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**The United States and economic and social rights:  
past, present...and future?**

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## The Economic and Social “Rights” Conundrum

There is probably no other topic in the field of human rights that is more difficult to talk about clearly than economic and social rights. The language surrounding economic and social goods as rights claims is often muddled and confusing, lacks precision, and is difficult to grasp. What does it mean, for example, to have a right to the “highest attainable standard of mental and physical health,” for example? What is “highest”? What about “attainable standard”? What is included in “mental and physical health?” Should health care be free-of-charge? Should the state provide it? Would we have to go court to prove we have a need for this “standard?” How do we determine when there has been a violation of this right?

One of the problems with economic and social rights is that they often are taken to mean “welfare entitlements,” “social support,” or, in the language of economic conservatives, “give-aways.” Therefore debates about whether we should believe in economic and social rights as rights must center on debates about welfare. This is an intractable divide that will never be bridged. But must one believe in economic and social rights in order to believe part of the ethical purpose of the modern state is to protect every person’s potential or actual ability to will his or her own ends?

This paper is going to explore how the United States has dealt with economic and social rights as human rights—their history, their status as rights, and ways in which we might reconceptualize them in a more meaningful way, not as rights, but as obligations arising from other rights that Americans do believe in. One of the problems with discussing economic and social rights has always been that the terms of the debate are framed in such a way as to require extreme, intractable positions. Opponents simply reject economic and social rights wholesale. Proponents seem to conflate the language of rights with the rhetoric of social, redistributive justice. The debate is at cross purposes because the terms are unclear.

By “economic and social rights” I am referring to those things listed in Articles 22 through 27 of the Universal Declaration of Human Rights, and in the International Covenant on Economic, Social and Cultural Rights.<sup>1</sup> President Jimmy Carter signed the Covenant on October 5, 1977—along with the International Covenant on Political and Civil Rights (ICCPR). The rights contained in these two treaties are almost always described as being “interdependent, indivisible and interrelated.” The United States Senate finally ratified the ICCPR in 1992—albeit after attaching a number of reservations, declarations and understandings.<sup>2</sup> The U.S. has yet to ratify the ICESCR. And it probably never will.

There are two dimensions of U.S. human rights policy: domestic and international. In order to understand the American refusal to officially endorsing economic and social rights in both domestic and foreign policy, and how that might someday be transcended, requires some understanding of both dimensions. Fortunately, two historical periods reflect these dimensions and the problems law-makers, policy makers and others have had with economic and social rights. The first period in particular is glossed over as simply the product of Cold War diplomatic rivalry—that the United

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<sup>1</sup> I am purposefully not including “cultural rights” in this category. For one, there really is only one “cultural right” which appears in the Declaration and the Covenant. However, I believe that the first of these rights—the right to take part in cultural life—is a civil right. The right to enjoy the benefits of scientific progress is, in my mind, a social right. The final one—essentially, the right personal copyright protection—is clearly a part of property right, which is economic.

<sup>2</sup> For an excellent overview of these “RUDES,” see Schabas (2000).

States could not accept economic and social rights because “our” rights were the civil and political ones, and economic and social rights were the Soviet ones. The problem with this conclusion, of course, is that the Cold War is over and the U.S. still does not recognize economic and social rights. Thus, the first part of this paper will explore the evolution of U.S. thinking on economic and social rights from the time they were first proposed by Franklin Roosevelt in during World War II, until their rejection by the middle of the 1950s. This period is about the domestic applicability of economic and social rights, and in particular the “treaty problem”—that the U.S. generally does not believe that international law is the most appropriate way to secure human rights. The second period—which will illustrate the international dimension of U.S. attitudes toward economic and social rights as a matter of foreign policy—begins with the official recognition of U.S. support for economic and social rights during the Carter administration, to its quick demise in the 1980s.

This historical overview will take us from (a) American support of the idea, to (b) mounting opposition after the War—opposition that nearly culminated in a Constitutional amendment curbing the President’s treaty making power, to (c) a brief and ultimately meaningless “recognition” of economic and social rights by the Carter administration, to (d) their ultimately abandonment in the 1980s—first by opposition, and finally by outright neglect. Whatever economic and social rights might be, clearly they are a matter for development policy, not international law. But there is an interesting mirroring even in that respect, in how U.S. development policies reflect its domestic attitudes about economic and social rights. A subtext running through this—but which cannot be examined in great detail here—is the American “vision” of the role that rights play in the individual’s relationship with the state and civil society—including the market. Could we go back to an understanding of economic and social “rights” that Franklin Delano Roosevelt had?

