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FDR and Economic Rights in the American Tradition

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Claremont McKenna College

FDR and Economic Rights in the American
Tradition

Submitted to Professor George Thomas

By
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Introduction

“A necessitous man is not a free man,” in his 1944 State of the Union Address, Franklin Delano Roosevelt made this bold claim, and, in the process, he upended the basis of the American liberal democratic order.¹ Our political tradition has always placed the most importance on political rights, and the founders created a Constitution which protected the people from government excess and gave them political power. They also included a Bill of Rights to secure specific political protections for citizens of their new nation. Roosevelt’s claim about necessity and freedom doesn’t seem to fit neatly into this picture of the American constitutional order. Many of the most prominent American political rights are specific guarantees of political liberty, but Roosevelt changed the discourse around rights to focus on economic claims. He argued that our vaunted political liberty was contingent on eliminating economic necessity: “true individual freedom cannot exist without economic security and independence”.² Roosevelt’s language of rights promising a minimal level of economic security was new, but the idea of republicanism having economic preconditions is an old one. The American founders saw their project as contingent on a robust middle class, and the second bill is a direct attempt to continue that tradition.³ Ultimately, Roosevelt’s belief in economic rights was founded on a broad truth about liberal democracies: securing political rights is not enough to ensure a prospering republican form of government. The economic conditions of a people are inexorably intertwined with their ability to be full

¹ Sunstein, Cass, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 242.

² Ibid.

³ Ganesh Sitaraman, *The Crisis of the Middle Class Constitution* (New York: Random House, 2017), 108.

democratic citizens. Governments must ensure a baseline level of economic security to allow their citizens to exercise their political rights.

There are two fundamental issues with the American constitutional order that a rights-based approach to economic issues seeks to address. The first problem is a moral one that is most easily proffered in the form of a question, why does the richest society in the history of the world let so many of its people live in poverty? Phrasing this problem as a question forces anyone who would oppose government action to lift up the least fortunate to justify that choice on moral grounds. Cass Sunstein argues that this moral argument was the driving impetus for Roosevelt's domestic crusades.⁴ Sunstein writes of Roosevelt's thought that to him, "human distress could no longer be taken as an inevitable by-product of life, society or 'nature'; it was an artifact of social policies and choices. Much human misery is preventable. The only question is whether a government is determined to prevent it"⁵. Further elaborating on Roosevelt's thought, Roosevelt's Secretary of Labor, Frances Perkins said: "Foremost was the idea that poverty is preventable, that poverty is destructive, wasteful, demoralizing, and that poverty is morally unacceptable in a Christian and democratic society"⁶. The moral argument, couched in these terms, seems difficult to dispute. Obviously, the portion of the argument that places the onus for rectifying the injustice of poverty on government action is where the disagreement resides. The juxtaposition of the United States' great wealth against the

⁴ Sunstein, Second Bill of Rights, 91.

⁵ Ibid.

⁶ Ibid.

misery of poverty is meant to undermine the notion that state action would be impractical or unnecessary.

The second fundamental issue that an economic rights approach addresses is what Sunstein calls “The material preconditions of citizenship”⁷. Men who don’t meet the material preconditions cannot fully exercise their political capabilities. These preconditions usually aren’t stated outright, but they are understood to be a level of economic security that allows individuals to self-govern. That is, they are secure enough in their lives to exercise their political judgments without being compelled by economic necessity. John Rawls included a similar notion as part of his ordering of a just liberal society in *Political Liberalism*, “the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens’ basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties”⁸. This understanding of material preconditions and basic needs isn’t just a modern conception. It is also tightly connected to the notion of freedom and liberty in the American tradition. At the time of the founding, property ownership was a condition of suffrage because it was the ultimate mark of the self-sufficiency that defined the American citizen.⁹ Sunstein describes this in simple terms, “Citizens who do not have a decent minimum cannot participate in politics; those without security cannot easily be citizens at all”¹⁰. Broad participation in the process of democracy is important for the healthy functioning of

⁷ Sunstein, *Second Bill of Rights*, 90.

⁸ John Rawls, *Political Liberalism* (New York, Columbia University Press, 2005), 23, Ebscohost.

⁹ *Ibid.*

¹⁰ *Ibid.*

republican government, but for that broad participation to be helpful it must also be meaningful. The economically insecure would not be able to exercise their freedoms meaningfully for both practical and systemic reasons. On the practical side, the economically insecure wouldn't be able to afford time off to vote, they wouldn't have time to devote to understanding the issues of the day, and they could be influenced by the choices of economic superiors. The broader systemic issue would be that the economically disadvantaged would have comparatively less power, even if they were able to participate in the political process. There is an emerging body of research that shows that the policy preferences of the wealthy, in this case the top 10% of Americans, differ from the preferences of the majority of Americans, and yet they are disproportionately enacted by the government.¹¹ A robust conception of economic rights would increase the political power of the middle and lower class majority by freeing them from the shackles of economic insecurity. By addressing the fundamental issue of material preconditions, economic rights can also be a victory for the moralists, but the argument is more compelling when it doesn't rest exclusively on an absolute moral case. The rest of this thesis will focus on both issues and how economic rights intersect with them in various ways.

Chapter One will give a detailed explanation of the concept of an economic right and provide a brief history of economic rights in the American Constitutional tradition. Economic rights have always been the less heralded sibling of more widely understood civil and political rights. The popular conception of rights doesn't usually include

¹¹ Sitaraman, *Middle Class Constitution*, 381

economic guarantees, and opponents of economic rights will often make the argument that they aren't even rights at all. The root of this dispute is in the distinction between positive and negative liberties, and the role of government in providing and securing those liberties. These conflicts are particularly pronounced in the American tradition, where economic rights have historically had little purchase. Abroad, economic rights have more stature, and the United Nations has promoted economic rights on the same level as civil and political rights in its Universal Declaration of Human Rights.¹² The examination of economic rights in Chapter One will lay the groundwork for Chapter Two's discussion of the most well-known appearance of economic rights in American history.

Chapter Two will examine the specifics of Roosevelt's second bill of rights proposal, how it came to be, and the broader justification for this idea demonstrated in Roosevelt's other writings. Roosevelt articulated eight specific economic rights in his 1944 State of the Union address:

“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;

¹² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

The right to a good education.”¹³

Listed here, most of them are relatively familiar to the American citizen. Many of them have been enacted by the government or have been the source of political contention. However, since Roosevelt’s time they haven’t necessarily been so explicitly connected to a larger conception of economic rights. Roosevelt saw these promises as a way of promoting a general personal security in the face of life’s risks, and by providing that security he was also securing a true sense of freedom for each citizen.¹⁴ In Roosevelt’s parlance, all of these rights could be seen as the specific fulfilment of an earlier promise he made during his famous “Four Freedoms” speech. Among the four freedoms he promised in response to the prevailing dangers of the fascist world was a “freedom from want”.¹⁵ Of the four claims, this may have been the most ambitious, and his stated goal was “economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world”¹⁶. Each right that he listed in his 1944 address was meant to build into a cohesive whole that would collectively secure the ability of every American to be truly free. Sunstein also points to the character of the second bill of rights, and its combination of government action with the idea of liberty, as being a fundamental rejection of the idea of American anti-government individualism. He said that “[The Second Bill] marked the utter collapse of the (ludicrous) idea that

¹³ Franklin D. Roosevelt, State of the Union Message to Congress, “*Second Bill of Rights Speech*,” January 11, 1944, The American Presidency Project, accessed April 7, 2019, <https://www.presidency.ucsb.edu/node/210825>.

¹⁴ Sunstein, *Second Bill of Rights*, 95.

¹⁵ Franklin D. Roosevelt, State of the Union Message to Congress, “Four Freedoms Speech,” January 06, 1941, The American Presidency Project, accessed April 7, 2019, <https://www.presidency.ucsb.edu/node/209473>.

¹⁶ *Ibid.*

freedom comes from an absence of government”¹⁷. By so intimately connecting the role of government to the promotion of liberty, Roosevelt flipped the script on those who would argue that increased government activity constrains liberty. The entire basis of the economic bill of rights is government action promoting liberty. The arguments of both his 1944 State of the Union and his broader thoughts on the topic remain persuasive to this day. Their enduring relevance is, perhaps surprisingly, not reflected in American political discourse, but rather abroad. After Franklin Roosevelt’s death in 1944, Eleanor Roosevelt was instrumental in the passage of the United Nations Declaration on Human Rights, which was heavily influenced by the ideas of FDR’s second bill of rights.¹⁸

Chapter Three will examine the different ways an economic bill of rights could be implemented. The name “bill of rights” seems to immediately suggest that new promises of an economic minimum would be introduced as full new constitutional rights via the Article V amendment procedure. The rights could be introduced via a single amendment that codified a right to be free of want, or each specific guarantee could be added as individual amendments. On its face, such a dramatic transformation of the actual constitutional text seems far-fetched, and in the case of economic rights there is also a huge question surrounding judicial enforcement of those rights. For those reasons, Roosevelt specifically maintained that he wasn’t trying to propose actual amendments to the Constitution.¹⁹ Instead, Roosevelt was hoping to change the fundamental political understandings of the nation to include support for economic rights. Sunstein calls these

¹⁷ Sunstein, *Second Bill of Rights*, 16.

