

**Expansive Rights:
FDR’s Proposed “Economic” Bill of Rights
Memorialized in the International Covenant on
Economic, Social, and Cultural Rights, But with
Little Impact in the United States**

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Introduction

In the United States, a common frame of reference for “rights” is found in the Bill of Rights emblazoned in the U.S. Constitution. On January 11, 1944, President Franklin D. Roosevelt (“FDR”) sought to fundamentally alter what would be commonly considered a “right” in his

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proposed “Economic” Bill of Rights. This new set of “rights” would supply every American with the right to housing, food, employment, education and other tangible items. FDR’s proposal was a dramatic departure from the rights espoused by our Founding Fathers and was largely a proposal to instill “positive” rights necessitating permanent government involvement in all facets of society. A similar set of positive rights is contained in a United Nations (“U.N.”) treaty known as the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). It turns out there was a tremendous amount of Rooseveltian influence in the development of the ICESCR, which may be why they share such similarities. Before exploring the ICESCR, let’s explore the development of FDR’s Economic Bill of Rights.

FDR, riding high after securing an unprecedented fourth term in the Oval Office, declared that his Economic Bill of Rights was necessary to ensure that every American was secure and able to prosper in life.¹ The President asked Congress to explore the means to implement the following rights:

The right to a useful and remunerative job in the industries or shops or farms or mines of the nation.

The right to earn enough to provide adequate food and clothing and recreation.

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living.

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.

The right of every family to a decent home.

The right to adequate medical care and the opportunity to achieve and enjoy good health.

The right to adequate protection from the economic fears of old age, sickness, accident and unemployment.

¹ FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 40-42 (Samuel Rosenman, ed., Harper 1950) (1938).

The right to a good education.²

This radical proposal gained little, if any, traction in Congress during FDR's remaining tenure in office. However, just over 20 years later, on December 16, 1966, a multilateral Covenant was adopted by the U.N. General Assembly that commits its parties to work toward granting economic, social, and cultural rights to individuals.³ This Covenant became the ICESCR. The U.S. signed the ICESCR, but has yet to ratify it. Below is a sample of the rights contained in the ICESCR:

The right to work, under "just and favorable conditions," with the right to form and join trade unions.

The right to social security, including social insurance.

The right family life, including paid parental leave and the protection of children.

The right an adequate standard of living, including adequate food, clothing and housing, and the "continuous improvement of living conditions."

The right to health, specifically the highest attainable standard of physical and mental health.

The right to education, including free universal primary education, generally available secondary education and equally accessible higher education.

The right to participation in cultural life.⁴

The trepidation in ratifying the ICESCR is similar to the U.S. government's reluctance to fully implementing the rights afforded in FDR's Economic Bill of Rights. The inaction of the U.S. government in embracing the positive rights described in both documents is due to

² *Id.* at 41.

³ *International Covenant on Economic, Social and Cultural Rights*, Vol. 993 U. N. T. S. (Dec. 16, 1966), <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> [hereinafter *ICESCR*].

⁴ *Id.*

various factors and this paper explores those factors. This paper also examines the similarities and differences between FDR's Economic Bill of Rights and the ICESCR. Before delving in to the outcomes produced by both documents, let's examine the driving force behind both the Economic Bill of Rights and the ICESCR.

FDR's Inspiration for the Economic Bill of Rights

FDR's rationale for proposing a new set of rights was based on the idea that, as the U.S. grew in size and stature, and its industrial economy expanded, the "political rights" firmly established in the Constitution's Bill of Rights "proved inadequate to assure us equality in the pursuit of happiness."⁵ FDR declared that, "necessitous men are not free men" and "people who are hungry and out of a job are the stuff of which dictatorships are made."⁶ It is possible that FDR examined how Adolf Hitler rose to power in Germany and wanted to establish policies that would prevent such an individual from attaining high office in the United States.

In 1929, when the Great Depression began, America called in all of its foreign loans, which crippled Weimar Germany.⁷ Unemployment spiked in Germany as a result. Chancellor Brüning tried to take action, but failed to get the Reichstag to agree to his policies.⁸ Instead of trying to work with members of the Reichstag, President Hindenburg used a provision in the Weimar Constitution, Article 48, to pass the Chancellor's measures by decree.⁹ Article 48 empowered the German President to take emergency measures without the prior consent of the Reichstag.¹⁰ This caused great turmoil and political unrest, which allowed the Nazi Party to gain support with the German people.¹¹ President Hindenburg dismissed Chancellor Brüning in 1932. The two successor Chancellors each lasted less than a year. In January of 1933, a plan was hatched to get the Nazi

⁵ Roosevelt, *supra* note 1, at 41.

⁶ *Id.*

⁷ *Hitler's Rise to Power*, BBC HISTORY, <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/germany/hitlerpowerrev1.shtml>

⁸ *Id.*

⁹ *Id.*

¹⁰ WEIMAR CONSTITUTION, excerpts available at, <https://www.facinghistory.org/weimar-republic-fragility-democracy/politics/weimar-constitution-excerpts-politics-general>.

¹¹ *Hitler's Rise to Power*, *supra* note 7.