## **The Legacy of the Roosevelts**

Often cited as marking the advent of the international human rights era is U.S. President Franklin Roosevelt’s 1941 State of the Union address, wherein he pledged that, as a nation, the American people “look forward to a world founded upon four essential human freedoms:” freedom of speech and expression; freedom of religion, freedom from want, and freedom from fear. Earlier in that speech, Roosevelt reflected on the war in Europe—a war the U.S. had not yet entered—and how important it was for the United States to provide the necessary materiel to those countries opposing the Axis powers. What was at stake, he reminded the nation, was democracy and freedom, and the institutions necessary for protecting them. This demanded sacrifice on the part of the public. But that sacrifice was part of a two-way relationship between the people and the government in a “healthy and strong democracy:”

The basic things expected by our people of their political and economic systems are simple. They are: equality of opportunity for youth and for others; jobs for those who can work; security for those who need it; the ending of special privilege for the few; the preservation of civil liberties for all; the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.

These are the simple, the basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world. The inner and abiding straight of our economic and political systems is dependent upon the degree to which they fulfill these expectations.<sup>3</sup>

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<sup>3</sup> Full text online at <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> (accessed February 24, 2005).

Eight months later, Roosevelt and British Prime Minister Winston Churchill signed the Atlantic Charter, a set of “common principles” held by both countries. In particular, “they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security.”<sup>4</sup>

On January 11, 1944, Roosevelt delivered his State of the Union address over the radio. He outlined an ambitious legislative agenda that he urged Congress to take up, regarding the conduct of the war. In addition to urging Congress to pass legislation to curb war profiteering, Roosevelt suggested a “national service law,” the civilian equivalent of a military draft (Levine and Levine 2002: 516-517). While this was the most controversial program in the speech—organized labor and business groups opposed it—the idea enjoyed fairly widespread support from the public. In an echo of his 1941 speech, Roosevelt suggested that while the American republic was based on the rights and freedoms protected by the original bill of rights, the nation had already begun to accept a number of self-evident *economic* truths: “We have come to a clearer realization of the fact, however, that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are hungry, people who are out of a job are the stuff of which dictatorships are made” (Levine and Levine 2002: 522).

Roosevelt suggested that the nation had already accepted the idea of a “second bill of rights,” and that it was time Congress enacted it formally. Among these rights were:

- 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 farmers to raise and sell their products at a return which will give them and their families a decent living;
- The right of every business man, 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, and sickness, and accident, and unemployment;
- And finally, the right to a good education.<sup>5</sup>

Out of a sampling of the many thousands of letters Roosevelt received after this speech, 18 are published in a recently published collection of post-radio address letters sent to the White House. Thirteen approved of the speech, and five did not. Four letters specifically mentioned this “second bill of rights”—and all four approved of the idea (Levine and Levine 2002: 525-538). Without actually saying so, they seemed to understand it not only as a natural extension of the New Deal, but also as a new kind of social contract: National Service in exchange for economic and social guarantees. Roosevelt had already proposed a “GI Bill of Rights” in July 1943; one of the “rights” in that bill, of course, was the right of every returning veteran to get a college degree or other training at the government’s expense. Roosevelt signed the GI Bill on June 22, 1944.

As Table 1 illustrates, the content of this new set of “rights” is remarkably similar to several of the rights that would eventually appear in the Universal Declaration of Human Rights, and the ICESCR. The important exceptions are two “market” rights: one of farmers to receive a return on their crops

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<sup>4</sup> Online at <http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm> (accessed February 24, 2005).

<sup>5</sup> Levine and Levine (2002: 522). Full text of the speech online at <http://www.fdrlibrary.marist.edu/011144.html> (accessed February 24, 2005).

adequate for a decent standard of living, and the right of access to markets not dominated by monopolies. Whereas the first could conceivably be subsumed under the overall right to work and make enough pay for a decent standard of living, the second “right” has no expression whatsoever in the Universal Declaration or the ICESCR. It could be argued that, in comparison to the others it is not properly a right. But in a way, it seems to sit quite comfortably alongside the others.

**Table 1: Roosevelt’s Economic Bill of Rights, the Universal Declaration and the ICESCR**

Roosevelt’s 2 <sup>nd</sup> Bill	Universal Declaration	ICESCR
Useful and remunerative job; right to earn enough to provide adequate standard of living and recreation	Article 23 (right to work; free choice of employment; just and favorable conditions of work; equal pay for equal work; just and favorable remuneration); Article 24 (right to rest and leisure)	Article 6 (right to work; free choice of employment); Article 7 (just and favorable conditions of work; fair wages; equal pay for equal work; pay that provides a decent living; safe and healthy working conditions)
Right of farmers to earn enough to support their families		
Right of market access		
Right of every family to a decent home; adequate medical care; opportunity to achieve good health; social insurance/security protections	Article 25: Right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control	Article 9 (social security/social insurance); Article 11 (the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions; fundamental right of everyone to be free from hunger; Article 12 (the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).
Right to education	Article 26 (right to education)	Article 13 (right to education)

It is illuminating that Roosevelt chose the language of right in order to highlight the importance of economic and social security in the modern world. In the 1941 “four freedoms” speech, he suggested that many of these things, and some others, were what people expected from their political *and economic* systems. Three years later, he suggests that rights are the way to guarantee them. But there is the interaction between the state and the market in the realization of these rights. As Sunstein (2004) points out, Roosevelt was certainly no socialist, and he despised the idea of “the dole.” He believed that type of welfare would destroy incentive and would create an unhealthy and destructive sense of entitlement (Ibid., 194). While he did believe the state should ensure that those who were not able to meet their own needs, because of old age, accidents, or other circumstances beyond their control, he also believed that the state had a vital role to play in creating and maintaining economic conditions and opportunities necessary for the able-bodied to do for themselves. And that didn’t mean mere survival—it meant fostering the development of people’s capabilities to move them as far away from that brink that so many had reached during the worst years of the Great Depression.