¹⁸ Sunstein, *Second Bill of Rights*, 2-3.

¹⁹ *Ibid.*, 61.

understandings “constitutive commitments,” and he defines them as such, “they have a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in social understandings”²⁰. The most widely recognized instance of constitutive commitments can be found in the Declaration of Independence. That document is not a binding legal text in the way the Constitution is, but it retains a privileged position in our nation’s political understanding. Indeed, no American would dispute that we are committed to the rights of life, liberty, and the pursuit of happiness, yet nowhere in the Constitution or Bill of Rights are these things explicitly stated. In that same way, Roosevelt was seeking to alter the political fabric of the country to accept basic economic rights as a fact of our democratic system.

Conveniently, such an approach also sidesteps the more difficult questions surrounding judicial enforcement that would arise from specific textual guarantees of economic rights. Constitutive commitments would be enforced via the democratic process. Citizens would support politicians and proposals that are in line with the commitments, rather than courts striking down laws or mandating action to guarantee constitutionally provided economic rights. Both the constitutive commitments path and the constitutional rights path are valid options for implementing an economic bill of rights, and their drawbacks and benefits would have to be closely weighed against one another. Roosevelt came down on the side of commitments, but other countries whose constitutions have been inspired by the UN convention on human rights include enforceable economic claims in their constitutions.²¹

²⁰ Ibid., 62.

²¹ Sunstein, *Second Bill of Rights*, 215-216.

The concluding chapter of this thesis will expand the idea of economic rights to explore why it is beneficial to approach societies problems on an economic rights basis. The chapter will include a presentation of a list of potential modern economic rights that would be an appropriate continuation of the legacy of Roosevelt's Second Bill.

modern economic rights that would be an appropriate continuation of the legacy of Roosevelt's Second Bill.

Chapter One: Economic Rights and the American Tradition

Late night talk shows often include a “man on the street” segment where unsuspecting passersby are subjected to difficult questions about culture or politics. It’s easy to imagine one such interview where the person is asked to describe rights. A typical high school graduate with at least some education in civics would probably mention something about the US Constitution and its Bill of Rights. They may even name a few of the most well-known rights that American citizens enjoy, such as the right to due process under the fifth and fourteenth amendments, the freedom of speech and religion, or the right to vote. These examples fall under the headings of civil and political rights, and they generally make up the popular conception of rights. However, there’s another category of things that are sometimes discussed in connection with rights: a right to healthcare, right to a job, right to an education, right to housing, and many others. These are so-called economic rights: positive state guarantees of material protections. Unlike civil and political rights, which generally involve protections against the government, rights of political participation, and personal liberties, economic rights are promises of specific economic benefits for citizens in a political community. To understand the relevance of economic rights, it’s first worthwhile to describe economic rights in greater detail and take a look at their history in the American tradition.

To illuminate the specific nature of economic rights, it will be useful to compare them with more familiar civil and political claims. Brian Orend uses helpful terminology to distinguish the two groups, calling civil and political rights “first-generation rights,” and he includes in that group claims about security of the person, property, due process

and typical political rights like freedom of speech or religion.²² He calls economic rights “second-generation rights,” and he includes more specific claims to a basic level of material subsistence along with social and economic freedoms.²³ The easiest distinction between the two is that first-generation rights are generally negative freedoms, protections against abuse by state power, whereas second-generation rights tend to be positive freedoms, which require action by the government to enact the promised right. For opponents of economic rights, this distinction is of paramount importance. Positive rights oblige action by another party, and in doing so they necessarily impose a duty upon another free person. Defenders of personal liberties think that positive rights undermine the entire liberal (need a different word such as ideology) by submitting individuals to the tyranny of those who can invoke positive rights-based claims against them. In practical terms, the liberty infringing mechanism would be increased taxation to fund government action to promote the positive rights. In the American constitutional tradition, first-generation rights take center stage, and positive rights aren’t much of a factor. The original Bill of Rights includes a bevy of negative rights that preclude action by the federal government, but it doesn’t include any positive declarations about how the government should use its remaining power. The difference between the generations of rights may have a simple explanation, the thinkers of the Enlightenment, who heavily influenced the founders, were theorizing in an era where the primary concern was

²² Brian Orend, “Justifying Socioeconomic Rights,” in *Economic Rights in Canada and the United States*, ed. Rhonda E. Howard-Hassmann and Claude E. Welch, Jr. (Philadelphia: University of Pennsylvania Press, 2006), 25.

²³ *Ibid.*

government tyranny.²⁴ The lack of positive rights in the American tradition is probably a primary reason why economic rights have historically not been widely recognized by the American people.

In the modern era, economic rights are also closely connected to the concept of human rights, which Orend defines as “a high-priority claim to a set of objects that are owed to each human person as a matter of minimally decent treatment”²⁵. Joseph Wronka offers an even briefer summation of human rights, “human rights are statements of human needs”²⁶. The most widely accepted collection of human rights is found in the United Nations Universal Declaration of Human Rights (UDHR) of 1948.²⁷ This document consists of 30 articles which declare a number of civil, political, and economic rights. The 30 articles are a mixture of first and second generation rights, and there isn’t an explicit delineation between the two in the document itself. Eleanor Roosevelt chaired the UN Commission on Human Rights which drafted the declaration, and the resulting document is clearly influenced by the economic rights that Roosevelt discussed in his “Four Freedoms” speech and his 1944 State of the Union.²⁸ Human rights aren’t often discussed in the American tradition because of the aforementioned historical focus on the civil and political liberties in our Constitution. America only seriously considered the idea of economic rights for a brief period in the early 1940s, when Franklin Roosevelt was promoting those ideas as a necessary precondition of lasting international peace that

²⁴ Joseph Wronka, *Human Rights and Social Policy in the 21st Century* (Lanham: University Press of America 1998), 79.

²⁵ Orend, “Justifying Socioeconomic Rights,” 26.

²⁶ Wronka, *Human Rights*, 24.

²⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

²⁸ Wronka, *Human Rights*, 90.

he hoped to engineer in the aftermath of World War II. Cass Sunstein notes the stark contrast between America and the rest of the world on the topic of human rights, “the Universal Declaration reflects an international agreement about the rights that people have. And it provides a dramatic contrast to the American Constitution”²⁹. Wronka published a comparative textual analysis of the United States Constitution and the Universal Declaration of Human Rights and concluded that there was no overlap between the two in the sphere of economics, “Apart from extremely weak phraseology of the general welfare and establish justice clauses of the Federal Constitution, there appear no correspondences with positive rights as described in Articles 22 through 27”³⁰. In contrast with an international consensus that sees civil and political rights as interdependent with economic rights, the American Constitution stands on its own in its sole recognition of civil and political liberties.³¹ As has been noted, this break can be traced to the historical moment when the U.S. Constitution was drafted, but that history wouldn’t prevent America from joining growing international consensus in favor of positive economic rights.

The American constitutional order has, in fact, come close to recognizing positive economic claims as constitutional rights in the past. Over the history of the United States, the Constitution has been interpreted to include rights that go far beyond what was explicitly intended by the founding fathers. In *Griswold v. Connecticut*, Justice William Douglas famously interpreted the Constitution as including a right to privacy, which he

²⁹ Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 101.

³⁰ Wronka, *Human Rights*, 152.

³¹ Sunstein, *Second Bill of Rights*, 101.

found in the so-called penumbra of the first amendment. Douglas described penumbras as being “formed by emanations from those guarantees [the Bill of Rights] that help give them life and substance”³². By way of such decisions, the opinions of the Supreme Court effectively become the real constitutional text of the United States. In the 1960s, the Warren Court came close to recognizing a few guarantees of minimum welfare as constitutionally protected rights.³³ Decisions like *Gideon v. Wainright* and *Goldberg v. Kelly* went down the path of giving specific rights to poor people. In *Gideon* it was a right to defense counsel for the indigent, and in *Goldberg* it was a right to due process before being deprived of welfare. However, with the retirement of Chief Justice Warren and the election of Richard Nixon, the composition of the Supreme Court changed, and the new majority emphatically shut down the idea that the Constitution protected specific economic rights. (perhaps elaborate on the conservative judicial appointments Nixon made to illustrate how he moved the court to the right) In *San Antonio Independent School District v. Rodriguez*, the Court had the opportunity to hold that education was a fundamental right protected by the U.S. Constitution. They declined to do so, and the Supreme Court hasn’t seriously taken up the idea of economic rights since then.³⁴ Notably, Justice Thurgood Marshall’s dissent in *Rodriguez* included a discussion of how the Court could have decided to protect economic rights. Marshall draws on the logic of the penumbra to argue that, “The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the

³² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³³ Sunstein, *Second Bill of Rights*, 154.