Party on their side – to make Hitler vice chancellor. However, Hitler refused the position and demanded to be made Chancellor.¹² President Hindenburg agreed, but what he did not expect was that, immediately after assuming power, Hitler successfully made himself absolute ruler by using the aforementioned Article 48 provision of the Weimar Constitution.¹³

FDR may have analyzed this sequence of events in Germany and contemplated the possibility of another depression in the U.S., which would result in economic instability, political chaos, and the ascendancy of a corrupt and evil President who would turn the office into a dictatorship. FDR stated in his 1944 State of the Union speech that the Economic Bill of Rights was intended to “spell security” and would “begin to lay the plans and determine the strategy for the winning of a lasting peace.”¹⁴ FDR declared that “the one supreme objective for the future, which we discussed for each Nation individually, and for all the United Nations, can be summed up in one word: Security. And that means not only physical security that provides safety from attacks by aggressors. It means also economic security, social security, and moral security—in a family of Nations.”¹⁵

However, FDR’s speech was not couched in pure national security rationale. Instead, FDR proclaimed the need to establish an “American standard of living higher than ever before known” and to set an incredibly high standard – if some fraction of the American people, “whether it be one-third or one-fifth or one-tenth is ill-fed, ill-clothed, ill-housed, and insecure” then, according to FDR, the U.S. cannot be content and must take action.¹⁶ This illustrates FDR’s belief in the federal government playing a role in various sectors of the U.S. economy so the economy would remain stable and prosper. Considering FDR’s track record of government interventionism, including the enactment of Social Security, unemployment insurance, and government-sponsored public works programs, this rationale for FDR’s Economic Bill of Rights stands to reason.

The issue of inspiration for FDR’s proposed Economic Bill of Rights has led to speculation about whether FDR would have ever

¹² *Id.*

¹³ *Id.*

¹⁴ Roosevelt, *supra* note 1, at 40.

¹⁵ *State of the Union Address to Congress: January 11, 1944*, FRANKLIN D. ROOSEVELT LIBRARY AND MUSEUM, http://www.fdrlibrary.marist.edu/archives/address_text.html [hereinafter *1944 State of the Union Address*].

¹⁶ Roosevelt, *supra* note 1, at 40.

actually tried to enact the sweeping policies contained in his State of the Union address. Some have argued that FDR was merely laying a foundation of economic principles that the U.S. should aspire to, as opposed to making a substantive policy proposal.

**Rights or Principles?
Determining the Driving Force Behind FDR's Economic Bill of
Rights**

According to Cass Sunstein, author of *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever*, FDR's proposal should be viewed as a set of principles that would give a "fresh account of the nation's defining aspirations."¹⁷ Sunstein points out that FDR never proposed amending the Constitution in his State of the Union address. In addition, Sunstein attempts to downplay FDR's statements by arguing that FDR "did not mean that every American was necessarily entitled to a job; he did mean that the national government would commit itself to promoting economic conditions that would reduce unemployment."¹⁸ Sunstein asserts that "this was a political speech, not a lawyer's document."¹⁹

However, Sunstein's argument does not hold water when reviewing FDR's track record as President. FDR was incredibly popular with the public, as evidenced by his election to an unprecedented fourth term with 53 percent of the popular vote.²⁰ FDR also had the luxury of working with a Democrat-controlled Congress, which would have made it much easier to pass his Economic Bill of Rights through Congress. He successfully coerced the Supreme Court to embrace his New Deal regulations, so the judiciary probably would not have struck down the rights in his proposal. Finally, in FDR's previous three terms in office, he enacted historically broad and influential domestic programs (e.g., Social Security). Based on these factors, the notion that FDR was merely espousing principles and aspirational goals, as opposed to substantive policy proposals, is misguided. It is reasonable to assume that, if FDR lived to complete his fourth term, he may have very well signed some

¹⁷ Cass R. Sunstein, *Obama, FDR and the Second Bill of Rights*, BLOOMBERG NEWS (Jan. 28, 2013), <http://www.bloomberg.com/news/2013-01-28/obama-fdr-and-the-second-bill-of-rights.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

version of the Economic Bill of Rights into law. FDR stated that whether the U.S. can maintain its “rightful place in the world” depends on how fully “these and similar rights [are] carried into practice for our citizens.”²¹

Another fact indicating that FDR was setting forth actual, substantive policy proposals, instead of principles, was FDR’s decision to select the portion of his State of the Union address unveiling his Economic Bill of Rights to be shown as a newsreel in movie theatres.²² Prior to the advent of television news, film companies were invited into the White House to film parts of the President’s State of the Union speeches, which would appear in movie theaters days after FDR’s address. In 1944, FDR selected two excerpts to read for the newsreels – (1) an excerpt discussing recommendations to stabilize the economy, such as a food price control law, currency stabilization measures, and a national service law and (2) his proposed Economic Bill of Rights.²³ It is irrational to argue that FDR selected the Economic Bill of Rights from his State of the Union address to be filmed and disseminated to millions of Americans if he was merely espousing principles, as opposed to setting forth serious policy proposals. In addition, there is evidence that the Roosevelts were serious about enacting the rights contained in the Economic Bill of Rights since his wife, Eleanor Roosevelt, championed those same rights while helping draft the ICESCR.

The Rooseveltian Influence on the ICESCR

The driving force behind persuading the United Nations (“U.N.”) to adopt the Universal Declaration of Human Rights (“Universal Declaration”), which contained the economic rights established in the ICESCR, was Eleanor Roosevelt.²⁴ The U.N. Commission on Human Rights drafted the language of the Universal Declaration of Human Rights, and Eleanor Roosevelt, not-so-coincidentally, was the chair of the Commission.²⁵ During a speech to the U.N., Mrs. Roosevelt proclaimed that the Declaration of Human Rights, along with the provisions of the ICESCR, would be an “international Magna Carta of all men

²¹ Roosevelt, *supra* note 1, at 41.