After the War, the protection of “human rights and fundamental freedoms” became one of the founding principles of the United Nations. The U.N. Commission on Human Rights was created in 1946, with Eleanor Roosevelt as its first chair. The Commission was tasked by the Economic and Social Council to begin work immediately on drafting an “International Bill of Rights,” to consist of a declaration of human rights, an international treaty to enshrine those rights in international law,

and some institutional arrangement implementation. The earliest proposal from Australia would have created a separate human rights court.

No sooner had the Commission begun its work than began sometimes sharp disagreements about what should be considered to be a “human right.” It also became clear that the drafting of a covenant and means of implementation would require more time and care in order to provide the detail necessary for international legal instruments. Thus, the Commission concentrated instead on drafting the declaration,<sup>6</sup> which was eventually adopted by the U.N. General Assembly, *nemine contradicente*, on December 10, 1948.

The Declaration contained 25 articles<sup>7</sup> enumerating a wide range of what would later be classified as civil, political, economic, social and cultural rights. Table 1 shows that every one of the rights that Roosevelt proposed Congress guarantee by federal legislation in 1944 was included in the grouping of “economic and social rights”—Articles 22 through 27—of the Universal Declaration. The only right not mentioned by Roosevelt that was subsequently classified as a “civil” and a “social” right<sup>8</sup> is Article 16: the right to marry and found a family, and the equal rights of men and women in entering marriage, and at its dissolution. One other right not mentioned by Roosevelt in the 1944 speech was Article 27, “the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” However, in Roosevelt’s 1941 State of the Union address, he did mention “the enjoyment of the fruits of scientific progress” as a reasonable expectation of the American people.

The United States’ active support for human rights at the U.N., coupled with Roosevelt’s domestic legacy on economic and social guarantees and the popularity of his Presidency, would suggest that moving from the Declaration to a treaty of human rights would have been quite simple. When John Foster Dulles was serving as acting chairman of the U.S. delegation to the United Nations, he remarked that it would be vital to turn the principles in the Declaration into binding treaty law immediately.<sup>9</sup>

Despite this level of support, in an extremely short period of time—a little more than four years—official support would erode and eventually collapse under the weight of an almost-successful attempt to amend the Constitution to limit the President’s treaty-making authority, in order to prevent economic and social rights from being recognized. How could such a reversal happen in such a short amount of time, and what can this episode in American history tell us about the status and meaning of economic and social rights in the United States today? Most accounts of the history of economic and social rights in the United States overlook this period of time, or perhaps fail to recognize that there was more to the debate than anti-communism:

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<sup>6</sup> The original title of the draft was the “International Declaration of Human Rights,” which was changed to the “United Nations Declaration,” and finally, “Universal Declaration.” The drafters wanted to shift the emphasis from the authors—states and the United Nations itself—to the “intended audience of ordinary men and women” (Morsink 1999: 33).

<sup>7</sup> The Declaration has 30 articles; four of them do not enumerate a specific right or associated cluster of rights. I purposely left out Article 28: that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” I would not call that a human right.

<sup>8</sup> Marriage rights appear in the Declaration and both Covenants.

<sup>9</sup> Dulles (1948). See also Green (1956: 37).

If there ever was an excuse for [the silence of human rights groups in economic and social rights], it ended with the Cold War. No longer can there be any claim that pressing for human rights at home plays into the hands of America's enemies abroad (Stark 2000: 84).

This view assumes (a) that this “claim” was anything more than a scare-tactic, and (b) that the silence was only a result of Cold War politics. I believe that anti-communism in the 1940s and 1950s, in terms of domestic opposition to economic and social rights was concerned, merely masked a disagreement *among Americans* about the importance of the state and civil society—including the market—for allowing us to enjoy the objects of these “rights.” Nevertheless, a detailed look at this period is illuminating, if only to uncover a history that is significant for understand American attitudes about economic and social rights in terms of their domestic application. I believe this period says far more about how these rights are best secured (through treaties?) than anything about the content of those rights.

### **From the Universal Declaration to the Bricker Amendment**

In early 1948, the U.S. government offered a proposal to the Commission on Human Rights, regarding what should be included in the Universal Declaration:

Among the categories of right which, the United states suggests should be considered are the following: (a) Personal rights, such as freedom of speech, information, religion, and rights of property; (b) Procedural rights, such as safeguards for persons accused of crime; (c) Social rights such as the right to employment and social security and the right to enjoy minimum standards of economic, social and cultural well-being; (d) Political rights, such as the right to citizenship and the right of citizens to participate in their government (Sohn 1948: 283).