³⁴ Sunstein, *Second Bill of Rights*, 166-167.

nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental”³⁵. In *Rodriguez*, the case was addressing education, and Marshall argued that the nexus between education and other guaranteed rights was close enough that education was itself a fundamentally guaranteed right. Though the Court didn’t side with Marshall, his dissent remains an interesting explanation of how the American Constitution could protect economic rights.

A reasonable critic of the American approach to rights may ask why the founding fathers couldn’t just include declarations of economic rights as an addition to their extensive work in the area of political rights. It was previously noted that one of the driving forces behind the focus on political rights was the danger of political tyranny in the late 18th century. The Revolutionary War was fought against a tyrannical king, and the new government was created to prevent the excesses of monarchical rule. However, this doesn’t seem like sufficient explanation to maintain relative silence on the topic of economic rights. Ganesh Sitaraman takes up this question in his book, *The Crisis of the Middle-Class Constitution*.³⁶ Sitaraman proposes that they ignored the question of economic inequality because they thought the structure of the American economy precluded dramatic wealth disparities that constitutional guarantees would need to alleviate.³⁶ Writing about Madison’s discussion of the multiplicity of interests constraining factions in *Federalist* No. 10, he discusses why Madison omits class, perhaps the most significant faction of all, “The unstated assumption that made Madison’s ‘variety of interests’ theory work was the relative economic equality that

³⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

³⁶ Ganesh Sitaraman, *The Crisis of the Middle Class Constitution* (New York: Random House, 2017), 101.

characterized the American republic”.³⁷ On this view, the founders’ silence on specific economic rights shouldn’t be seen as a condemnation of the whole idea. Rather, the omission reflects an assumption about the underlying class structure in America. Namely, that assumption was that America would remain a mostly agrarian economy with a correspondingly flat distribution of wealth. In contemporary terms, this economic composition would be described as a broad middle class. William Forbath and Joseph Fishkin make a similar claim to Sitaraman that, “the core of these reformers’ arguments was an idea that we cannot keep our constitutional democracy—our “republican form of government”—without certain essentials: constitutional restraints against oligarchy and a political economy that sustains a robust, wide-open middle class, broad enough to accommodate everyone”³⁸. As the character of the American economy has shifted, the assumption that we will have a self-sustaining broad middle class hasn’t held up. At the time of the founding, economic rights would have been redundant since they would have been guaranteeing a level of economic wellbeing that people could reach without the assistance of the government. However, now that the agrarian economy of the Revolutionary time has given way to modern industrial capitalism, economic rights could be a way of reasserting the prominence of a healthy middle class that the founders thought to be a necessary precondition for our Constitution.

Economic rights also are often conflated with large-scale government welfare programs that have been designed to implement them. This conflation is a

³⁷ Sitaraman, *Middle Class Constitution*, 101.

³⁸ Joseph Fishkin and William Forbath, “Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality,” *UT Law Review* 94, no. 7(June 2016): 1289.

misunderstanding of the nature of an economic right. A right to minimal subsistence need not entail any specific provision mechanism. Orend makes the point that providing for those who can't provide for themselves is different from large-scale socialism, "it's wrong to confuse the assertion that people have rights to food, clothing, shelter, education, clean water, and medical care with the view that the government must set up a huge, separate program for each to actually provide these things for everyone"³⁹.

Opponents of economic rights conjure up images of bureaucratic boogymen who are trying to undermine the fundamental right of private property. However, economic rights don't have to be a danger to private interests and personal liberty. In fact, some of the most fervent defenders of personal freedoms have defended basic economic rights.

Chapter One of Milton Friedman's classic work, *Capitalism and Freedom*, is called "The Relation between Economic Freedom and Political Freedom," and he devotes that chapter to the idea that "economic freedom is also an indispensable means toward the achievement of political freedom," which may as well be another way of phrasing Franklin Roosevelt's classic claim that "necessitous men are not free men"⁴⁰. In the same book, Friedman recognizes the ills of poverty and advocates for a negative income tax to ensure a minimum level of economic stability for the poorest in society⁴¹. In their work trying to rehabilitate a left leaning understanding of Constitutional economic rights, Fishkin and Forbath note that it's the libertarian right who have put forth the most consistent vision of constitutionalized economic rights, "For an affirmative argument about the demands the Constitution makes on political economy and the opportunity

³⁹ Orend, "Justifying Socioeconomic Rights," 34.

⁴⁰ Milton Friedman, *Capitalism and Freedom* (Chicago: The University of Chicago Press, 2002), 8.

⁴¹ *Ibid.*, 192.

structure, today the best place to look is the libertarian right. Libertarian advocates have a substantive vision of a political and economic order that they believe the Constitution requires. They have long translated that vision into rights claims that can be enforced in court”⁴². Though the economic rights they may envision differ in extent when compared to those proposed by Roosevelt and others, it’s noteworthy that there is support for economic rights across the political spectrum. One doesn’t have to be a card-carrying member of the communist party to believe that economic rights are important,⁴³ nor is it necessary to be a devoted classical liberal, but it does seem relevant that there is support for the broad concept of economic rights at both extremes of the ideological spectrum.

Franklin Roosevelt’s call for a “Second Bill of Rights” in his 1944 State of the Union Address was the most high-profile instance of an American politician advocating for substantive economic rights. He saw them as a natural augmentation of the existing American Constitutional Order, and the next chapter will explore, in detail, the development of his ideas about economic rights in the American context.

⁴² Joseph Fishkin and William Forbath, "The Anti-Oligarchy Constitution," *Boston University Law Review* 94, no. 671 (2014), 674.

⁴³ Although communists certainly did support economic rights. The 1936 Soviet Constitution included specific economic guarantees like the right to work, a right to social security, and a right to education. See Wronka, *Human Rights*, 83-85.

Chapter Two: FDR

Franklin Delano Roosevelt's presidential administration lasted 12 years, and in that time, he brought America through both the worst economic collapse in its history and helped win the largest war the world had ever seen. But perhaps the most lasting mark he left on society was the massive reordering of the American economic order that he undertook during his time in office. His New Deal programs changed how Americans viewed the powers of the national government and promoted large-scale government action to solve the great economic crisis of the day. By the time he died in 1945, he had accomplished an economic shift of unparalleled consequence. One of his biographers, H.W. Brands, described this shift in dramatic terms, "Franklin Roosevelt radically altered the landscape of American expectations. The small-government world of the nineteenth and early twentieth centuries was banished forever. Americans demanded more of their government: more services, more safeguards, more security"⁴⁴. Indeed, it was that idea of safeguards and security that animated much of Roosevelt's life work. In his first two terms he framed this message as a choice between democracy and economic royalism.⁴⁵ It was a fight against the tyranny of oligarchy, and he won it by securing a measure of prosperity for all citizens. In the last half of his presidency, the terms of the conversation shifted to focus on the emerging threat of fascism and dictatorships.⁴⁶ In those terms his focus on security was even more apparent, though this time it was a physical security from the predations of fascist states. However, Roosevelt coupled this intense focus on

⁴⁴ H. W. Brands, *Traitor to His Class: The Privileged Life and Radical Presidency of Franklin Delano Roosevelt* (New York: Doubleday Publishing Group 2008), 821.

⁴⁵ Ganesh Sitaraman, *The Crisis of the Middle Class Constitution* (New York: Random House, 2017), 199.

⁴⁶ *Ibid.*

security with an equally strong commitment to freedom. He believed that intimate connections between security of all sorts and crucial freedoms were necessary to maintain the democratic order. The practical manifestation of this commitment eventually came from his articulation of a “Second Bill of Rights” in his 1944 State of the Union Address. The Second Bill was a statement of a series of economic rights that were the means by which Roosevelt proposed to guarantee the freedoms to which he was so committed. The economic rights provided a minimum level of economic security which Roosevelt thought was necessary to ensure all other freedoms. To provide context for the genesis of the Second Bill of Rights, it’s worthwhile to trace the development of Roosevelt’s commitment to freedom and security.

Cass Sunstein authored the definitive book on Roosevelt’s efforts in the economic rights sphere, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever*, and he points to a few key moments in the evolution of Roosevelt’s ideas. Those moments include a 1932 campaign speech at the Commonwealth Club in San Francisco, discussions of economic rights in his 1936 address at the Democratic National Convention, the 1941 State of the Union and his famous articulation of four freedoms, the internationalization of those freedoms in the Atlantic Charter in mid-1941, and the culmination in his 1944 State of the Union where he lays out a second bill of rights.⁴⁷ A more detailed examination of these texts will show how and why Roosevelt was so committed to the idea of economic rights.

⁴⁷ Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 65.

