courtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK Y.B. U.N. L. 317, 330 (2007).

55. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973).

56. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

57. *Id.* at 578.

58. *Id.*

Similarly, until recently, the right of consenting same-sex couples to engage in sexual activity was not protected by the Supreme Court. However, in *Lawrence v. Texas*, the Court held that states could not criminalize sodomy between consenting homosexuals.<sup>59</sup> To support this extension of our human rights, the Court cited to international law, noting that in 1981 the European Court of Human Rights ruled that laws against gay sexual activity violated the European Convention on Human Rights.<sup>60</sup> Again in *Lawrence*, the Court looked internationally to support the notion that the United States lagged behind other developed nations in regards to social justice.<sup>61</sup>

The Court has a similar responsibility to look to other nations in the effort to tackle food insecurity. Currently, fifty-six constitutions protect the right to food either implicitly or explicitly as a justiciable right, or explicitly as a directive principle of state.<sup>62</sup> The positive effect of such constitutional safeguards has been demonstrable. In Brazil, for example, millions of people have been lifted out of poverty since the right to food was made a constitutional right.<sup>63</sup> The Court has both the opportunity and the responsibility to follow the lead of other nations in recognizing the right to food as a fundamental right.

Of course, constitutional change becomes more likely when civil society groups and social movement organizations on the domestic front challenge prevailing views on constitutional interpretation. Several decades of sustained advocacy by groups such as Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal Defense Fund, and Freedom to Marry, for example, helped transform same-sex marriage from “an idea that provoked outrage to a broadly accepted constitutional right.”<sup>64</sup> Similarly, the Court may be more likely to realize the constitutional right to food in the United States if civil society groups engage in advocacy that reinforces internationally recognized human rights.

Simply, to supplement our established, baseline constitutional rights with progressive, internationally recognized human rights does not undermine the Constitution. Precedent supports the power of the Court to interpret the Constitution to protect rights that were not explicitly enumerated in the Constitution. Through judicial interpretation, the Court has the opportunity to equip U.S. citizens with a positive, justiciable right to food. By establishing the right to food, the Court could have a hand in ending the inadequacy and access issues that have plagued the SNAP program.

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59. *See Lawrence v. Texas*, 539 U.S. 558, 559–61 (2003).

60. *Id.* at 573.

61. *Id.*

62. KNUTH & VIDAR, *supra* note 52, at 32.

63. OXFAM, BEHIND BRAZIL'S AMAZING SUCCESS AGAINST HUNGER AND POVERTY, QUESTIONS REMAIN . . . , at 1 (2012), <https://www.oxfam.org/sites/www.oxfam.org/files/oxfamriplus20-case-study-brazil-jun2012.pdf> [<https://perma.cc/WG93-D554>].

64. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 9 (2016).

## V. THE RIGHT TO SHARE FOOD VS. THE RIGHT TO FOOD

Much of the legal energy around food insecurity in the United States has centered not on strengthening the right to food, but on strengthening the right of private sector actors to share food. In part, this emphasis may arise because the right to share food is better institutionalized than the human right to food and in part because the right to share food is often challenged by local ordinances. Certainly, in the face of the government's failure to establish a human right to food, SNAP beneficiaries are often forced into the private sector to avoid hunger and malnourishment. Yet, as noted by Chilton and Rose, "A common misperception about hunger in the United States is that involuntary lack of access to food ought to be solved with charity."<sup>65</sup>

Shifting responsibility for hunger and food insecurity to private sector charities emphasizes voluntary action without accountability, without obligation, and without legal protections for beneficiaries. This is because purely private agencies in the United States are free from the constitutional constraints that bind governments when they act directly on citizens through the law or through the actions of public officials.<sup>66</sup> Indeed, accountability is an ambiguous concept in the nonprofit sector, in part because it is poorly institutionalized in law.<sup>67</sup> An emphasis on charity is therefore antithetical to a human rights framework, which is premised on the concept of government accountability.

Legal action to protect the right to share food is in part motivated by the politics of homelessness, in which local governments often prevent nonprofit and other charitable groups from sharing food. A report by the National Law Center on Homelessness and Poverty found that 9% of the 187 U.S. cities they collected data from prohibited nonprofits and other private groups from sharing food with people experiencing homelessness.<sup>68</sup> A study of fifty-eight cities in California found that over 20% had laws prohibiting food sharing.<sup>69</sup> As noted by the National Law Center on Homelessness and Poverty, these laws are often driven by the premise that "providing homeless persons with free food encourages them to remain homeless. Moreover, there is unfounded concern that access to free food services attracts

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65. Mariana Chilton & Donald Rose, *Framing Health Matters: A Rights-Based Approach to Food Insecurity in the United States*, 99 AM. J. PUB. HEALTH 1203, 1207 (2009).