It should be recalled that, at the same time, the Commission was also considering a draft covenant, which contained no economic or social rights at that time. They had set aside working on the Covenant in order to focus on the Declaration. The inclusion of these categories of rights in the Declaration was definitely supported by a number of civil society organizations in the United States. However, one in particular—the American Bar Association—became ever more vocal against the idea, starting in early 1948. While most of the opinions and articles appearing in the *American Bar Association Journal* during this time were specifically leveled at the draft covenant on human rights, the leadership of the ABA, and its newly created Committee for Peace and Law Through United Nations, were seriously disturbed about the consequences of the United States agreeing to a Declaration of Human Rights, and what obligations would be placed on the U.S. with regard to those rights. In 1948, the ABA issued a joint resolution with the Canadian Bar Association, which urged that

Any Declaration on Human Rights should not be in any manner approved, accepted or promulgated by or in behalf of the government of the United States except upon and after the submission of such document to, and the approval of it by, the Congress of the United States (American Bar Association 1948: 338)

The fear that the United States would be legally bound to protect the rights listed in the Declaration was based on the specious argument that the Declaration was an enumeration of the term “human rights and fundamental freedoms,” the protection of which was incumbent upon member-states of the United Nations under Articles 55 and 56 of the Charter—which *is* a legally-binding treaty. This, of course, ignored the understanding that the United States had of the purpose and effect of the Declaration, first stated in December 17, 1947, that “[t]he Declaration is not intended to be a legislative document in any sense. Since it is the proper purpose of the Declaration to set forth basic

human rights and fundamental freedoms, as standards for the United Nations, it is inappropriate to state the rights in the Declaration in terms of governmental responsibility” (Sohn 1948: 476). The United Nations would have never been able to promulgate a document of such scope and generality as the Universal Declaration had any government believed it to be binding under international law.<sup>10</sup>

The ink on the Declaration was barely dry when proponents of continued U.S. involvement with giving human rights the status of treaty law began back-pedaling on economic and social rights. Perhaps in an effort to stave off critics like those in the ABA, immediately after the Declaration was adopted, Eleanor Roosevelt clarified that: “the United States Government does not consider that economic, social and cultural rights imply an obligation on governments to assure the enjoyment of these rights by direct government action” (Kunz 1949: 322). As the Commission began to take up the unfinished work on the draft Covenant on Human Rights, this statement presaged what would become the eventual American position: that economic, social and cultural rights are not really “rights”—or that the U.S. would not consider them to be so.

The American Bar Association was indispensable to this movement. Generally, they were against the idea of promoting human rights through treaty law—in fact, they took a position not very different from that the Soviet Union, South Africa and other states would take over the years: that they did not want international “intrusion” on their sovereignty. But they were incensed over the idea of economic and social rights. Just as the Declaration was being adopted, the new President of the Association, Frank Holman, began to write a series of articles focused on the draft Covenant, and the danger that it would pose to the United States. Holman was convinced that human rights were central to a communist plan to destroy the American way of life (Kaufman 1990: 16). The very idea of “economic and social rights” would mean a centralized, planned economy and the destruction of free enterprise. And, of course, the movement must be subversive: not only had the public and “even the Bar” been ignorant of how different these “human rights” were in comparison to American concepts of rights and freedoms, they were also clearly unaware of “how far in other particulars it is a proposal for world-wide socialism to be imposed through the United Nations on the United States and on every other member nation” (Holman 1948: 985).

To Holman and the members of the Committee on Peace and Law Through United Nations, this conspiracy was plainly evident from the provisions for economic, social and cultural rights that had been included in the Declaration, and might be included in the Covenant:

These latter articles do not pretend to limit the powers of government, but on the contrary, impose so-called economic and social duties upon government, the fulfillment of which will require a planned economy and a control by government of individual action. This program, if adopted, will promote state socialism, if not communism, throughout the world” (Holman 1948: 1080).

The initial draft Covenant on Human Rights contained only “civil and political” rights. However, stressing the belief that “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man,”<sup>11</sup> the General Assembly directed the Economic and Social Council to include economic, social and cultural rights, “in a manner which relates them to the civil and political freedoms proclaimed by the

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<sup>10</sup> This is not to say that the Universal Declaration did not become, over time, a part of customary international law, as some scholars argue. It is undisputed that some specific rights in the Declaration—such as freedom from torture or genocide—constitute *jus cogens*.