Roosevelt's Commonwealth Club Address was delivered to an audience of more than 2000 businesspeople at a lunch reception in San Francisco, and press articles on the speech indicate that the response was tepid at best.⁴⁸ The speech was primarily composed by a Columbia Law Professor, Alfred Berle, who was a member of Roosevelt's so-called "Brain Trust."⁴⁹ The speech was essentially a distillation of Berle's academic work, which focused on the changing character of the American economy over the course of the 19th and 20th centuries. Berle's take was inherently more pessimistic than the ever optimistic Roosevelt, and the speech delved into rather arcane matters of theory that were at least partially at odds with Roosevelt's famous aversion to political philosophizing. The tepid reception was probably a result of the borderline socialist content of the speech, which would have been distasteful to a gathering of businessmen, and also because of its rather lengthy historical digressions, which read more like an academic lecture than the soaring oratory Roosevelt is known for. Despite the lack of import in the moment, the Commonwealth Club Speech stands out as a first articulation of the kinds of themes Roosevelt will return to later in his presidency. D.W. Houck undertakes a lengthy rhetorical analysis of the Commonwealth Club Speech, and then dismisses it because he sees Berle's hand rather than Roosevelt's.⁵⁰ However, the important bits aren't the ones that are easily identifiable as Berle's academic work, those are the lengthy discussions of the economic development of the nation and his pessimistic take on the allocation of resources. Houck calls Berle's points, "A view of economic stagnation and retrenchment"

⁴⁸ Davis W. Houck, "FDR's Commonwealth Club Address: Redefining Individualism, Adjudicating Greatness." *Rhetoric and Public Affairs* 7, no. 3 (2004): 269.

⁴⁹ Sunstein, *Second Bill of Rights*, 67.

⁵⁰ Houck, "Commonwealth Club, Adjudicating Greatness," 276.

that Roosevelt “had never articulated”⁵¹. Rather than those pieces, the important parts are ones that speak to the larger themes that Roosevelt will continue to voice in the future. Sunstein sees the speech in this light, and he takes it as indicative of a blend between Berle’s academic thought and Roosevelt’s optimism plus one specifically novel engagement, “[The Commonwealth Club Speech] showed a direct engagement with unemployment and its human meaning—an engagement that led to a novel emphasis on the centrality of security”⁵². It’s for those portions that the Commonwealth Club Speech needs to be looked at.

Towards the final part of the speech, Roosevelt utters the words that will continue to define his political agenda, “As I see it, the task of Government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order. This is the common task of statesman and business man. It is the minimum requirement of a more permanently safe order of things”⁵³. There’s a lot to unpack in just this short paragraph, but it’s all emblematic of the path Roosevelt will tread in the future. First of all, he begins this passage by noting that the task of Government in the realm of economics is fundamentally related to the conduct of business. So the development of this declaration of rights is a joint venture between the Government and private industry. Roosevelt was no socialist. Sunstein notes that he was, indeed, strongly committed to the capitalist system, “He was committed to free markets, free enterprise, and private ownership of property. He was not an egalitarian. . . It was

⁵¹ Houck, “Commonwealth Club, Adjudicating Greatness,” 276.

⁵² Sunstein, *Second Bill of Rights*, 67-68.

⁵³ Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club, “Commonwealth Club Speech,” September 23, 1932, The American Presidency Project, accessed April 8, 2019, <https://www.presidency.ucsb.edu/node/289312>.

freedom, not equality, that motivated the second bill of rights”⁵⁴. In the Commonwealth Club Speech, his commitments are to the ends of economic security, the mechanism by which that is achieved is left open to interpretation. That ambivalence about the means by which his agenda was implemented is a well documented part of Roosevelt’s character; Sunstein describes him as such, “Roosevelt was an experimenter, a pragmatist interested in results and solutions rather than theories and themes”⁵⁵. His lack of interest in a formal theory behind his agenda could explain his affinity for economic rights. In the passage he next refers to an “economic constitutional order,” which is a perfect way to describe his theory-less economic agenda. By ascribing certain economic principles the status of constitutional rights, he placed them as central goals that the nation should strive for, through whichever means they want. The final portion of this passage connects economic rights to the notion of security. This will be a major theme that Roosevelt returns to in later years, particularly during the War period. By putting economic rights together with their most tangible benefit, physical security, Roosevelt lends an urgency to the creation and maintenance of these economic goals. Through the language of security, Roosevelt harnesses the anxiety of a people faced with external threats. Though at the time of this speech Roosevelt does not have the foil of international fascism, he will circle back around to his early thoughts on security when faced with advancing an economic agenda while fighting a war.

The Commonwealth Club Speech is also notable for articulating two specific economic rights that Roosevelt would later expand and elaborate on, the right to life and

⁵⁴ Sunstein, *Second Bill of Rights*, 2.

⁵⁵ *Ibid.*, pg. 42.

the right to property. Introducing the first right, he said, “Every man has a right to life; and this means that he has also a right to make a comfortable living. . . Our Government formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of plenty sufficient for his needs, through his own work”⁵⁶. This right to life plays off the old motif from the preamble Declaration of Independence, that all men have rights to life, liberty, and the pursuit of happiness. In this case, that familiar right to life is taken by Roosevelt and filled out with a robust meaning related to employment. The right to life here means more than just a right to existence; Roosevelt, instead, defines it as a right to make a comfortable living. Also of note is a continuing theme of having private industry as a joint partner, and even a leader, in upholding the rights Roosevelt discusses. Roosevelt is agnostic about the means by which his ends are accomplished, and if he could harness the energy of private industry to meet his ends he would. The other specific right he sketches in this speech is a right to property, and specifically a safety of savings, “Every man has a right to his own property; which means a right to be assured, to the fullest extent attainable, in the safety of his savings. By no other means can men carry the burdens of those parts of life which, in the nature of things, afford no chance of labor; childhood, sickness, old age”⁵⁷. This right was particularly relevant in 1932, after the Great Depression sparked bank runs which devastated the savings of ordinary families. This right in particular seems to be a forerunner of a more complete notion of material security. The goal of savings safety is to allow families to feel secure in their material condition, and it would be a logical next

⁵⁶ Roosevelt, “Commonwealth Club Speech.”

⁵⁷ Ibid.

step to more thoroughly assure a minimum material condition later on. As to these specific rights, Sunstein notes that they can be seen as clear precursors to the programs he creates to promote employment and secure savings during the New Deal⁵⁸. The great legacy of the Commonwealth Club Speech is its evidence that even in the early stage of Roosevelt's presidential career he was discussing the theme that economic rights ensured security, a notion that would animate his economic agenda for the next 13 years.

Four years later, at the 1936 Democratic National Convention, Roosevelt further articulated his vision of a government committed to economic rights. In Philadelphia, the home of Independence Hall, Roosevelt began his ambitious convention address by directly harkening back to the days of the American Revolution, "Philadelphia is a good city in which to write American history. This is fitting ground on which to reaffirm the faith of our fathers; to pledge ourselves to restore to the people a wider freedom; to give to 1936 as the founders gave to 1776—an American way of life"⁵⁹. Here he makes explicit the connection between his project and the Declaration of Independence, which was only an allusion four years before in San Francisco. In this statement he is making a sweeping claim to the same revolutionary authority that the founders had when fighting against the British. However, instead of struggling against political tyranny, Roosevelt identifies his opposition as a new form of 'economic royalists,' "The royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody's business.

⁵⁸ Sunstein, *Second Bill of Rights*, 71.

⁵⁹ Franklin D. Roosevelt, Acceptance Speech for the Renomination for the Presidency, "Economic Royalists Speech," June 27, 1936, The American Presidency Project, accessed April 8, 2019, <https://www.presidency.ucsb.edu/node/208917>.

They granted that the Government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live”⁶⁰. He equates the forces of economic oppression with the British Royalists, enemies of political freedom that all Americans are bound to oppose. These new royalists allow the government to protect political liberties, but their economic domination of the common man infringes on their ability to exercise those liberties. Roosevelt also returns to the concepts of right to live and right to work. In this speech, these economic rights are bulwarks against the domination of the new royalists. Those rights, among others, secure conditions of economic security and free the people from economic domination. Roosevelt goes on to warn that these business interests will denounce him as the real agent of oppression, “These economic royalists complain that we seek to overthrow the institutions of America. . . (do you mean to have three dots here, or just one period?) In their blindness they forget what the Flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the over-privileged alike”⁶¹. Ganesh Sitaraman notes the overtly constitutional nature of the whole speech, and particularly this portion, “Roosevelt’s speech put the economic challenge of the time in distinctly constitutional terms. At stake was the survival of the American system of government, the preservation of democracy.” He also goes on to link this address to the Commonwealth Club Speech and its reference to an “economic constitutional order”⁶². Sitaraman’s point is important because it shows how fundamental Roosevelt’s argument

⁶⁰ Roosevelt, “Economic Royalists Speech.”

⁶¹ Ibid.

⁶² Sitaraman, *Middle Class Constitution*, 187.

is. Rather than just bullet pointing a list of economic programs, he publicizes the underlying rationale for his systemic upheaval of the existing economic order, and Roosevelt's urgent tone makes it clear that the conflict with the royalists is one of existential importance to American democracy.