²² *Id.*

²³ *1944 State of the Union Address*, *supra* note 15.

²⁴ John F. Sears, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, FDR LIBRARY AT MARIST COLLEGE 4, <http://www.fdrlibrary.marist.edu/library/pdfs/sears.pdf> [hereinafter *John Sears Article*].

²⁵ *Id.*

everywhere” and an event “comparable to the Proclamation of the Rights of Man in France in 1789” and to the “adoption of the Bill of Rights in the U.S.”²⁶

Drafting the Universal Declaration, along with the provisions of the ICESCR, was no easy task. In fact, when representatives of the major world powers, including the United States, Soviet Union, United Kingdom, France, and China, arrived in San Francisco on April 25, 1945 for the conference that founded the U.N., the objectives of the U.N. did not include the promotion of human rights. However, revelations of the brutality of the Nazi concentration camps, liberated just prior to the opening of the U.N. conference, spurred a push to include human rights as a centerpiece of the U.N.’s mission.²⁷

The Commission on Human Rights was established, with Mrs. Roosevelt as the chair, and the members had a discussion regarding what an international bill of rights should contain. In February of 1947, the Commission agreed that three of its members – Mrs. Roosevelt, P.C. Chang, and Charles Malik – would draft the first version of the international bill of rights. This initial draft was met with some apprehension by members and led to a myriad of revisions.²⁸ It was during the third session of the Commission on Human Rights in May of 1948 when Mrs. Roosevelt advocated for inclusion of economic and social rights that would later become the provisions of the ICESCR. The arguments over these rights became especially intense and Mrs. Roosevelt referenced the rights that were pronounced in FDR’s Economic Bill of Rights speech in 1944. Mrs. Roosevelt proclaimed that, “men in need were not free men.”²⁹ Mrs. Roosevelt’s proposals continued to be met with trepidation and dissension. In fact, Robert Lovett, the undersecretary of state for the U.S., argued that neither the Universal Declaration nor the ICESCR would serve the interests of the U.S. and believed that economic and social rights (e.g., the right to work and the rights to education and health) had no place in a bill of human rights.³⁰ Nevertheless, Mrs. Roosevelt insisted and successfully persuaded the State Department to accept the inclusion of economic and social rights in

²⁶ *Eleanor Roosevelt Speech on the Adoption of the Universal Declaration of Human Rights*, AMERICAN RHETORIC (Dec. 9, 1948), <http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm>.

²⁷ Sears, *supra* note 24.

²⁸ *Id.* at 8-9.

²⁹ *Id.* at 9.

³⁰ *Id.* at 10.

the Universal Declaration and to join the majority of the Commission on Human Rights in supporting the adoption of both the Universal Declaration and the ICESCR.³¹ On December 10, 1948, after nearly three years of work, the Declaration was adopted by the U.N.³² The ICESCR was later adopted in 1966.

Similarities Between FDR's Economic Bill of Rights and the ICESCR

The ICESCR was rooted in Rooseveltian ideology due to Eleanor Roosevelt's involvement in its inception. Along with the Rooseveltian influence, there is a consistent theme found in FDR's Economic Bill of Rights and Eleanor Roosevelt's ICESCR – the government must be empowered to secure and promote the liberties of individuals. Implied in this theme is the belief that the liberties already afforded to individuals were insufficient and incapable of preventing future turmoil both domestically and internationally. For example, the ICESCR declares that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”³³ Essentially, the ICESCR is claiming that a government entity must be empowered to create those “conditions” in order for individuals to enjoy their aforementioned economic, social, and cultural rights. In a similar fashion, FDR declared that, “true individual freedom cannot exist without economic security and independence” and that the Constitution's Bill of Rights “proved inadequate to assure us equality in the pursuit of happiness.”³⁴ FDR essentially stated that the economic structure in the U.S. was ill-equipped to ensure security and prosperity for citizens and it was incumbent upon the government to take action so security and prosperity can be fully realized.

Both the ICESCR and the Economic Bill of Rights appear to downplay the notion that, in order for individuals to achieve economic security and prosperity, there is personal responsibility. Granted, sub-section 1 of Article I in the ICESCR states that “all peoples have the right of self-determination [and by] virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁵ However, sub-section 3 of Article I declares that it is the

³¹ *Id.* at 9.

³² Sears, *supra* note 24.

³³ ICESCR, *supra* note 3, at 5 (emphasis added).

³⁴ Roosevelt, *supra* note 1, at 41.

³⁵ ICESCR, *supra* note 3, at 5.

responsibility of the state to “promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”³⁶ Basically, sub-section 3 contradicts sub-section 1, since the underpinnings of self-determination is a reliance on the self, not the state.

FDR was unabashed in declaring that the U.S. cannot be content, “no matter how high [the] general standard of living may be, if even a fraction of U.S. citizens, whether it be one-third or one-fifth or one-tenth . . . is ill-fed, ill-clothed, ill-housed, and insecure.”³⁷ Essentially, FDR was stating that we share a common responsibility to ensure that all citizens have an adequate standard of living. The ICESCR contains a similar belief declaring that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”³⁸

Along with the similarity in underlying themes, there is the more obvious similarity in the actual language used in the ICESCR and Economic Bill of Rights. In fact, the language contained in the ICESCR reads much like a more detailed version of the Economic Bill of Rights. If FDR had lived through his fourth term in office and actually tried to enact this proposal, it’s not unreasonable to assume that the final version of the Economic Bill of Rights would look quite similar to the ICESCR. For example, the Economic Bill of Rights contains the right to a “good education.”³⁹ Article 13, sub-section 1 of the ICESCR declares that the state must “recognize the right of everyone to education.”⁴⁰ Sub-section 1 goes on to detail what exactly this right entails, stating, “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”⁴¹

The Economic Bill of Rights includes the “right to a useful and remunerative job in the industries or shops or farms or mines of the nation.”⁴² Similarly, the ICESCR includes the right to employment, but goes even further by stating that the right “shall include technical and vocational guidance and training programs, policies and techniques to

³⁶ *Id.* at 5.