<sup>11</sup> U.N. General Assembly Resolution 421 (V), December 4, 1950, §E, preamble.

draft Covenant.”<sup>12</sup> This move effectively strangled the work of the Commission, which became embroiled—along with the Economic and Social Council—in debates over the different kinds of implementation and monitoring mechanisms that would be required to ensure the protection and promotion of different categories of rights. Not wanting to draft a “treaty within a treaty,” the General Assembly eventually agreed that the Commission should draft two separate treaties, which nonetheless would be opened for ratification at the same time.<sup>13</sup>

But until this decision was taken in 1952, opposition to U.S. involvement with the U.N.’s human rights enterprise became fierce. There were basically three “interwoven themes” prevalent in the opposition. The first was that the covenant would violate domestic jurisdiction or sovereignty by allowing international scrutiny of human rights problems in the U.S. Second, by virtue of the Supremacy Clause of the Constitution, the obligations of the covenant would require the expansion of the powers of the federal government to the detriment of states’ rights. Finally, the covenant would enhance communist influence in the U.S., and usher in socialism (Kaufman 1990: 17).

Because of the size of the organization, and the paucity of domestic civil society organizations that were actively promoting U.S. involvement in human rights activities at the U.N., the ABA’s influence on policymakers and public opinion was significant. In 1953, 61% of U.S. Senators were lawyers, and presumably members of the ABA (Kaufman 1990: 20). The position of the Association as a whole was largely driven by the activities of the President—Holman—and the seven-member Committee on Peace and Law Through United Nations, which had taken over the ABA’s activities in this area from the usually more sober and even-keeled Section on Comparative and International Law (*ibid.*, 20-21). The Committee consisted of a solid block of opposition to the human rights activities at the U.N., and routinely fed that opposition with hefty shovelfuls of anticommunist hype. The other tie-in, of course, was a fear that U.S. ratification of a human rights treaty would encourage the emerging civil rights movement in the U.S., which of course was tied into the states’ rights concern. Holman even wrote in 1949 that Article 16 of the Universal Declaration “means that mixed marriages between the races are allowable without regard to state or national law or policy forbidding such marriages” (Holman 1949: 483).

The most concerted and extensive attack on economic and social rights as “back-door communism” was delivered by William Fleming in 1951, in a two part exegesis that appeared in the pages of the ABA Journal. The first part focused on economic and social rights, which were still included in the draft Covenant. As for the inclusion of these rights, Fleming wrote, “It is impossible not to recognize the heavy imprint of Eastern philosophy. As a matter of fact, Part III is nothing else but the perfect embodiment of the unadulterated welfare state and unmitigated socialism” (Fleming 1951: 794). He saw in the “right to work” the end of free enterprise (*ibid.*, 795) and was convinced that “adoption of the covenant would mean the end of our colleges” because of the provision that states gradually introduce free higher education, which would require a government takeover. If that were not bad enough, consider the consequence: “[t]he private liberal arts colleges, important bulwarks of the free world in the struggle against communism and totalitarianism, would be driven from the American scene...” (*ibid.*, 796). The United States would be required to provide social security “for the whole world,” and eventually the Covenant would lead to the establishment of global economic planning by the United Nations. (*ibid.*, 799).

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<sup>12</sup> *Ibid.*, §E, paragraph 7(b). The resolution recognized that the *enjoyment* of civil and political freedoms, and of economic, social and cultural rights was “interconnected and interdependent.”

<sup>13</sup> U.N. General Assembly Resolution 543 (VI), February 5, 1952.

Opponents to the Covenant took offense at the U.N.'s definition of "civil and political rights" as well. The right protecting "freedom of movement," for example, would certainly frustrate enforcement of the Internal Security Act (or McCarran Act) of 1950, which provided for the fingerprinting and registration of "subversives"—especially communists. Freedom of asylum would overturn the barring of communists from entering the United States, which was also provided for in the Act.<sup>14</sup>

This small but influential group within the ABA began to pressure key U.S. Senators into action to prevent the U.S. from becoming a party to the Covenant. By this time—1952 and 1953—despite the fact that the U.N. had agreed to draft two separate human rights treaties—the ICESCR and the ICCPR—the ABA under the direction of Holman and others found an ally in Senator John Bricker, a Republican from Ohio, close associate of Joseph McCarthy, and staunch opponent of U.N. treaties on human rights. The ABA had actually drafted one version of the amendment, and all seven members of the ABA committee leading this movement testified before a subcommittee of the Senate Judiciary Committee (Schubert 1954: 262). The main concern they were attempting to rectify was the "self-executing" nature of treaties under Article VI, Clause 2 of the Constitution (the "Supremacy Clause") which places treaty law at the same level as constitutional and statute law. Another, more controversial part of the Amendment would have restricted the power of the President to enter into other types of agreements in the foreign policy field without first receiving approval of the Senate.<sup>15</sup> The version of the Amendment offered up by the ABA further stipulated that the individual states would have to adopt implementing legislation before the terms of a treaty would become valid in their states.