After introducing the problem of the economic royalists in depth, he first utters the most succinct summation of the problem with this new form of tyranny, "An old English judge once said: "Necessitous men are not free men." Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for"⁶³. Quoting from the ever-prescient judges of the common law, Roosevelt brought his trademark eloquence to bear on the otherwise complex relationship between economic rights and security. All of the hundred thousand or more people in the crowd could understand the point Roosevelt was making, their vaunted political liberties were only as secure as their material conditions allowed them to be. True freedom, in the American sense of the word, required action to provide a healthy minimum of material condition. Roosevelt made that commitment concrete in the 1936 Democratic platform, whose opening lines called for economic guarantees that were spiritually descended from the Declaration of Independence, "We hold this truth to be self-evident—that government in a modern civilization has certain inescapable obligations to its citizens, among which are: (1) Protection of the family and the home. (2) Establishment of a democracy of opportunity

⁶³ Sitaraman, *Middle Class Constitution*, 187.

for all the people. (3) Aid to those overtaken by disaster”⁶⁴. These goals are more specific targets that Roosevelt hoped would combat necessitousness. Although these goals could all be easily connected to specific rights, Sunstein makes an important note that Roosevelt hasn’t yet taken the step of explicitly articulating his goals in terms of rights, “This catalog of objectives was not cast in terms of rights. But with a little effort, it could easily be translated into those terms.” He goes on to say, “It took an external threat to push Roosevelt to take that step”⁶⁵. The outbreak of World War II, and the shift in the landscape of domestic political affairs that accompanied it changed Roosevelt’s approach to his economic agenda.

By 1941, the growing threat of fascism and communism around the globe had limited the appeal of Roosevelt’s old anti-royalist rhetoric. To continue to promote his agenda, Roosevelt and his administration had to change their messaging. Sitaraman describes this change, “In 1936, Roosevelt framed America’s choice as between democracy and economic royalism, his version of the old debate between republics and oligarchy. . . (three dots?) But by the 1940s, the threat of oligarchy and demagogues preying on the poor had largely dropped out of the conversation, replaced by a fear of dictatorship”⁶⁶. Despite the external enemy changing from Mr. Monopoly to Mr. Mussolini, the basic message remained the same. Freedom, liberty, were the goals of our government, and true freedom could only be ensured once the physical and material security of the people was guaranteed.

⁶⁴ Democratic Party Platforms, 1936 Democratic Party Platform Online by Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/273216>.

⁶⁵ Sunstein, *Second Bill of Rights*, 78.

⁶⁶ Sitaraman, *Middle Class Constitution*, 199.

Roosevelt's 1941 State of the Union Address, more commonly known as the Four Freedoms Speech, is the most famous example of Roosevelt's new approach to his economic agenda. In that speech he called on the country to take note of the worsening conditions around the globe, exhorting them to see how "every realist knows that the democratic way of life is at this moment being directly assailed in every part of the world"⁶⁷. This dire warning was preceded by a long list of conflicts that the United States did not deem necessary to involve itself in. By cataloguing the isolationist history of the prior century, Roosevelt hoped to draw a contrast with the dire circumstances of 1941. He twisted the usual upbeat line of presidents before and after him, "the state of our union is strong," to say "As your President, performing my constitutional duty to 'give to the Congress information of the state of the Union,' I find it, unhappily, necessary to report that the future and the safety of our country and of our democracy are overwhelmingly involved in events far beyond our borders"⁶⁸. Americans had always been wary of entanglement in a European war, and Roosevelt had to convince them that it was in their self-interest to care about the outcome of the far-flung conflict. The bulk of his speech was devoted to an explanation of his rationale for providing material support to the victims of aggression abroad. For the average American, the takeaway was that by propping up democracies around the world, the enemies of freedom will not be able to bring war to American shores. However, ever the optimist, Roosevelt didn't want to cast his international ambitions in purely calculating and geostrategic terms. He exhorted the

⁶⁷ Franklin D. Roosevelt, State of the Union Message to Congress, "Four Freedoms Speech," January 06, 1941, The American Presidency Project, accessed April 7, 2019, <https://www.presidency.ucsb.edu/node/209473>.

⁶⁸ Ibid.

people to remember the convictions that he wanted America to stand for, “Those who man our defenses, and those behind them who build our defenses, must have the stamina and the courage which come from unshakable belief in the manner of life which they are defending. The mighty action that we are calling for cannot be based on a disregard of all things worth fighting for” and he continued, “Certainly this is no time for any of us to stop thinking about the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world”⁶⁹. The coming war would not be one that was fought simply out of necessity, America was on the righteous side, supporting the cause of liberty. Even, or perhaps especially, in the face of a looming fascist threat, Roosevelt remained committed to the ambitious reordering of the American economic order that had been his project for the previous two terms.

The Four Freedoms Speech moved on to a restatement of the economic ideals that Roosevelt thought were necessary to maintain a democratic order. He reminded the people what they were in simple terms, “there is nothing mysterious about the foundations of 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”⁷⁰. Roosevelt’s political thought always began with the ends he sought, and these simple goals were in line with the commitments he was making as early as the

⁶⁹ Roosevelt, “Four Freedoms Speech.”

⁷⁰ Ibid.

Commonwealth Club Speech. As objectives for his policymaking, they easily match up with the economic constitutional order that he was trying to promote, and he did promote specific policies, from the extension of unemployment insurance to increased access to healthcare, to meet these goals. The more detailed proposals were a departure from Roosevelt's usual tendency to set out his goals but not necessarily articulate the means to achieve them. Sunstein, however, lauds this attempt to, as he says, "amid the threat of war, propose a bold new series of domestic reforms."⁷¹ But the real heart of the speech is in its spirited conclusion.

For the finale, Roosevelt finally launches into the eponymous four freedoms, saying that, "We look forward to a world founded upon four essential human freedoms."

"The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world."⁷²

These four freedoms are the most concrete expression of Roosevelt's animating purpose he offered in all his time in office. Taken together, they constitute a complete articulation of the modern democratic ideal. The first and second freedoms are well known to Americans who are from an early age raised with the core protections of the Bill of

⁷¹ Sunstein, *Second Bill of Rights*, 81.

⁷² Roosevelt, "Four Freedoms Speech."

Rights etched into their memory. Freedom of expression and worship are the prototypical negative liberties that citizens in a democratic society expect. They represent the sorts of freedoms that are typically associated with the American constitutional order. It's the third and fourth freedoms where Roosevelt moves into new territory. Freedom from want represents the minimum material conditions that all of Roosevelt's economic policies work towards. Moving forward, freedom from want will be the animating concern of Roosevelt's sponsorship of economic rights. Freedom from fear is both an old and new idea for Roosevelt. On the one hand, it calls back to the immortal line in his first inaugural address that "the only thing we have to fear is fear itself," but on the other hand it is a new sentiment which leans heavily on the physical security that the United States will go to war over a few short months after this speech is delivered (the 2nd half of this sentence needs to be more direct but I can't figure out how to fix it). Freedom from fear is about guaranteeing his people the fundamental security from outside aggression. The final two freedoms also directly connect with one another. Physical security from external powers is worthless unless it is accompanied by a freedom from economic domination (domination by whom? Explain a bit). Roosevelt plainly understood this fact, so he always tried to frame his economic proposals as guarantees of security. The four freedoms remained a potent force that represented the values America would fight for in World War II and beyond.

The four freedoms were also notable for their international character. Roosevelt dictated them personally, and he insisted on including the tag of "everywhere in the

world” after each freedom.⁷³ Roosevelt backed up his internationalist tendencies when he met Winston Churchill eight months later at a clandestine meeting off the coast of Newfoundland. The public result of that meeting was a joint communique that has come to be known as the Atlantic Charter. The short document is a list of eight principles on which the two leaders “base their hopes for a better future for the world”⁷⁴. The Charter’s most relevant principles are the fifth and sixth, “Fifth, 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; Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want”⁷⁵. Both clearly show the influence of the four freedoms speech. The fifth lays out concrete objectives for securing the material conditions of all peoples, and the sixth directly references freedom from fear and want. The Atlantic Charter was well received around the free world because of its serious commitments to liberal values, but in America the reaction was muted⁷⁶. Roosevelt internationalized his values, even though it was not a popular move at home, because he believed that the rights of economic and political security were universal. It was this international theme that his wife Eleanor would carry forward in her push to enshrine Roosevelt’s economic values in the Universal Declaration of Human Rights in 1948.

⁷³ Sunstein, *Second Bill of Rights*, 83.

⁷⁴ “Atlantic Charter, 1941,” The Avalon Project at the Yale Law School, accessed April 14, 2019, <http://avalon.law.yale.edu/wwii/atlantic.asp>.

⁷⁵ Ibid.

⁷⁶ Brand, *Traitor to His Class*, 609.

Finally, in Roosevelt's 1944 State of the Union, he articulated his full vision of a Second Bill of Rights which was centered on guarantees of economic security and implemented through a series of economic rights. He specified eight particular economic rights that would constitute the Second Bill,

“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;

The right to a good education.”⁷⁷

As a group, they touch on many common economic afflictions that all citizens would be familiar with. Roosevelt summarized this list in a familiar manner, following his presentation of the bill with the assertion that “all these rights spell security”⁷⁸. After reviewing the evolution of his statements on economics and freedom, this focus on security should come as no surprise. All the way back in the Commonwealth Club Speech, Roosevelt was stating his intention to create an “economic constitutional order” which “is the minimum requirement of a more permanently safe order of things”⁷⁹.