³⁷ Roosevelt, *supra* note 1, at 40.

³⁸ ICESCR, *supra* note 3, at Intro.

³⁹ Roosevelt, *supra* note 1.

⁴⁰ ICESCR, *supra* note 3, Art. 13(1), at 8.

⁴¹ *Id.*

⁴² Roosevelt, *supra* note 1.

achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”⁴³

Despite many striking similarities between the Economic Bill of Rights and the ICESCR, there still remain differences that illustrate the much broader scope of the ICESCR.

Differences Between FDR’s Economic Bill of Rights and the ICESCR

The proposals contained in FDR’s Economic Bill of Rights are extremely broad, but the ICESCR goes even further in stating the level of involvement and powers bestowed to the government. For example, Article 9 of the ICESCR declares that everyone shall have the right to social security, including social insurance.⁴⁴ The benefits must be “adequate, accessible to all, and provided without discrimination.”⁴⁵ In the Economic Bill of Rights, FDR, surprisingly, never mentions social security as a right. This is surprising since he was the architect of the landmark Social Security Act of 1935.⁴⁶ It could be argued that FDR was simply confident that his Social Security program was firmly embedded in society and not at risk of ever being repealed or discontinued. Another argument is that the rights contained in the Economic Bill of Rights would be building blocks to the already-enacted Social Security program. Another possibility is that the Economic Bill of Rights would have afforded overarching protections to citizens that would be, in and of themselves, “social security.”

The ICESCR distinguishes itself again in Article 10, which provides for the right to a family life. Article 10 declares that the family is “the natural and fundamental group unit of society” and requires the state to accord it “the widest possible protection and assistance.”⁴⁷ Article 10 also declares the importance of having voluntary marriages, rather than forced marriages.⁴⁸ FDR never mentions marriage, or the importance of family, as a societal foundation in the Economic Bill of Rights. He only mentions family in relation to farmers being given the opportunity to

⁴³ ICESCR, *supra* note 3, Art. 6(2), at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *The Social Security Act of 1935*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/history/35act.html> (last visited Oct. 26, 2014).

⁴⁷ ICESCR, *supra* note 3, Art. 10 at 7.

⁴⁸ *Id.*

raise and sell products so they can give their family “a decent living.”⁴⁹ Article 10 of the ICESCR also contains a provision regarding paid leave for mothers before and after childbirth. Once again, there is no mention of the treatment of mothers or newborns in the Economic Bill of Rights.

Another somewhat distinct portion of the ICESCR is found in the aforementioned right to education. The Economic Bill of Rights contains the right to a “good education,” while Article 13 of the ICESCR lists five very specific requirements that each nation should strive for when attempting to realize this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.⁵⁰

The intent of the five requirements appears to be free education at all levels, which may or may not have been included in the Economic Bill of Rights if FDR ultimately enacted his proposal.

Since the ICESCR and the Economic Bill of Rights are focused on the concept of expanding “rights,” it would be helpful to compare and contrast these proposals with the rights already established in the U.S. Constitution.

⁴⁹ Roosevelt, *supra* note 1.

⁵⁰ ICESCR, *supra* note 3, Art. 13(2)(a-e) at 8.

Comparing the ICESCR and the U.S. Constitution's Bill of Rights

When comparing the ICESCR with the U.S. Constitution's Bill of Rights, the differences are much more apparent than any similarities. The ICESCR is an international Covenant embracing the idea of collective action, and fostering a quasi-partnership with the government and every individual as the key to achieving prosperity and happiness. The Constitution's Bill of Rights is rooted in an aversion to government intervention in all aspects of a law-abiding citizen's life.

Another distinction is that the ICESCR establishes various reporting mechanisms meant to ensure that the signatory nations are actually implementing and enforcing the rights afforded under the Covenant. This creates a layer of bureaucracy and vests power in a centralized oversight committee. The Constitution's Bill of Rights is based on a very different structure. For example, the Ninth Amendment of the U.S. Constitution states that the rights enumerated in the Constitution, and in the first eight Amendments, do not preclude the existence of other rights belonging to the people. The Tenth Amendment follows by stating that the states and the people retain all powers not expressly granted to the Federal Government.⁵¹ The Bill of Rights thus indicates that whatever power the federal government does not have should be placed in the people and the States. Conversely, the ICESCR declares that any remaining power is vested in a committee, not individuals or nation states.

The ICESCR is not alone in terms of being in stark contrast to the Constitution's Bill of Rights. FDR's proposal, despite being described as a second Bill of Rights, does not share many similarities with the Constitution's Bill of Rights.