The incoming Eisenhower administration became quite concerned about the amendment, especially its potentially debilitating effect on the power of the President to conduct foreign policy. Thus, on April 6, 1953, Secretary of State John Foster Dulles appeared before the Senate Judiciary Committee, and pledged that the administration would not sign any human rights treaty currently under negotiation at the U.N. (i.e., the Covenant), any human rights treaty completed (i.e., the Convention on the Political Rights of Women), nor would the administration seek ratification of the Genocide Convention, which had been before the Senate since 1948. Dulles also promised to give the Senate the opportunity to "advise and consent" during the negotiation of future treaties.<sup>16</sup>

After these assurances from the Administration were delivered, support for the Bricker Amendment began to drop away. The United Nations had already voted to split the draft covenant into two separate treaties. Despite this, and perhaps as a show for the Senate, Dulles instructed the U.S. delegate to the U.N. Commission on Human Rights to persuade the Commission to "give up trying to draft a legal instrument defining social, political [sic] and economic 'rights'" (New York Times 1953). U.S. activity in the Commission from this point forward—dubbed the "United States Action Program"—reduced the emphasis on the international legal aspects of protecting and promoting human rights, favoring instead a system of periodic, voluntary self-reporting on the status of human rights in member-states countries, studies on specific human rights problems throughout the world,

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<sup>14</sup> (Fleming 1951: 818). Truman initially vetoes the Act, complaining that it flew in the face of civil liberties. Congress overrode the veto. The law was finally repealed in 1990—only to be partially resurrected in the guise of the USA PATRIOT Act of 2001.

<sup>15</sup> The text of all six versions of the amendment can be found in Kaufman (1990: 201-203)

<sup>16</sup> New York Times, April 7, 1953 (1). For the full text of Dulles' statement, see Dulles (1953).

and advisory services in the form of seminars, scholarships and technical assistance similar to that being done already in the social and economic and public administration fields (Moskowitz 1958: 65-66). By December 1954, the U.N. General Assembly requested that its Third Committee begin an article-by-article review of both covenants;<sup>17</sup> “[s]o began over a decade of detailed scrutiny” (McGoldrick 1991: 9). They were finally approved by the U.N. and opened up for signature in 1966, by which time the attentions of U.S. foreign policy were focused almost exclusively on southeast Asia. While the United States voted in the General Assembly for the resolutions opening up both Covenants for ratification, the U.S. would not sign the treaties until 1977—a year after both had come into force.

It is quite tempting, especially from a distance of 50 years, to snicker at such anti-communist hype and the absurdity of a human rights treaty destroying the American way of life. What is important here is the manner in which we can use this history to provide a glimpse into how U.S. lawmakers and others view the domestic effect of human rights. There is a great deal of literature underscoring the ways in which the United States used the prioritization of civil and political rights for diplomatic purposes, and while the arguments against economic and social rights during this time were certainly linked to international tensions, they took on a life of their own domestically. The twenty-year stretch between Bricker and Helsinki was a very quiet one. When a domestic debate about economic and social rights emerged again in the 1970s and 1980s, it took on a different character, focused far more on the effect that recognizing those rights might mean for our foreign policy than domestically.

### **Carter, Reagan and the Death of Economic and Social Rights**

The closest the United States ever came to formally recognizing economic and social rights was during the Carter administration. But that moment was short-lived, and not really focused on U.S. domestic policy. Indeed, the “ghost” of Senator Bricker haunted the Senate, but this time in the witness rooms of the Foreign Relations Committee rather than the Judiciary Committee. The Carter administration’s interest in human rights was clearly about U.S. foreign policy, and not about bringing the virtues of international human rights to the American people. Although both Covenants were signed by Carter and sent together in a package with two other human rights treaties—the American Convention on Human Rights, and the Convention on the Elimination of Racial Discrimination (CERD). The U.S. ratified the ICCPR in 1992, and CERD in 1994.

Even though Carter signed the ICESCR, the extent of U.S. commitment to those rights wavered considerably during his administration. In Presidential Directive NSC-30, which outlined the formal human rights policy of the United States, Carter had stated that “It will also be a continuing U.S. objective to promote basic economic and social rights (e.g., adequate food, education, shelter and health).”<sup>18</sup> Yet, during the drafting of a human rights speech Carter was to deliver in May 1977, his primary speechwriter, Griffin Smith, removed a passage on economic and social rights that had been placed in the speech by a subordinate. Objecting to the use of “rights” to describe “needs,” Smith wrote in memo to the original drafter of the speech:

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<sup>17</sup> U.N. General Assembly Resolution 833 (IX), December 4, 1954.

<sup>18</sup> Full text of the Directive online at <http://www.jimmycarterlibrary.org/documents/pddirectives/pd30.pdf> (accessed February 15, 2005).

[I]f that definition ever gets so broad that it also includes Milk for Hottentots, its usefulness will be lost. I know the temptation is strong to define one's pet project as a human right so that the president will appear to be endorsing it, but let's keep human rights to mean human rights, and find another label for economic and social progress (Hartmann 2001: 408).