Though he may not have fully fleshed it out then, the bones of what would become the

⁷⁷ Franklin D. Roosevelt, State of the Union Message to Congress, “*Second Bill of Rights Speech*,” January 11, 1944, The American Presidency Project, accessed April 7, 2019, <https://www.presidency.ucsb.edu/node/210825>.

⁷⁸ Ibid.

⁷⁹ Roosevelt, “Commonwealth Club Speech.”

Second Bill are plainly apparent. Economics, specified at the formative constitutional level, was necessary to ensure the safety of all people. The beauty of Roosevelt's approach is that unlike the grand security pronouncements of the totalitarian leaders of his day, this security enhanced freedom rather than restricted it. Roosevelt sought to create conditions of economic and physical security because he felt it enhanced freedom, which he saw as the ultimate goal of all democratic governments.

It undoubtedly wasn't lost on Roosevelt, being the astute politician that he was, that arguments in favor of a robust notion of security would be well received by the wartime public. Indeed, Sunstein argues that the Second Bill was an attempt by Roosevelt to reconcile the two distinct phases of his presidency, "The call for the second bill was an attempt to connect these two doctors [Dr. New Deal and Dr. Win the War]—to suggest that they shared the single task of ensuring security"⁸⁰. This is a convincing claim about the political rationale for the Second Bill, and this speech certainly came at an opportune moment, but Roosevelt's history of connecting the two ideas of economic rights and security suggests that the Second Bill was more than just a political ploy to advance his domestic agenda. Ganesh Sitaraman suggests that the Second Bill was also a way of reconciling Roosevelt's early attempts at changing the structure of economic institutions with his more pro-business side that came out during the war years, "World War II shifted Roosevelt from a debate over the structure of economic institutions to the creation of an economic bill of rights"⁸¹. A rights-based approach was means agnostic, always appealing to the pragmatic Roosevelt, and crucially the ambiguity surrounding

⁸⁰ Sunstein, *Second Bill of Rights*, 15.

⁸¹ Sitaraman, *Middle Class Constitution*, 201.

implementation meant it could win the support of interests across the political spectrum. While conservative organizations could (and did) oppose his early New Deal efforts, broad claims about health care and education could receive support from all corners. In this way, the Second Bill was meant less as a policy statement than as a set of aspirations for policymakers to aim for in the future. By intimately connecting the Second Bill to victory in the war, also Roosevelt seemed to be trying to set the terms on which the country would discuss its peacetime domestic agenda, indeed he said as much “It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known”⁸². Unfortunately, Roosevelt’s untimely death hampered his ability to affect the national conversation, and the only immediate legislative response to the Second Bill was the passage of the GI bill of rights⁸³. While that package of benefits for returning soldiers was certainly a strong start to an implementation of the Second Bill, it fell short of Roosevelt’s expectations for action that would benefit the whole of society.

The entire Second Bill is devoted to Roosevelt’s twin goals of freedom and security. However, the popular conception of those two concepts would indicate that they are more likely to conflict with than mutually reinforce one another. Indeed, security, understood as government action, is often thought to hamper liberty, not promote it. Sunstein calls this popular conception “the myth of laissez-faire,” which he boiled down to the simple premise that “nobody really opposes government intervention”⁸⁴. On its

⁸² Roosevelt, “Second Bill of Rights Speech.”

⁸³ Sunstein, *Second Bill of Rights*, 15.

⁸⁴ *Ibid.*, 19,

face, this appears to be an astoundingly controversial claim, but Sunstein justifies it by noting the ways in which government action secures all the conditions by which supposedly “free” exchange occurs.⁸⁵ While Sunstein attacked this “myth” on more academic terms, Roosevelt challenged this paradigm in his classic straightforward manner. He would ridicule the idea that there could be strict separation between the economic sphere and government action. In his first nomination acceptance speech in 1932, he railed against Republican political leaders taking that very stance, “while they prate of economic laws, men and women are starving. We must lay hold of the fact that economic laws are not made by nature. They are made by human beings”⁸⁶. By claiming economic laws as human creation, he asserted the right to challenge and reform them. The Second Bill is the concrete outcome of his foray into economic laws. In the Second Bill, he elevates his conventional economic welfare policies to the vaunted tier of laws and rights, and in doing so he changes the terms of the argument around them. The questions surrounding a Second Bill of Rights are ones about the core ideals that those proposed rights represent, rather than the nuts and bolts of specific policies. By placing his goals into this lofty space, he was trying to set the terms of any debate that would occur about them. If he could win acceptance of his basic aspirations, the only remaining questions would be around implementation.

We’ve traced the development of Roosevelt’s ideas about freedom and security, and we saw how they finally manifested themselves in his Second Bill of Rights.

⁸⁵ Sunstein, *Second Bill of Rights*, 19.

⁸⁶ Franklin D. Roosevelt, Address Accepting the Presidential Nomination, July 2, 1932, The American Presidency Project, accessed April 14, 2019, <https://www.presidency.ucsb.edu/node/275484>.

However, with Roosevelt's subsequent death and the fracturing of the New Deal coalition, implementation of his economic rights sputtered out. The next chapter will draw on Roosevelt's own ideas and some international comparisons to examine the two main ways economic rights could be implemented.

Chapter Three: Two Approaches to Implementation

The preceding chapters have engaged at length with the rationale behind economic rights and their place in the American system. However, there's been little discussion about what economic rights would look like in practice. For many skeptics about the utility of the sort of approach outlined by FDR in the Second Bill of Rights Speech, questions about implementation are a big part of their concerns. To allay those concerns, it's worthwhile to examine the mechanisms by which economic rights could be put into practice. To that end, there seems to be two distinct paths by which economic rights could be placed into action. K. Sabeel Rahman makes the distinction between "small-c" and "big-C" constitutionalism, where "small-c" is "This is the constitutionalism of social movements, of public philosophy, and of the laws and regulations that literally constitute our politics and our economics" and "big-C" is the "Constitutionalism of Supreme Court doctrine, precedent, or textual interpretation"⁸⁷. That difference is helpful for describing the two approaches to economic rights. The "big-C" version of economic rights is perhaps the more obvious path. On this view, the rights could be secured by enshrining them in constitutional text. This approach is common in many of the world's Constitutions which were written after the beginning of the modern human rights era and the Universal Declaration on Human Rights.⁸⁸ However, Roosevelt was not an advocate of the "big-C" approach for his Second Bill, he wanted the catalog of rights to serve as an aspiration which Congress would look to implement. Immediately

⁸⁷K. Sabeel Rahman, "Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?," *UT Law Review* 94, no. 7(June 2016): 1332.

⁸⁸ Sunstein, *Second Bill of Rights*, 102.

following his outline of the Second Bill he said, “I ask the Congress to explore the means for implementing this economic bill of rights- for it is definitely the responsibility of the Congress so to do”⁸⁹. Cass Sunstein describes this approach as an attempt to change the nation’s *constitutive commitments* without changing specific constitutional text.⁹⁰

Sunstein describes constitutive commitments as “a statement of the fundamental aspirations of the United States,” and he offers the Declaration of Independence as the most significant and well-known example of such commitments.⁹¹ Although Roosevelt was a proponent of the “small-c” approach, either method would work to implement economic rights, and both have advantages and drawbacks that need to be fleshed out.

The “big-C” constitutional approach is more popular in the international context, and its direct manner has significant appeal. Joseph Wronka fleshes out this appeal in general terms, “Because of the legal status of constitutions, people could then refer to them as legitimate claims in order to have their basic human needs met. Judiciary, legislative, and executive branches of government and law enforcement personnel would also refer to them as standards for the development and implementation of just social policies”⁹². By using the concrete method of adjusting constitutional text to implement economic rights, those rights immediately gain a stature and sense of permanence that they wouldn’t otherwise have. As Wronka points out, they are also functionally binding

⁸⁹ Franklin D. Roosevelt, State of the Union Message to Congress, “*Second Bill of Rights Speech*,” January 11, 1944, The American Presidency Project, accessed April 7, 2019, <https://www.presidency.ucsb.edu/node/210825>.

⁹⁰ Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 65.

⁹¹ Cass R. Sunstein; Randy E. Barnett, "Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue," *Drake Law Review* 53, no. 2 (2005): 216

⁹² Joseph Wronka, *Human Rights and Social Policy in the 21st Century* (Lanham: University Press of America 1998), 196.

on all arms of the government, and both state actors and citizens would be used to abiding by constitutional directives. Perhaps most importantly, by placing rights in a constitution they become legally enforceable claims that a country's judiciary is bound to protect. That legal protection is at the root of many concerns about constitutionally implemented economic rights.