Comparing the Economic Bill of Rights and the U.S. Constitution's Bill of Rights

There are more differences than similarities between FDR's Economic Bill of Rights and the Founder's Bill of Rights. One of the most glaring distinctions between the two documents is the fact that the Constitution's Bill of Rights list freedoms *from* government

⁵¹ *Our Wonderful Bill of Rights: The Ninth and Tenth Amendments*, YAHOO VOICES (July 12, 2005), <http://voices.yahoo.com/our-wonderful-bill-rights-ninth-tenth-amendments-3472.html>.

intervention.⁵² The Founders framed the Bill of Rights as “negative rights,” in the sense that the rights could be enjoyed by all citizens without government involvement. They were considered “natural rights” in that all people may enjoy them as long as there is not an infringement on each other’s liberty. FDR’s proposal is fundamentally different. It features a list of “positive rights,” which necessitate action by a centralized authority capable of enforcing those rights.⁵³ For example, the right to a decent home necessitates government action, whether it is the government furnishing every citizen with a home or having the government intervene in the economy and mandate that a private company provide citizens with adequate housing.

Another distinction is that the Economic Bill of Rights views the attainment of liberty as requiring a quasi-partnership between the government and the individual, where the individual is incapable of pursuing true happiness and prosperity without the assistance of the government. For example, if you do not have adequate employment, the Economic Bill of Rights would presumably allow an individual to invoke their right to employment and seek the assistance of the government to attain adequate employment.

Despite the vast differences, there are some similarities between the Constitution’s Bill of Rights and FDR’s Economic Bill of Rights. One similarity is the desire for a significant change in governmental structure. For example, FDR declared that the “political rights” found within the Bill of Rights were “inadequate to assure us equality in the pursuit of happiness.”⁵⁴ So, as a response to those alleged inadequacies, he drafted the Economic Bill of Rights. A similar intent can be found with the Founders in the drafting of both the Bill of Rights and the Constitution. Prior to the Constitution, the U.S. operated under the Articles of Confederation (“the Articles”). As the flaws in the Articles became apparent, the Founders desired to fundamentally change the structure of the government by establishing a centralized federal government that would be accompanied by a system of checks and balances in governmental power. Establishing this system of government resulted in a diminution in the sovereignty enjoyed by the States under the Articles. This illustrates that, in both the Economic Bill of Rights and the

⁵² *The Bill of Rights: A Transcription*, CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited Nov. 25, 2014).

⁵³ VICKI JACKSON V. MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*, 1751-1758, (1999).

⁵⁴ Roosevelt, *supra* note 1.

Founders' Bill of Rights, there is the intent to improve society with the implementation of a drastically different government structure than what was in place at the time.

Another similarity between the Constitution's Bill of Rights and FDR's Economic Bill of Rights is the intent to improve the nation's security. For example, in FDR's State of the Union address, he frames the Economic Bill of Rights as being essential to ensure the U.S. maintains its standing in the world and continues to thrive. FDR proclaimed that a second Bill of Rights would create "a new basis of security and prosperity."⁵⁵ Similarly, improving the nation's security was a driving force behind the drafting of the Constitution. In Federalist Paper 23, Alexander Hamilton argued that there were four "principal purposes" behind establishing a union among the states. Those purposes included:

1. The common defense of the members;
2. The preservation of the public peace, as well against internal convulsions as external attacks;
3. The regulation of commerce with other nations and between the States;
4. The superintendence of our intercourse, political and commercial, with foreign countries.⁵⁶

The first two purposes are common defense and preservation of the public peace. Basically, Hamilton argued, like FDR in his 1944 State of the Union address, that we needed to make dramatic changes to our system of government in order to have a more secure nation.

Even though there are some similarities between the Economic Bill of Rights and the Constitution's Bill of Rights, they remain vastly different. The biggest difference is that the Economic Bill of Rights remains merely a proposal within a State of the Union address, whereas the Bill of Rights is firmly embedded in the Constitution. This raises the issue as to why the Economic Bill of Rights failed to become law.

⁵⁵ *Id.* (emphasis added).

⁵⁶ ALEXANDER HAMILTON, *The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union*, FEDERALIST No. 23, (Dec. 18, 1787), available at <http://www.gutenberg.org/files/1404/1404-h/1404-h.htm> (last visited Oct. 26, 2014).

Why the Economic Bill of Rights is Not Law

There appear to be two critical factors that led to the failure of the Economic Bill of Rights becoming law. First and foremost, FDR passed away on April 12, 1945.⁵⁷ This meant that the architect of the proposed Economic Bill of Rights, and its most influential figure, was gone. Another critical factor is the timing of FDR's proposal. He announced his Economic Bill of Rights in 1944, while the U.S. was still embroiled in World War II. The War would not come to an end until 1945, and after its conclusion, the national debt of the U.S. was 113 percent of GDP.⁵⁸ This high level of public debt likely contributed to trepidation by members of Congress to even consider enacting the sweeping policies and positive rights contained in the Economic Bill of Rights. This may be attributed to the fact that virtually every right in the Economic Bill of Rights carries an embedded cost, either through the cost of additional regulations or through taxation to effectively enforce the right. For example, the Economic Bill of Rights contains the right "to a decent home."⁵⁹ Setting aside the legal challenge of defining "decent home," there is still the unavoidable fact that, to realistically service this right, the government would either need to raise taxes to provide a sufficient subsidy so citizens could purchase a "decent" home, or to regulate the housing industry and mandate that every citizen seeking to purchase a home gets one.

The failure to enact the Economic Bill of Rights was not for a lack of trying. After FDR passed away, Harry Truman assumed the presidency and on September 6, 1945. President Truman advocated for the enactment of FDR's Economic Bill of Rights. In his speech, widely known as President Truman's "21-point plan for reconversion" he stated:

The objectives for our domestic economy which we seek in our long-range plans were summarized by the late President Franklin D. Roosevelt over a year and a half ago in the form of an Economic Bill of Rights. Let us make the

⁵⁷ *This Day In History, Apr. 12, 1945: FDR Dies*, HISTORY.COM, <http://www.history.com/this-day-in-history/fdr-dies> (last visited Oct. 26, 2014).