66. H.J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461, 462 (1987).

67. See generally A.P. Williams & J.A. Taylor, *Resolving Accountability Ambiguity in Nonprofit Organizations*, 24 VOLUNTAS: INT'L J. VOLUNTARY AND NONPROFIT ORGS. 214 (2013).

68. NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* (2014), [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place) [<https://perma.cc/CSR9-RFA6>].

69. MARINA FISHER ET AL., BERKELEY LAW POLICY ADVOCACY CLINIC, *CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE* (Feb. 12, 2015), <http://dx.doi.org/10.2139/ssrn.2558944> [<https://perma.cc/GTW9-6UXN>].

homeless people to the service area, increasing crime and negatively affecting the aesthetic of a neighborhood.”<sup>70</sup>

The right to share food may be upheld under the U.S. Constitution in certain instances, especially when local ordinances impinge on the religious expression of faith-based organizations. In *Big Hart Ministries v. City of Dallas*, which challenged the city’s anti-food-sharing law, the court found that food-sharing activities were religious expression protected under the Texas Religious Freedom Restoration Act.<sup>71</sup> The American Civil Liberties Union (ACLU) of Southern California settled a lawsuit against the state of California, alleging that the state had infringed on the freedom of expression and religion of a group, Welcome INN, when state park rangers threatened to ticket members for serving food to people experiencing homelessness as an expression of faith.<sup>72</sup>

Such legal efforts are necessary to protect the right to share food; yet they distract from a human rights framework, which asserts that the right to food cannot be attained through charity but is, rather, grounded in the obligation of a government to its people. Indeed, an emphasis on the right to share food places food provision in the hands of private sector actors who operate absent the obligation to provide food and therefore outside of a legal and political system that would hold them accountable for fulfilling such an obligation. Therefore, clients are stripped of their already weak right to food under SNAP when they seek nourishment in the private sector. This can lead to increased food insecurity.

Consider the example of Carl, a disabled, homeless man in his fifties. When the local welfare office discontinued his SNAP benefits because of an overpayment error, he sought food from a charity group which brings meals to the shelter in the city he considers home. Then, the shelter staff banned Carl, whose name has been changed to protect his privacy, for arguing with a resident who had stolen his radio. When Carl attempted to get a meal from the charity group that brings food to the shelter, staff informed him that they had instituted a new rule—no shelter meant no access to the building—not even for meals provided by an outside nonprofit. Put together, the bureaucratic hurdles of SNAP and the capricious and unaccountable behavior of the homeless shelter put Carl at risk for hunger.

Establishing a human right to food would constitute a major step towards eliminating this paradoxical situation. A legally enforceable right to food would hold the government responsible for the adequate distribution of food, to the extent that people would not require assistance from the private sector.

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70. NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 68.

71. *Big Hart Ministries Ass’n Inc. v. City of Dallas*, No. 3:07-CV-0216-P, 2011 WL 5346109, at \*4–45 (N.D. Tex. Nov. 4, 2011).

72. *Welcome INN, Inc. v. Coleman*, No. 8:08-cv-00506-DOC-RNB, 2008 WL 4488404 (C.D. Cal. Sept. 8, 2008).

## CONCLUSION

For a rich nation with an overabundance of food, the United States has a remarkably significant hunger problem. In fact, the United States lags far behind other rich nations when it comes to food security. In the international context, it also trails behind in terms of establishing the right to food. For example, out of the 164 nations that have recognized the right to food by signing the ICESCR, it is one out of only six that has not ratified the treaty.<sup>73</sup>

This growing disjuncture between the situation in the United States and international consensus may appear discouraging; yet, it could provide a legal avenue through which to secure the right to food in the United States. In a number of relatively recent decisions, foreign laws, decisions, and norms have served as supplementary evidence to support the notion that the United States lags behind other nations when it comes to social justice. In turn, this evidence provides the foundation for judicial interpretation that strengthens human rights by bringing them into alignment with international norms. With increasing recognition that the United States is out of sync with other rich nations in addressing hunger, an opportunity is opening for the establishment of a right to food in the United States. The establishment of this right is critical to the efforts to alleviate food insecurity in the United States.

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73. International Covenant on Economic, Social and Cultural Rights, *supra* note 40.