The legal enforceability of economic rights claims brings up the so-called problem of judicial enforcement. The problem has two facets. The first is the question of ambiguity in economic rights. More so even than political rights, economic rights seem to bear on questions of specific policies, and by making the rights judicially enforceable, judges are put in the position of ruling on the efficacy of programs which they may not have the expertise to analyze.⁹³ Since the specific rights they are ruling from, for instance a "right to health care," are quite vague, judges don't have the tools to determine what the specific content of that right would entail.⁹⁴ Sunstein disputes the legitimacy of this portion of the judicial enforceability problem by comparing determinations about economic rights to the task judges undertake when interpreting political rights, "Does free speech encompass commercial advertising, libel, sexually explicit speech, bribery, criminal solicitation, and nude dancing? Courts try to answer this question notwithstanding the vagueness of the text, and in doing so, they typically concede that the right itself is far from self-defining"⁹⁵. Judges are always filling in the specific content of ambiguous rights, the only difference with an economic right is the character of that

⁹³ D. M. Davis, "The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles," *South African Journal on Human Rights* 8, no. 4 (1992): 484

⁹⁴ Sunstein, *Second Bill of Rights*, 210.

⁹⁵ *Ibid.*

content. The distinction in character brings up the second part of the problem of judicial enforcement. Governments exist in a world of limited resources, and since economic rights are guarantees of material benefits, judges would be in the position of designing programs and making decisions about allocations of funds. Courts seem to be manifestly unfit for the task of determining the distribution of government funds, and in America, and Stephen Holmes and Sunstein compellingly make this argument, “While judges may be perfectly competent to spot egregious violations of rights and even to invalidate egregious misallocations of resources, they cannot intelligently decide, in most such cases, when imaginable remedies are better channeled to other pressing needs”⁹⁶. Holmes and Sunstein don’t invalidate the entire idea of economic rights as a result, but they do note that scarcity is an unavoidable problem, and the courts seem to be particularly ill-suited to wrestling with that problem, particularly relative to the legislature.⁹⁷ However, these objections haven’t stopped many countries around the world from placing economic guarantees into their constitutions, and the ways they have dealt with the problem of judicial enforcement are instructive.

In the post-World War II era, many of the new constitutions that were drafted incorporated economic rights, and they sourced those rights to the previously discussed UN Universal Declaration of Human Rights. Sunstein describes this ubiquity of the Universal Declaration, “All over the globe, modern constitutions follow the Universal Declaration in creating social and economic rights, sometimes using its precise words”⁹⁸.

⁹⁶ Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton & Company, 2000), 95.

⁹⁷ *Ibid.*, 131.

⁹⁸ Sunstein, *Second Bill of Rights*, 102.

Most European states include economic rights in their constitutions, and the European Union acts to enforce those obligations on its member states via the European Social Charter.⁹⁹ Some countries constitutionalize their economic rights but try to avoid the problem of judicial enforcement by explicitly describing them as goals that are not legally enforceable.¹⁰⁰ This method avoids the worst of the judicial enforcement problem, but loses the benefits that come with having claims be justiciable, namely that violations can be forcibly rectified by the justice system. Without the teeth of an enforcement provision, these goals risk being ignored completely. The Indian Constitution notably follows this approach and can be seen as representative of this method of constitutionalizing welfare rights. Part IV of the Indian Constitution is titled “Directives Principles of State Policy,” and it many of the second-generation rights found in the Universal Declaration of Human Rights are included as directive principles.¹⁰¹ The notable difference with the Indian Constitution is that these directive principles are explicitly not judicially enforceable. The second provision of this section of their Constitution reads, “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”¹⁰². While economic rights are elevated to the status of Constitutional text, their actual legal status is that of unenforceable goals.

⁹⁹ Sunstein, *Second Bill of Rights*, 102.

¹⁰⁰ *Ibid.*, 103.

¹⁰¹ Constitution of India, 1950, Part IV.

¹⁰² *Ibid.*

Of particular note, is the post-apartheid South African Constitution which tries to split the difference on the judicial enforcement question. Their Constitution created legally enforceable economic rights with the caveat that fulfilment of those rights was contingent on available resources. For instance, Chapter Two, Sections 26(1) and (2) of the South African Constitution reads “(1) Everyone has the right to have access to adequate housing (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”¹⁰³. In a significant ruling on the meaning of these provisions, *Government of the Republic of South Africa v. Grootboom*, the Constitutional Court of South Africa fleshed out the duties of the government under the economic rights provisions of their Constitution, “This is recognized by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce”¹⁰⁴. The genius of this approach is that it recognizes that resource constraints exist and are legitimate, while also still providing the economic guarantees the legitimizing force of a constitutional right. This approach is notable because it directs the government to take action, in this case creating a program of emergency housing, but doesn’t place the judiciary in the role of explicitly defining that program. On its own, that still seems to encounter the difficulty that the judiciary is

¹⁰³ South African Constitution, 1996, Ch. 2 Sec. 26(1)-(2)

¹⁰⁴ *Government of the Republic of South Africa and Others vs. Grootboom*, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

engaged in policy priority setting, but the innovation is that the Constitutional Court explicitly recognizes the constraints that the government is operating under and consequently gives them latitude to work under. Through this approach, claimants retain the ability to challenge the government when they fail to provide the minimums guaranteed by economic rights, without turning democracies into tyrannies of the judiciary.

As we've seen, normally critics of the constitutionalizing of welfare rights question the capability of the judiciary to enforce positive rights. However, there is another argument against explicit constitutionalizing which comes at the problem of judicial enforcement from the complete opposite direction. Proponents of economic welfare rights could find themselves in a situation where a conservative leaning judiciary interpreted rights of minimal subsistence as invalidating the current instruments of the welfare state. In this scenario, the flexible and means agnostic nature of economic rights would seriously harm the agenda that welfare rights proponents want to advance. Positive and judicially enforceable rights are dangerous because the effective content of that right is left up to the interpreting agent. Frank Cross makes this argument in specific terms by taking up the example of minimum wage laws driving down employment, "A conservative judiciary might use these findings to conclude that minimum wage laws had the effect of increasing poverty, rendering them illegal under consequentialist positive rights"¹⁰⁵. While this outcome is obviously speculative and dependent on a specific makeup of the high court, it isn't so farfetched as to be unbelievable. This argument also

¹⁰⁵ Frank B. Cross, "The Error of Positive Rights," *UCLA Law Review* 48, no. 4 (April 2001): 912.

is helpful for illustrating the serious risks that come with placing enforceable positive rights in the hands of the judicial system. For every effective South African approach, it's easy to envision another situation where the consequences of specifically enforceable economic rights are more harmful than helpful.

The South African method remains the newest innovation in the field of constitutionalizing economic rights, but there remains a second path for implementing economic rights which doesn't even touch constitutional text. This is the so-called "small c" approach which Roosevelt favored for the implementation of his Second Bill of Rights. Under this implementation plan, economic rights would exist as the commitments of a democratic people, rather than explicit constitutional claims that are the province of the judiciary. While these claims don't have the force of constitutional text, they have the force of broad acceptance by the people of a state. They are constitutional in the sense that they are fundamental commitments, and they are perhaps stronger because they do not come with the baggage of "big-C" constitutional commitments. In the American context, the best example of "small-c" commitments are found in the Declaration of Independence. Though it is a revered document in our political tradition, it doesn't have the force of laws behind it. Despite that lack of explicit authority, no American would deny that our government could not deny us the rights to life, liberty, and the pursuit of happiness. The Declaration sets out guiding principles that our greatest statesmen draw upon to justify and explain their actions. Indeed, Roosevelt himself harked back to the Declaration in his Second Bill of Rights speech. Before listing his new economic rights, he began with an homage to the claims of the declaration, "This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable

political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty”¹⁰⁶. Though he lists protections from the Bill of Rights, he understands them as securing the broader principles of life and liberty from the Declaration. On this view the Constitution is simply an instrument for fulfilling the larger commitments that were made in 1776. Roosevelt continues on to mirror the phrasing of the Declaration again as a lead in to his Second Bill, “In our day these economic truths have become accepted as self-evident”¹⁰⁷. The Declaration of Independence clearly loomed large in Roosevelt’s thoughts as he proposed a Second Bill of Rights, and he undoubtedly felt there were large similarities between his proposal and that of the bold rebels some 168 years before. Both were revolutionary statements of intent, but neither was intended to have the force of constitutional law.

Sunstein calls the sort of “small-c” commitments that Roosevelt proposed “constitutive commitments,” and he defines them as such, “The founding document does not refer to them, and it is not seriously argued that they are encompassed by anything in the Constitution. But these rights are nonetheless constitutive commitments. They have a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in social understanding”¹⁰⁸. Constitutive commitments are usually implemented through legislative action, and they come to be accepted and supported on the same level as true constitutional rights. As an example of constitutive commitments,

¹⁰⁶ Roosevelt, “Second Bill of Rights Speech.”

¹⁰⁷ Ibid.

¹⁰⁸ Sunstein, *Second Bill of Rights*, 62.