⁵⁸ Arthur Weinstein, *10 Milestones in U.S. National Debt History*, LISTOSAUR.COM (Aug. 31, 2012), <http://listosaur.com/politics/10-milestones-in-us-national-debt-history/>.

⁵⁹ Roosevelt, *supra* note 1.

attainment of those rights the essence of postwar American economic life.⁶⁰

This was not the last time President Truman referenced his predecessor's Economic Bill of Rights. In November 1945, President Truman quoted the proposal when discussing the right to adequate medical care and the "right to adequate protection from the economic fears of...sickness."⁶¹ President Truman then declared:

Our new Economic Bill of Rights should mean health security for all, regardless of residence, station, or race—everywhere in the United States...We should resolve now that the health of this Nation is a national concern; that financial barriers in the way of attaining health shall be removed; that the health of all its citizens deserves the help of all the Nation.⁶²

Despite his efforts, President Truman did not successfully pass a law that provided for "health security for all" and failed to enact the rights in the Economic Bill of Rights. Nevertheless, that does not mean FDR's proposal was an abject failure. In fact, the spirit of FDR is alive and well in many domestic programs.

Not a Complete Failure: Portions of FDR's Economic Bill of Rights are Law

Despite the failure to achieve full enactment, portions of the Economic Bill of Rights are firmly cemented in U.S. domestic policy. For example, President Lyndon Johnson successfully passed Medicare and Medicaid. Both are broad public health programs, wherein the government provides health care coverage for the elderly and low-income individuals. These programs appear to secure two rights contained in the Economic Bill of Rights – (1) the "right to adequate medical care and the

⁶⁰ *Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period*, THE AMERICAN PRESIDENCY PROJECT (Sept. 6, 1945) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=12359> (last visited Oct. 26, 2014).

⁶¹ Harry S. Truman, *Public Papers of the Presidents: Special Message to the Congress Recommending a Comprehensive Health Program*, THE TRUMAN LIBRARY, <http://www.trumanlibrary.org/publicpapers/index.php?pid=483> (last visited Oct. 26, 2014).

⁶² *Id.*

opportunity to achieve and enjoy good health” and (2) the “right to adequate protection from the economic fears of old age, sickness, accident, and unemployment.”⁶³ Along with Medicare and Medicaid, the Affordable Care Act, signed into law by President Barack Obama, established a universal health coverage system in the U.S.⁶⁴

Along with programs in the public health realm, there have also been programs established in the education realm aimed at establishing the “right to a good education.” For example, in 2001, President George W. Bush signed the No Child Left Behind Act (“NCLB”) into law. NCLB requires all public schools that receive federal funding to administer a statewide standardized test to all students. This standard-based education system was instituted to improve individual outcomes in public education and to provide all children with a “good education.”⁶⁵

**A Moment to Speculate:
What the United States Would Look Like if FDR’s Economic Bill of
Rights were Enacted in 1944**

There’s no doubt that if FDR’s Economic Bill of Rights became the law of the land in the U.S., it would have fundamentally altered the relationship between its citizens and the government. An entire generation of Americans would have conceivably grown up believing that they were entitled to certain tangible items from the government, such as employment that provides enough income to provide for adequate food, clothing, recreation, and a “decent” home.⁶⁶ This would have drastically changed the trajectory of the U.S. and its economy. For example, substantially higher levels of taxation would have been required of all eligible citizens to effectively service the rights contained in the Economic Bill of Rights. From the 1950s through the 1970s, top marginal tax rates varied from 70 to 90 percent. Two economists, Nobel laureate Peter Diamond and Emmanuel Saez, have argued that the “optimal” top

⁶³ Roosevelt, *supra* note 1.

⁶⁴ Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, NATIONAL LIBRARY OF MEDICINE, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3001814/> (last visited Nov. 25, 2014).

⁶⁵ *No Child Left Behind*, U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/nclb/landing.jhtml> (last visited Nov. 25, 2014).

⁶⁶ Roosevelt, *supra* note 1.

income tax bracket for the United States is 73 percent.⁶⁷ They arrived at that percentage by asserting that a tax policy that maximizes welfare will invariably be disproportionately high on the top-end of income earners.⁶⁸ Keep in mind that, in a society without the positive rights contained in the Economic Bill of Rights, these economists consider the 73 percent tax bracket “optimal.” It is reasonable to assume that tax rates would likely need to be even higher, possibly in the 90 percent range, to achieve an “optimal” tax rate sufficient to service the societal welfare embedded in the Economic Bill of Rights. The reduction in tax rates implemented by President Kennedy in 1964 and by President Reagan in 1981, both of which generated economic growth,⁶⁹ would probably be impossible in a society actively adhering and servicing the rights contained in the Economic Bill of Rights.

Other economic issues arise when trying to satisfy the right of “every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.”⁷⁰ When the internet proliferated and global trade expanded, this right would have probably hindered the U.S. from entering into major trade agreements that generated economic growth. For example, both President George H.W. Bush and President William Jefferson Clinton advocated, and eventually passed, the North American Free Trade Agreement (“NAFTA”) in 1994.⁷¹ It is difficult to imagine such an expansive trade agreement being signed if every single businessman in the U.S. believed he had a right to trade in an environment devoid of unfair competition and domination by monopolies. A businessman could claim that NAFTA created unfair competition, which thus violated his rights, and should therefore be struck down. Similarly, an agreement like NAFTA would raise legal issues with a citizen’s “right to earn enough to provide adequate food and clothing and recreation.”⁷² Citizens could

⁶⁷ Peter Diamond and Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, CESIFO (Aug. 2011), <http://elsa.berkeley.edu/~saez/diamond-saezJEP11opttax.pdf>.