Others in the Administration were also worried that having a clearly supportive and defined position on economic and social rights might torpedo the entire human rights portion of the Administration's policy. It was definitely the last component in a hierarchy of importance the Carter administration placed on different categories of human rights. At first, the emphasis was on "integrity rights"—especially those dealing with disappearances and torture—followed by political rights, and finally, economic and social rights. With the Cold War beginning to heat up again—the discovery of Soviet troops in Cuba; the invasion of Afghanistan; the victory of the Sandinistas in Nicaragua—political rights began to receive priority. But even in that, human rights overall were placed on the back-burner, having become a "moral luxury, a stranger to sober geostrategic calculations" (Hartmann 2001: 419).

Looking again to the process of ratifications of the Covenants, the Senate Foreign Relations Committee held hearings in November 1979. Events in Iran soon overshadowed the work of the Committee, and the package of four treaties was never sent to the floor of the Senate until a decade later. But the hearings are instructive nonetheless. Most of the testimony was strongly in support of ratification, and the attitude of the Committee members seemed to reflect that support. Opposition from witnesses, while resolute, was certainly less shrill than it was in the early 1950s, and wasn't nearly as much about communism as it was about a more contemporary economic conservatism that would eventually dominate domestic policy. For example, Phyllis Schlafley's written statement to the Committee suggested that "...article 2 [of the ICESCR] could mean that the United States is making a legally binding commitment to legislate unlimited taxes on ourselves in order to support every other country in the world" (1979: 110). J. Philip Anderegg claimed that a clause in Article 7 of the ICESCR<sup>19</sup> would require federal legislation interfering in private ownership of, for example, family-owned businesses, in order to outlaw nepotism (Ibid., 165).

Another opponent, Oscar Garibaldi (who is currently a member of the ultra-conservative Federalist Society) testified that the ICESCR

...is largely the historical product of Marxist ideology espoused by the Soviet bloc, coupled with the non-Communist world's postwar infatuation with various forms of democratic socialism. In other words, however worthy its general goals may look, this is largely a document of collectivist inspiration, alien in spirit and philosophy to the principles of a free economy....Second, viewed in the best possible light, this is a big government treaty which, by virtue of the principle of progressive implementation, would commit the United States to ever-increasing levels of welfare, an ever-increasing governmental control of the economy, and ever-increasing restrictions on individual initiative and freedom. (Ibid., (323)

It is perhaps the second half of this quote that is illuminating in terms of the language, especially in comparison to the objections of conservatives in the 1950s, whose language was far more incendiary than an appeal for limiting "government control" over the economy and "ever-increasing levels of welfare." This is precisely the language that would be employed by Ronald Reagan, who was elected one year after these hearings.

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<sup>19</sup> Clause (c) requires States-parties to the Covenant to recognize the right of "[e]qual opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence."

Reagan's election in 1980 ushered in a dramatic shift in U.S. human rights policy. But even the Carter administration had begun to speak of economic and social "rights" as not really being rights, and probably best dealt with through the U.S. Agency for International Development. The foreign policy of the first Reagan administration was clearly focused on confronting the Soviet Union, and quashing a "growing communist threat" in Latin America. Jeane Kirkpatrick's famous article in *Commentary*<sup>20</sup> would set the tone for Reagan's Western Hemispheric policy, but also made it quite clear what the U.S. would mean when it talked about "human rights"—curbing the Soviet Union's newfound appetite for imperialism.

In October of 1981, a memo from Deputy Secretary of State William Clark and Undersecretary of Management Richard Kennedy to Secretary of State Alexander Haig was "accidentally leaked" to the *New York Times*. The memo suggested the Administration reinvigorate U.S. human rights policy, but suggested that the language of "human rights" be replaced with the more precise terms, "individual rights," "political rights," and "civil liberties."<sup>21</sup> There was no mention at all of economic and social rights. The next edition of the U.S. State Department Human Rights Report had removed the category of economic and social rights entirely.

Elliott Abrams, the Assistant Secretary of State, Bureau of Human Rights and Humanitarian Affairs, explained that, in the Administration's view, the recognition of economic and social rights created confusion about human rights priorities and a "dispersion of energy in ending human rights violations" (Alston 1990: 373). Abrams also maintained that economic and social rights merely serve as a cover; that nations that champion the cause of economic and social rights only do so in order to excuse their violations of "real" civil and political rights (ibid.). By 1986 this new language of human rights, and the rejection of economic and social rights, was straightforward and "unquestionably consistent:"

This process of reinventing the concept of human rights to make it resemble more closely the ideological predilections of the U.S. Government reached a high point in a June 1988 statement by the Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs [Paula Dobriansky], in which she sought to dispel a number of "myths" about human rights, the first of which was that "economic and social rights' constitute human rights" (ibid., 374).

### **Economic and Social Rights: Present...and Future?**

So far this paper has seen how we have gone from the initial idea of economic and social rights, as first suggested by Roosevelt, to the internationalization of that idea and the United States' subsequent rejection of the idea of securing economic and social goods through rights claims, or promoting, for example, development assistance as a human right. What is the American understanding of rights generally, and of economic and social rights in particular?