Sunstein discusses social security, “another example, perhaps the simplest, is the right to social security. The Constitution does not mention this right, and public officials are permitted to disagree about how to respect it. But it is widely agreed that the nation is committed to the social security system in some form that fundamentally protects the economic expectations of its beneficiaries”¹⁰⁹. Roosevelt himself is quoted saying to his aides on the topic of social security taxes, “We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program”¹¹⁰. He clearly understood how a right could be guaranteed politically without having to go through the official constitutional process. The constitutive commitments approach is worthwhile because it allows for a degree of flexibility that explicitly constitutionalizing economic rights would preclude. The commitments approach leaves room for the legislative process, and it relies on building consensus in society around the ideas it promotes. Roosevelt understood the lasting power of a societal consensus, so it was on that level that he tried to promote his Second Bill.

Constitutive commitments ultimately experience the same sorts of difficulties that judicially enforceable positive rights do. Their strengths are also their weaknesses. While explicitly protected economic rights allow citizens to use the courts to enforce their access to the positive goods, they also risk the judiciary acting contrary to the will of the

¹⁰⁹ Sunstein, *Second Bill of Rights*, 62.

¹¹⁰ Arthur Schlesinger Jr., *The Age of Roosevelt: Volume III The Politics of Upheaval* (Boston: Houghton Mifflin Harcourt, 2003), 308-309.

people or ineffectively implementing the welfare rights. For constitutive commitments, their reliance on consensus of the people and avoidance of constitutional text gives them flexibility in implementation and wide popular support, but the indeterminate bar for what qualifies as a constitutive commitment seems to muddy its utility as an actionable concept. Randy Barnett criticizes constitutive commitments on these grounds, “The existence of a constitutive commitment adds nothing to normative discourse over what our basic political commitments ought to be, which is what normal political discourse is all about” and in less academic terms, “The assertion of a constitutive commitment amounts to the very conventional claim that “. . . and lots of people agree with me!”¹¹¹. Barnett’s argument is that constitutive commitments lack of defined form or function is not sufficient to justify them as the groundbreaking devices that Roosevelt (or Sunstein) take them to be. On this view, such commitments lack any character beyond that of a normal political argument with broad support and trying to define economic rights through such instruments would be a gross misuse of the idea of rights.

Both approaches have their issues and their benefits, and either would work as a method for implementing economic rights. In most situations, which method is used will depend on the political situation at the time of implementation and the legal history of the country.

¹¹¹ Barnett and Sunstein, “Constitutive Commitments,” 225.

Chapter Four: Economic Rights for Today and Tomorrow

The preceding chapters of this thesis have given an explanation of economic rights, taken a deep look at their zenith in American politics via Franklin Roosevelt's Second Bill of Rights speech, and then examined the two main theories on how economic rights could be implemented. Drawing on history and the works of other authors, I've tried to lay out a fair account of economic rights and their place in the American political tradition. To conclude this work, I'd like to offer my own brief take on a modern economic bill of rights, along with the rationale behind it.

The purpose of economic rights is not to secure an equal distribution of wealth in a society. As was noted in Chapter One, the idea of explicitly economic guarantees on the level of rights is one with support from the whole political spectrum. On the far left, economic rights could necessitate total state control of the economy and the dismantling of the capitalist system. At the opposite end, classical liberals could see economic rights as primarily securing property and providing an absolutely basic minimum for members of a society. My own vision of economic rights falls somewhere in between those two poles, with a bias towards the left in their terms of their extent but the right in terms of how they should be secured. The extent of the rights would be wide reaching, meaning that they would encompass a comprehensive suite of basic goods. Rather than focusing on property rights to the exclusion of other economic factors, there should be a focus on specific guarantees of economic stability. In terms of implementation, the constitutive commitments approach is most appealing because of its flexibility and popular support. By focusing on the broader public consciousness and the legislative process, rights

become a part of the fabric of society rather than a constitutional diktat. This method also allows for a variety of mechanisms for putting economic rights into practice, and the legislative process allows for all possible strategies for implementation to be weighed and heard before selecting one. An economic rights approach isn't could look like a state driven planned economy, a social democracy, or a limited state with a few key constraints and programs. The economic engine of the unfettered market economy is a powerful tool for improving people's lives, and through some state action it can be harnessed to lift up those on the bottom rungs of society. A modern economic bill of rights should learn from the successes and failures of the New Deal era. The implementation of a scheme of economic rights doesn't require a reheated alphabet soup of federal government agencies. Provision of robust system of basic needs and protecting the conditions that allow people to improve their lot in life beyond that should be the role of the government. To that end, this is a potential modern economic bill of rights:

Right to employment

Right to social security for the elderly, the infirm, and the handicapped

Right to healthcare, food, and housing

Right to education

Right to information

In substance, it's mostly composed of rights that have been seen before. The right to employment was a key part of the guarantees that Roosevelt proposed in the aftermath of the Great Depression. A promise of a guaranteed job was a way of ensuring many of the other economic rights, because through the income provided by work individuals could secure for themselves the other basic necessities of life. One particularly forceful advocate for the right to employment was Martin Luther King Jr. The famous "March on

Washington,” which culminated in the famous “I Have a Dream” speech was actually called “The March on Washington for Jobs and Freedom”¹¹². Though the civil rights struggle of the 1960s is mostly remembered for its celebrated victories in the realm of desegregation, King and other leaders of the movement saw the right to employment as a crucial feature of achieving substantive racial equality.¹¹³ The right to employment was a fix to the problem of structural unemployment among racial minorities. In effect, it’s similar to a universal basic income, but with jobs associated with the payments. Fulfilment of this right would be possible through encouragement of increased private employment but guaranteeing a job to all citizens would probably also require the government to act as an employer of last resort for people who couldn’t find any work in the private sector.

The right to social security should also be familiar. Roosevelt promised a right to adequate protection during old age, and this right would be a codification of the programs we have that provide for the elderly today.¹¹⁴ Sunstein notes that, effectively, this right has already been accepted as a constitutive commitment by the American people.¹¹⁵ As a provision in a modern economic bill of rights, this would serve as a concrete commitment to maintain, and perhaps even expand, programs for the security of the elderly and infirm.

¹¹² “March on Washington for Jobs and Freedom,” King Encyclopedia, Stanford University King Institute, accessed April 28, 2019, <https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom>.

¹¹³ Sylvie Laurent, *King and the Other America: The Poor People’s Campaign and the Quest for Economic Equality* (Oakland: University of California Press, 2018), 4.

¹¹⁴ Franklin D. Roosevelt, State of the Union Message to Congress, “*Second Bill of Rights Speech*,” January 11, 1944, The American Presidency Project, accessed April 28, 2019, <https://www.presidency.ucsb.edu/node/210825>.

¹¹⁵ Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 233-234.

The right to healthcare, food, and housing is an amalgamation of the most basic actual goods that individuals require to live their lives. Healthcare is perhaps the most politically salient topic on the entire list, and nearly every 2020 Democratic presidential candidate can be quoted saying “Healthcare is a human right”¹¹⁶. On the provision of that right, they are split, but the basic idea that healthcare is a right remains. Food and housing are other simply understood basic necessities which people in a modern society should have access to. A right to housing would be a strong statement about the persistent scourge of homelessness, and it would give housing advocates a strong tool with which to push for housing for all people.

The right to education is another which has been vindicated as a substantive commitment by the people of the United States. While it hasn’t been explicitly constitutionalized, 44 state constitutions do guarantee a right to education, and public education has the same noncontroversial political status as social security.¹¹⁷ The reason for including an explicit right to education in this modern economic bill of rights would be to codify and support the existing status of education. By making it a guaranteed right, it could also act as a tool by which advocates could agitate for higher quality education.

The final right I propose is one that is entirely new, a right to information. A modern economic bill of rights should take up modern issues, and the right to digital privacy is one of the most pressing issues of the day. Although the right to privacy, historically, has been recognized as a first generation right, the modern incarnation of the

¹¹⁶ “Here's where the Democratic candidates stand on the biggest 2020 issues,” Beatrice Jin and Caitlin Oprysko, Politico, April 25, 2019, <https://www.politico.com/interactives/2019/04/25/2020-democratic-presidential-candidates-take-stands-issues/>.

¹¹⁷ Joseph Wronka, *Human Rights and Social Policy in the 21st Century* (Lanham: University Press of America 1998), 175.

privacy problem seems to have a different character. The violators of digital privacy are often nonstate actors, and they collect information that in many ways is the property of individual citizens. The protection of that data, and the provision of it to citizens would entail the kinds of government action that make it an active guarantee rather than a negative protection. The right to information would help secure the people's political liberty by giving them autonomy in the digital space where they increasingly spend their time.

Taken together, I think these rights would constitute a strong suite of economic rights for the modern democratic citizen. Although, I'm partial to the constitutive commitments approach to implementation. The South African model and the *Grootboom* decision demonstrate how explicit constitutional guarantees could also work well. Either manner of implementation would be a strong step towards guaranteeing the economic preconditions of political liberty. To again quote Franklin Delano Roosevelt, "Necessitous men, are not free men," and we will not live in a truly free society until our constitutional structure reflects that truth.

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