⁶⁸ *Id.*

⁶⁹ David Greenberg, *Tax Cuts in Camelot?*, SLATE.COM (Jan. 16, 2004), http://www.slate.com/articles/news_and_politics/history_lesson/2004/01/tax_cuts_in_camelot.html.

⁷⁰ Roosevelt, *supra*, note 1..

⁷¹ *North American Free Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

⁷² Roosevelt, *supra* note 59.

claim that NAFTA resulted in the loss of their jobs, which means they can no longer earn enough money to provide for food, clothing, and recreation; and hence, that NAFTA is a violation of their rights.

Along with economic issues, full implementation of the Economic Bill of Rights would have probably resulted in social turmoil in the mid-1940s, namely because of the issue of segregation. FDR declared that the Economic Bill of Rights would create a “new basis of security and prosperity,” established for all people, “regardless of station, race, or creed.”⁷³ If the Economic Bill of Rights became law during FDR’s last term in office, it is feasible that it could have been used as a legal basis to challenge segregation laws that, unfortunately, remained on the books in many states during that period. As such, confronting segregation may have been an implied goal in the Economic Bill of Rights. Evidence indicates that Eleanor Roosevelt made it clear that she desired the ICESCR to advance the fight for civil rights in America. For example, Mrs. Roosevelt received a letter from a woman in Iowa about the Universal Declaration and the ICESCR, to which Mrs. Roosevelt replied:

One major point [in the Declaration is that it] guarantees no discrimination because of race, creed or color. We must work in our communities to break down prejudice and eliminate discrimination if we are to be an example to the rest of the world.⁷⁴

If the Economic Bill of Rights became the law of the land, we may have confronted racially prejudicial laws sooner than 1957.⁷⁵

However, enforcing the Economic Bill of Rights in the judicial system assumes that the courts would be capable of properly interpreting and applying those rights. Frank Cross authored an article focusing on the deficiencies of the U.S. judicial system in interpreting and applying positive rights.⁷⁶ Cross points to empirical evidence indicating that courts have not been very active in enforcing state constitutional positive rights. Cross also asserts that positive rights are an example of “indeterminacy,” which means that courts would be forced to choose from contested values without any selection criteria, in the face of imperfect information and

⁷³ *Id.*

⁷⁴ John F. Sears, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, FDR Library at Marist College (2008), <http://www.fdrlibrary.marist.edu/library/pdfs/sears.pdf>.

⁷⁵ *Civil Rights Act of 1957*, CIVIL RIGHTS DIGITAL LIBRARY, http://crdl.usg.edu/events/civil_rights_act_1957/?Welcome

⁷⁶ Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. Rev. 857 (2001).

normative uncertainty.⁷⁷ Such a task would place a heavy burden on the courts, since they would be called upon to “command a policy that will reach a given end,” as opposed to “applying a principle or even evaluating a given event or decision.”⁷⁸ This would likely mean that the courts would either misapply the rights contained in the Economic Bill of Rights or simply fail to properly enforce the rights, since proper enforcement would necessitate protracted litigation that most citizens could not endure or afford.⁷⁹

Even though there are some domestic policies that share the spirit of FDR’s Economic Bill of Rights, the fact remains that the Economic Bill of Rights was never fully enacted in the U.S., and the ICESCR shares a similar shortcoming – it too, was never ratified in the U.S.

Like the Economic Bill of Rights, the ICESCR Falls Flat in the U.S.

In 1978, the ICESCR was submitted to the U.S. Senate for its advice and consent by President Jimmy Carter.⁸⁰ In 1979, the Senate Foreign Relations Committee held a hearing about the potential ratification of the ICESCR, but representatives of the Carter administration asserted that the ICESCR was merely “a declaration of aims” and that “no ratifying party thereby commits itself to present implementation of these rights.”⁸¹ Essentially, the Carter administration downplayed the significance of the Covenant in an effort to reduce anxiety about possible issues with state sovereignty. In fact, a former U.S. ambassador to the United Nations assured the Senate Foreign Relations Committee that the ICESCR was simply a “statement of goals to be achieved progressively.”⁸²

Despite the argument that ratifying the ICESCR would merely mean adopting progressive goals, the fact remains that if, *arguendo*, the U.S. ratified the ICESCR, the country would then be subject to oversight by the Committee on Economic, Social and Cultural Rights, according to

⁷⁷ *Id.* at 901.

⁷⁸ *Id.* at 902.

⁷⁹ *Id.*

⁸⁰ CHARLES S. MCCOY, ROBERT TRAER, LEONARD JOY, ABROL FAIRWEATHER, RITA MARAN, KARL SCHOENBERGER, CHERYL A. KIRK-DUGGAN, NJONGONKULU NDUNGANE, AND HARLAN DOUGLAS ANTHONY STELMACH, *Promises to Keep: Prospects for Human Rights*. Pinole, CA: Literary Directions, 2002. Print.