As we can see, most opposition to economic and social rights is vaguely expressed, or instrumental for some other purpose. During the 1940s and 1950s, the movement ended up really being about "legislation by treaty," and the fear—perhaps unfounded and paranoid—that this new "international constitutionalism" would amount to bypassing the democratic process in the United States. While we can say that opposition to economic and social rights was simply anti-communist rhetoric, that

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<sup>20</sup> Kirkpatrick (1979); see also Kirkpatrick (1981)

<sup>21</sup> *New York Times* (1981); see also Alston (1990: 372) and Hartmann (2001: 426).

rhetoric was meant to protect something. That “something” is an abstraction usually called “the American way of life.”

As we can see, proponents of economic and social rights won't get very far arguing for ratification of the ICESCR—especially in the post-9/11 environment. Perhaps the unlikelihood of getting the U.S. to recognize these “rights” as rights means we can look for other, perhaps more effective and convincing ways of achieving the same ends. The language of human rights can still be of use—but that language needs to overcome the dualist view of the state that has always lied at the heart of this debate, and debates about human rights generally: that civil and political rights are “negative” and economic and social rights are “positive.” Rights are neither one of those things: rights are meant to protect our ability to will our own ends. The state is the institution that (a) protects those rights, and (b) creates the conditions necessary for their enjoyment; in other words, to will our own ends.

In order to more effectively counter the critics of economic and social rights, proponents of those rights will need to reconsider the language of rights, and speak to their opponents in their own language—the language of the market. They need to demonstrate—as Sunstein has—that the state is vital to the survival of the market, and the state has obligations to live up to so the market can survive, and protect our ability to meet our economic and social needs. The idea of a “free market” is a myth; the market only exists because the state regulates it. Unregulated capitalism would eat itself alive—as recent “corporate scandals” amply demonstrate.

There is not one good in the ICESCR that anyone would object to people enjoying. The problem is in claiming a right to something, and what would satisfy the enjoyment of that right. Clearly Americans believe that the state has economic and social obligations to its citizens; otherwise, why not just abandon the Social Security system, if it's so much trouble? Why shouldn't the elderly have to pay the same for their medications as everyone else does; after all, there is no recognized right to free or discounted drugs. If we believe that the only way we can get a guarantee out of the state for something like social security or education is by claiming a right to it, and the United States does not recognize those rights, then why they exist?

Not all obligations of the state arise from a rights claim. If we are to accept this, then we also have to accept the fact that the state does more than just enforce rights claims. The state is much more. As Roosevelt recognized sixty years ago, citizens have expectations of their economic and political systems. We need to think of a way to reformulate economic and social guarantees in some other way other than claiming a direct right to those goods. Non-discrimination is a very good start. But I would argue that most of what economic and social rights are really about is state regulation of civil society. And by suggesting that the market is indispensable for the realization of most economic and social rights, we can begin to bridge the gap between those who do not believe in those rights. By doing so, proponents of economic and social guarantees are able to argue that the state has an enormously important role to play, because without its powers of regulation there would be no market.

The challenge is this: very few Americans are aware of the existence of the Universal Declaration of Human Rights. A 1997 poll asked respondents whether “there is an official document that sets forth human rights for everyone worldwide,” 7% answered in the affirmative, but didn't know what it was

called; 8% mentioned the Universal Declaration.<sup>22</sup> Without an enumeration of “human rights,” I would imagine that the general public considers human rights to be the same as basic constitutional rights in the United States. Every president since Carter has slightly redefined the basic thrust of what the U.S. means when it says “human rights.” The current administration, speaks more about “human dignity,” couched within an evangelistic rhetoric that “freedom is a gift from the Almighty.” Julie Mertus is less charitable: for Bush, human rights is a “random rendition of the administration’s current priorities” (Mertus 2003: 374). In a speech soon after 9/11, Lorne Craner, the head of the State Department’s Bureau of Democracy, Human Rights and Labor, stated that the U.S. stance toward human rights is “to focus on U.S. national interests...advancing human rights and democracy in countries important to the United States” in order to “protect the values that underpin civil society at home” (ibid., 373).

When this administration speaks of “the values that underpin civil society at home,” it is referring to the market and private—presumably faith-based—charities. “Economic rights” mean “market freedoms,” and social rights—welfare—are better handled outside the state. Economic and social rights have been realized. The public seems to support this rendition: over the past twenty-five years we have witness the entrenchment of a “domestic consensus” that favors reigning in the regulatory and welfare-providing powers of the state, and an increased faith in, and reliance upon, civil society institutions—including the market and private charities—for the securing of the object of economic and social “rights.” The further we go down this track, the less attractive economic and social rights claims become, because of the assumption that, as rights, whatever they are must be provided by the state (food, health, housing). Proponents of economic and social rights—meaning economic and social conditions guaranteed by the state that make human freedom meaningful—need a new strategy.

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<sup>22</sup> Reported on the Americans & the World Website, [http://americans-world.org/digest/global\\_issues/human\\_rights/HRinGen.cfm](http://americans-world.org/digest/global_issues/human_rights/HRinGen.cfm) (accessed on February 17, 2005).

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