⁸¹ *Id.*

⁸² *Id.*

Article 17.⁸³ The Committee consists of 18 human rights experts who monitor whether the ICESCR is being properly implemented by ratifying nations. The nations that ratified the ICESCR are required to submit reports every five years to the Committee, outlining policies the nation has implemented that are geared towards advancing the rights in the ICESCR.⁸⁴ The Committee then examines the report and addresses its concerns and provides recommendations to the nation in the form of concluding observations.⁸⁵ Aside from this report, there is no real enforcement mechanism provided to the Committee if a nation fails to adopt its recommendations or does not enact policies aimed at advancing the rights in the ICESCR. If a ratifying nation does not want to be subject to the Committee's review, there is a provision in the ICESCR allowing for a self-evaluation. But even if the U.S. ratified the ICESCR and selected the self-evaluation option, the result would be a diminution of sovereignty since U.S. domestic policy would then be open for inspection and criticism by the international community. Understandably, the members of the Senate Foreign Relations Committee met such an idea with great apprehension when they discussed possible ratification of the ICESCR during the Carter Administration.

After the Carter Administration failed to ratify the ICESCR, subsequent Administrations decided ratification was not a desirable, or realistic goal. Both the Reagan and George H.W. Bush Administrations asserted that economic, social, and cultural rights were not rights, but merely desirable social goals, and therefore, should not be the subject of binding international treaties.⁸⁶ The Clinton Administration did not deny the nature of the rights contained in the ICESCR, but decided that pursuing ratification would have been an ineffective use of political capital.⁸⁸ The George W. Bush Administration followed in line with the view of the previous Bush Administration.⁸⁹ The Obama Administration

⁸³ *International Covenant on Economic, Social and Cultural Rights*, *supra* note 3.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*

⁸⁶ Giorgio Baruchello and Rachael Johnstone, *Rights and Value: Construing the International Covenant on Economic, Social and Cultural Rights as Civil Commons*, *STUDIES IN SOCIAL JUSTICE*, Vol. 5, Issue 1 (2011),

http://www.academia.edu/876240/Rights_and_Value_Construing_the_International_Covenant_on_Economic_Social_and_Cultural_Rights_as_Civil_Commons.

⁸⁸ *Id.*

⁸⁹ Shulamith Koenig, *Economic, Social, and Cultural Rights: Questions and Answers*, AMNESTY INTERNATIONAL, http://www.amnestyusa.org/pdfs/escr_qa.pdf.

stated that it will not send the ICESCR to the Senate for advice and consent on ratification.⁹⁰

Even though there was concern about the effect that the ICESCR would have on U.S. domestic policy, the fact remains that many nations that fully embraced and ratified the ICESCR have failed to comply with its provisions.

Effect of ICESCR on Signatory Parties: Negligible at Best

As of 2012, the ICESCR featured 160 parties with an additional seven countries, including the U.S., that have signed the ICESCR, but have not yet ratified it. On the surface, it looks as though much of the world has embraced the rights contained in the ICESCR, and that the U.S. should get its act together and ratify it. However, an examination of the signatory nations illustrates that ratifying the ICESCR does not mean that citizens around the globe are enjoying the right to a good education, housing, steady employment, and social security. For example, signatory parties include Afghanistan, Iran, Sudan, and other countries that have categorically failed to comply with the vast majority of the provisions contained in the ICESCR.⁹¹

However, this does not mean that all signatory parties show an outright disregard for the ICESCR. For example, the Nordic countries, including Sweden, Finland, Iceland, Denmark, and Norway, are all signatory parties to ICESCR and afford citizens with a litany of government-directed positive rights. For example, all citizens in the Nordic countries enjoy access to free education and healthcare.⁹² However, with these rights comes a cost. In both Sweden and Denmark, more than half of their gross domestic product is directed towards public spending. As mentioned earlier in this paper, the high level of public spending necessary to service these rights requires a high level of taxation. Both Sweden and Denmark have the highest marginal tax rates in all of Europe.⁹³

⁹⁰ Barbara J. Stark, *At last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, TRANSNAT'L L. & CONTEMP. PROBS., Mar. 22, 2011.

⁹¹ *International Covenant on Economic, Social and Cultural Rights*, supra note 3.

⁹² Torben M. Andersen, *The Nordic Model: Embracing Globalization and Sharing Risks*, RESEARCH INSTITUTE OF THE FINNISH ECONOMY 64, (Dec. 7, 2007), http://www.arhiv.svez.gov.si/fileadmin/svez.gov.si/pageuploads/docs/Strategija_razvoja_Slovenije/The_Nordic_Model.pdf.

⁹³ *Sweden Snags Top Spot in European Tax Ranking*, THE LOCAL BLOG (Oct. 3, 2012), <http://www.thelocal.se/discuss/index.php?showtopic=53355>

Conclusion

The similarities between the Economic Bill of Rights and the ICESCR are striking; this is largely due to the Rooseveltian influence on both documents. Both seek to fundamentally alter the relationship between the individual and the government by establishing a new, wide-ranging set of positive rights afforded to all citizens and requiring government action to adequately deliver those rights. However, the ICESCR is not faithfully followed by many ratifying nations, and the Economic Bill of Rights never became law in the United States. In this respect, the Economic Bill of Rights and the ICESCR have achieved similar results: they both espouse ideals and advocate for rights that, on the surface, appear worthy of adoption for all nations. Nevertheless, the devil is in the details. Successfully securing the positive rights set forth in the Economic Bill of Rights and the ICESCR requires a level of government interventionism that many nations either do not embrace, or simply cannot afford. In essence, both the Economic Bill of Rights and the ICESCR are based on good intentions, but good intentions do not automatically translate into good, or feasible, public policy.